MONTANA CRIMINAL CODE OF 1973

TITLE 94

1947 REVISED CODES OF MONTANA

Effective January 1, 1974

Containing

TITLE 94, REVISED CODES OF MONTANA, THE CRIMINAL CODE OF 1973, AS AMENDED THROUGH THE 45TH LEGISLATURE IN 1977

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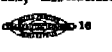

FOREWORD

This pamphlet contains all of Title 94, Revised Codes of Montana, the Criminal Code of 1973, as enacted or amended by Chapter 513, Laws of 1973, and as amended through the 1977 Session of the Legislature. The new Criminal Code was prepared by the Criminal Law Study Commission created by Chapter 103, Laws of 1963, acting under the chairmanship of the Honorable Wesley Castle, Associate Justice of the Supreme Court of Montana. The Code became effective January 1, 1974.

Title 94 contained herein completely replaces the original Title 94 of the Revised Codes of Montana, 1947, as heretofore amended. As a result of Chapter 513, Laws of 1973, every section previously contained in old Title 94 is either repealed, renumbered in accordance with the arrangement and section-numbering system of new Title 94, or transferred to some other title of the Revised Codes.

Three different 1973 acts that were not part of the Criminal Code of 1973 properly belong in the title on criminal offenses. The compiler has given these acts section numbers that are consistent with the arrangement and section-numbering system of the new Criminal Code, and they appear in this pamphlet.

Included in this pamphlet are Source notes and Commission Comments on the various sections of the new Criminal Code. These notes and comments were prepared by the Criminal Law Study Commission and have been revised and edited by Professor Larry M. Elison, School of Law, University of Montana, who served as Vice-Chairman and Reporter of the Commission.

A Cross-Reference Table appears in this pamphlet, beginning on page 169. This Table, based on a table prepared by the Criminal Law Study Commission, shows, for each section of old Title 94, either the place to which the section has been transferred by renumbering or the sections either in new Title 94 or other titles of the Revised Codes which cover the same subject matter.

An index begins on page 200.

TITLE 94

CRIMINAL CODE

CHAPTER 1

GENERAL PRELIMINARY PROVISIONS

94-1-101. Short title. This act shall be known and may be cited as the "Criminal Code of 1973."

History: En. 94-1-101 by Sec. 1, Ch. 513, L. 1973.

Title of Act

An act creating a Montana Criminal Code, to codify and generally revise the statutes concerning criminal offenses; and providing an effective date.

94-1-102. General purposes and principles of construction. (1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;

(b) to safeguard conduct that is without fault from condemnation as criminal;

(c) to give fair warning of the nature of the conduct declared to constitute an offense;

(d) to differentiate on reasonable grounds between serious and minor offenses.

(2) The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.

History: En. 94-1-102 by Sec. 1, Ch. 513, L. 1973.

Source: Subdivisions (1) (a) to (1) (d) substantially the same as Illinois Criminal Code, Chapter 38, section 1-2. Subsection (2) is identical to Revised Codes of Montana 1947, section 94-101.

Commission Comment

This section expresses the legislative purpose of the code and provides a convenient reference for the interpretation of its more specific provisions. See also the provisions of the Bill of Rights of the Montana constitution [Art. II, 1972 Constitution] which outline the basic concepts of criminal law.

DECISIONS UNDER FORMER LAW

Liberal Construction

Under section 12-202 and former section 94-101, the rule that statutes in derogation of common law be strictly construed did not apply to code provisions, liberal construction being the rule as to all; prior decisions strictly construing a repealed section relating to the incurrence of liability for debts of corporation by directors for failure to file annual report with county, were overruled. Continental Supply Co. v. Abell, 95 M 148, 24 P 2d 133.

Sections 59-518 to 59-520, defining "nepotism" and prohibiting public officers, boards or commissions from appointing relatives to a position of trust or emolument, and providing punishment by fine and imprisonment in the county jail, were not strictly construed in view of former section 94-101. State ex rel. Kurth v. Grinde, 96 M 608, 614, 32 P 2d 15.

94-1-103. Application to offenses committed before and after enactment. (1) The provisions of this code apply to any offense defined in this code and committed after January 1, 1974.

(2) Unless otherwise expressly provided or unless the context otherwise requires, the provisions of this title and Title 95 govern the construction of and punishment for any offense defined outside of this code and committed after January 1, 1974, as well as the construction and application of any defense to a prosecution for such an offense.

(3) The provisions of this code do not apply to any offense defined outside of this code and committed before January 1, 1974. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted.

History: En. 94-1-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 7, Ch. 359, L. 1977.

Source: Substantially the same as New York Penal Code, Title 39, section 5.05; also derived from Revised Codes of Montana 1947, section 94-103.

Commission Comment

This section is intended to provide for the transition from the old Criminal Code to the new Criminal Code. The provisions of the new Criminal Code apply only to offenses committed after its effective date

[January 1, 1974]. See also Section 33 [Chapter 513, Laws of 1973 (Effective Date note following sec. 94-8-431)].

Amendments

The 1977 amendment substituted "January 1, 1974" throughout the section for references to the effective date of this code; substituted "this title and Title 95" in subsection (2) for "this code"; and made minor changes in phraseology and punctuation.

Receiving Stolen Property

Defendant found in possession of stolen property in 1974 could not be prosecuted under the old law since the offense of possession did not relate back to the date of the theft. State v. Jimison, — M —, 540 P 2d 315.

94-1-104. Other limitations on applicability. (1) This code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered and the civil injury is not merged into the offense.

(2) No conduct constitutes an offense unless it is described as an offense in this code or in another statute of this state. However this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment or decree.

History: En. 94-1-104 by Sec. 1, Ch. 513, L. 1973.

Source: Subsection (1) identical to Illinois Criminal Code, Chapter 38, section 1-4; subsection (2) identical to Illinois Criminal Code, Chapter 38, section 1-3; also derived from Revised Codes of Montana 1947, sections 94-103, 94-106 and 94-108.

Commission Comment

It has been contended that the victim of a criminal offense should be denied civil relief until he has performed his public duty to prosecute the offender. The English courts developed the rule that a civil action cannot be maintained until after prosecution, if the offense involved a felony.

Legislatures in a number of states have reached the opposite conclusion declaring the criminal and civil aspects to be independent. See R. C. M. 1947, section 94-106. This appears to be the prevailing American rule and is continued by this section.

Subsection (2) is intended to complete the process of replacing the common law definitions of offenses with statutory definitions—a process which has continued for many years.

The language that the provision does not affect the power of a court to "employ any sanction authorized by law" is intended to preserve the power of courts of justice to punish for contempt and the authority of properly constituted courts of justice to act as courts martial. See R. C. M. 1947, section 94-108.

DECISIONS UNDER FORMER LAW

Ordinance Violation

An action by a city instituted in its police court by the filing of a complaint charging a violation of one of its ordinances, and seeking the imposition of a fine, was criminal in its nature; the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest. State ex rel. Marquette v. Police Court, 86 M 297, 309, 283 P 430, modifying City of Bozeman v. Nelson, 73 M 147, 237 P 528.

Removal from Office

A proceeding for the summary removal of a county attorney for misconduct, even though instituted by a private person, was a public proceeding, and, though it was summary in its nature, was classed as a prosecution for crime under former section 94-112. State ex rel. McGrade v. District Court, 52 M 371, 373, 157 P 1157.

94-1-105. Classification of offenses. (1) For the determination of the court's jurisdiction at the commencement of the action and for the determination of the commencement of the period of limitations, the offense shall be designated a felony or misdemeanor based upon the maximum potential sentence which could be imposed by statute.

(2) An offense defined by any statute of this state other than this code shall be classified as provided in this section and the sentence that may be imposed upon conviction thereof shall be governed by this title and Title 95.

History: En. 94-1-105 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 8, Ch. 359, L. 1977.

Source: New.

Commission Comment

The actual sentence imposed upon conviction determines the classification of the offense. The potential sentence determines the court's jurisdiction at the commencement of the action and is determinative of the commencement of the period of limitations. The section is at least partially contra the holding in State v. Atlas, 75 M 547, 551, 244 P 477 (1926), in which the Montana supreme court held that the potential sentence determines the grade of the crime.

Amendments

The 1977 amendment substituted "this title and Title 95" at the end of subsection (2) for "this code."

Convictions in Other Jurisdictions

In construing state statutes relating to voter disqualification, a Montana voter cannot be denied the right to vote because of conviction of an offense in federal court that would not be a felony by Montana statutory definition. Melton v. Olcson, — M —, 530 P 2d 466, overruling State ex rel. Anderson v. Lousek, 91 M 448, 8 P 2d 791.

DECISIONS UNDER FORMER LAW

Concurrent Sentences

Where defendant was convicted of felony under first portion of consolidated information and of misdemeanor under second portion and the trial court adjudged that the sentences be served concurrently, the felony sentence was to be served in state prison with credit for misdemeanor fine to be given at the same time, and any remaining time under the misdemeanor at end of the state prison term was to be served in county jail. State v. Bogue, 142 M 459, 384 P 2d 749.

Federal Rule

Under federal law, the maximum potential punishment determines whether an offense constitutes a felony or misdemeanor as contra-distinguished from the prevailing Montana rule under which crimes are classified as felonies or misdemeanors by the punishment actually imposed. State ex rel. Anderson v. Fousek, 91 M 448, 8 P 2d 791, overruled on other grounds, — M —, 530 P 2d 466.

Limitation of Actions

The potential maximum sentence was determinative of the grade of the crime until sentence was imposed where the offense was neither divisible into degrees **nor inclusive of lesser offenses and was** punishable as either a felony or misdemeanor in the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison the offense was considered a misdemeanor under former section 94-114, but the reduction was not retroactive so as to make the misdemeanor period of limitations applicable. State v. Atlas, 75 M 547, 244 P 477.

94-1-106. General time limitations. (1) A prosecution for criminal homicide may be commenced at any time.

(2) Except as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

(a) a prosecution for a felony must be commenced within 5 years after it is committed;

(b) a prosecution for a misdemeanor must be commenced within 1 year after it is committed.

(3) The period prescribed in subsection (2) is extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) if the aggrieved person is a minor or incompetent, during the minority or incompetency or within 1 year after the termination thereof;

(b) in any other instance, within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not himself a party to the offense or, in the absence of such discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(4) An offense is committed either when every element occurs or, when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found or an information or complaint is filed.

History: En. 94-1-106 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 9, Ch. 359, L. 1977.

Source: Identical to Revised Codes of Montana 1947, sections 94-5702 and 94-5703. Also derived from Revised Codes of Montana 1947, section 94-5701 and Illinois Criminal Code, Chapter 38, sections 3-5 and 3-6.

Commission Comment

This section describes the general time limitations on prosecutions; the extension thereof under certain conditions; and the exclusion of certain periods in the calculation of limitations.

Subsection (1) continues the present Montana provision that no time limit exists with respect to homicide.

Subsection (2) similarly preserves the present general time limitations in Montana of five (5) years for all other felonies and one year for misdemeanors.

Subsection (3) is designed to permit increases in the general time limitations with respect to certain offenses which are capable of being readily concealed by the offender, from both the victim and the law enforcing authorities, over substantial periods of time and beyond the general limitations applicable to those offenses.

Subsection (4) states the general rule that the period of limitation does not start in the case of a "continuing offense" until **the last act of the offense is performed.** The rule would be applicable to a series of related acts constituting a single course of conduct extended over a period of time, often occurring in cases of embezzlement, conspiracy, bigamous cohabitation, and nuisance.

When the limitation period has not run on the offense charged, but has run on an offense included therein, the general rule is that the defendant cannot be convicted of the included offense, since to hold otherwise would permit the prosecutor, by charging a more serious inclusive offense not barred by the limitation, to circumvent the limitation on the lesser offense. **(State v. Chevlin, 284 SW 2d 563 (Mo.** 1955)).

Unless time is a material ingredient in the offense or in charging the same, it is only necessary to prove that it was committed prior to the finding of the indictment or filing the information or complaint. (State v. Rogers, 31 M 1, 4, 77 P 293). The general statute of limitations applicable to misdemeanors should not be enlarged beyond what its plain language imports, and whenever the exceptions embodied in subsection (3) are invoked, the case should clearly and unequivocally fit **within the exceptions. (State v. Clemens, 40 M 567, 569, 107 P 896).**

Amendments

The 1977 amendment substituted "by law" in subsection (2) for "in this code"; and made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

Exceptions

Former section 94-5703 was a general statute of limitations, applicable to misdemeanors, and an exception to it could not be enlarged beyond what its plain language imported; to invoke the exception, the case must clearly and unequivocally fall within it. State v. Clemens, 40 M 567, 569, 107 P 896.

Felony or Misdemeanor

The maximum potential sentence determines the grade of the crime until sentence is imposed; under former section 94-114 the imposition of a sentence other than imprisonment in state prison reduced the crime to a misdemeanor in cases where the offense was neither divisible into degrees nor inclusive of lesser offenses and punishment was within the discretion of the court or jury; but this did not operate retroactively so as to deprive the court of jurisdiction by making the misdemeanor limitations period applicable. State v. Atlas, 75 M 547, 244 P 477.

94-1-107. Periods excluded from limitation. The period of limitation does not run:

(1) during any period in which the offender is not usually and publicly resident within this state or is beyond the jurisdiction of this state; or

(2) during any period in which the offender is a public officer and the offense charged is theft of public funds while in public office; or

(3) during a prosecution pending against the offender for the same conduct, even if the indictment, complaint or information which commences the prosecution is dismissed.

History: En. 94-1-107 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Revised Codes of Montana 1947, section 94-5704 and Illinois Criminal Code, Chapter 38, section 3-7.

Commission Comment

Certain occurrences should stop the period from running. Subsection (1) tolls the statute for the offender who is absent from this state, or absents himself from his usual place of abode and makes some effort to conceal himself.

Subsection (3) is intended to preserve the substance of the former Montana provision which tolled that statute while proceedings were pending.

Note that the phrase "same conduct" is intentionally broad.

DECISIONS UNDER FORMER LAW

Circumstantial Evidence

In 1922, testimony that defendant had taken a trip to Ireland where he had visited several cities created an inference sufficient to establish that the defendant had been absent from the state for at least twenty days, and satisfied the state's burden of proof under former section 94-5704. State v. Knilans, 69 M 8, 220 P 91.

CHAPTER 2

GENERAL PRINCIPLES OF LIABILITY

94-2-101. General definitions. Unless otherwise specified in the statute, all words will be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following definitions apply in this title:

(1) "Acts" has its usual and ordinary grammatical meaning and includes any bodily movement, any form of communication, and, where relevant, a failure or omission to take action.

(2) "Another" means a person or persons as defined in this code other than the offender.

(3) "Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law or in which a law or a regulation is particularized in its application to an individual.

(4) "Benefit" means gain or advantage or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

(5) "Bodily injury" means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.

(6) "Cohabit" means to live together under the representation of being married.

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan which results in the repeated commission of the same offense or affects the same person or the same persons or the property thereof.

(8) "Conduct" means an act or series of acts and the accompanying mental state.

(9) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(10) "Correctional institution" means the state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

(11) "Deception" means knowingly to:

(a) create or confirm in another an impression which is false and which the offender does not believe to be true;

(b) fail to correct a false impression which the offender previously has created or confirmed;

(c) prevent another from acquiring information pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.

(12) "Defamatory matter" means anything which exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or injury to his or its business or occupation.

(13) "Deprive" means to withhold property of another:

(a) permanently;

(b) for such a period as to appropriate a portion of its value;

(c) with the purpose to restore it only upon payment of reward or other compensation; or

(d) to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(14) "Deviate sexual relations" means sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal.

(15) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding 1 year.

(16) "A frisk" is a search by an external patting of a person's clothing.

(17) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(18) "Government" includes any branch, subdivision, or agency of the government of the state or any locality within it.

(19) "Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any person or entity in whose welfare he is interested.

(20) "A house of prostitution" means any place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

(21) "Human being" means a person who has been born and is alive.

(22) "An illegal article" is an article or thing which is prohibited by statute, rule, or order from being in the possession of a person subject to official detention.

(23) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

(24) "Intoxicating substance" means any controlled substance as defined in chapter 3 of Title 54 and any alcoholic beverage including but not limited to any beverage containing ½ of 1% or more of alcohol by volume. The foregoing definition shall not extend to dealcoholized wine or to any beverage or liquid produced by the process by which beer, ale, port, or wine is produced if it contains less than ½ of 1% of alcohol by volume.

(25) "An involuntary act" means any act which is:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion; or

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(26) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state in any action or proceeding or by any officer authorized by law to impanel a jury in any action or proceeding. The term "juror" also includes a person who has been drawn or summoned to attend as a prospective juror.

(27) "Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts know-

ingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

(28) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

(29) "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling his conduct as result of the influence of an intoxicating substance.

(30) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term or fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

(31) "Negligently"—a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or if he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. Gross deviation means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

(32) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance thereof.

(33) "Obtains or exerts control" includes but is not limited to the taking, carrying away, or sale, conveyance, transfer of title to, interest in, or possession of property.

(34) "Occupied structure" means any building, vehicle, or other place suited for human occupancy or night lodging of persons or for carrying on business whether or not a person is actually present. Each unit of a building consisting of two or more units separately secured or occupied is a separate occupied structure.

(35) "Offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

(36) "Offense" means a crime for which a sentence of death or of imprisonment or fine is authorized. Offenses are classified as felonies or misdemeanors.

(37) "Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the

purpose of the protection of the welfare of the person detained or for the protection of society. "Official detention" does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(38) "Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with such proceeding.

(39) "Other state" means any state or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(40) "Owner" means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

(41) "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts or participates in directing or conducting party affairs at any level of responsibility.

(42) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

(43) "Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

(44) "Person" includes an individual, business association, partnership, corporation, government, or other legal entity and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

(45) "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

(46) "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

(47) "Premises" includes any type of structure or building and any real property.

(48) "Property" means anything of value. Property includes, but is not limited to:

(a) real estate;

(b) money;

(c) commercial instruments;

(d) admission or transportation tickets;

(e) written instruments which represent or embody rights concerning anything of value, including labor or services, or which are otherwise of value to the owner;

(f) things growing on, affixed to, or found on land and things which are part of or affixed to any building;

(g) electricity, gas, and water;

(h) birds, animals, and fish which ordinarily are kept in a state of confinement;

(i) food and drink, samples, cultures, microorganisms, specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes, or models thereof; and

(j) any other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes, or models thereof which constitute, represent, evidence, reflect, or record secret scientific, technical, merchandising, production, or management information or a secret designed process, procedure, formula, invention, or improvement.

(49) "Property of another" means real or personal property in which a person other than the offender has an interest which the offender has not authority to defeat or impair, even though the offender himself may have an interest in the property.

(50) "Public place" means any place to which the public or any substantial group thereof has access.

(51) "Public servant" means any officer or employee of government, including but not limited to legislators, judges, and firefighters and any person participating as a juror, advisor, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term does not include witnesses. The term public servant includes one who has been elected or designated to become a public servant.

(52) "Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

(53) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. It includes serious mental illness or impairment.

(54) "Sexual contact" means any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party.

(55) "Sexual intercourse" means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

(56) "Solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an offense.

(57) "State" or "this state" means the state of Montana, all the land and water in respect to which the state of Montana has either exclusive or concurrent jurisdiction, and the air space above such land and water.

(58) "Statute" means any act of the legislature of this state.

(59) "Stolen property" means property over which control has been obtained by theft.

(60) "A stop" is the temporary detention of a person that results when a peace officer orders the person to remain in his presence.

(61) "Tamper" means to interfere with something improperly, meddle with it, make unwarranted alterations in its existing condition, or deposit refuse upon it.

(62) "Threat" means a menace, however communicated, to:

(a) inflict physical harm on the person threatened or any other person or on property;

(b) subject any person to physical confinement or restraint;

(c) commit any criminal offense;

(d) accuse any person of criminal offense;

(e) expose any person to hatred, contempt, or ridicule;

(f) harm the credit or business repute of any person;

(g) reveal any information sought to be concealed by the person threatened;

(h) take action as an official against anyone or anything, withhold official action, or cause such action or withholding;

(i) bring about or continue a strike, boycott, or other similar collective action if the property is not demanded or received for the benefit of the groups which he purports to represent; or

(j) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

(63) (a) "Value" means the market value of the property at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value shall be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(b) When it cannot be determined if the value of the property is more or less than $150 by the standards set forth in subsection (63)(a) above, its value shall be deemed to be an amount less than $150.

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

(64) "Vehicle" means any device for transportation by land, water, or air or mobile equipment with provision for transport of an operator.

(65) "Weapon" means any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

(66) "Witness" means a person whose testimony is desired in any official proceeding, in any investigation by a grand jury, or in a criminal action, prosecution, or proceeding.

History: En. 94-2-101 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 190, L. 1975; amd. Sec. 1, Ch. 405, L. 1975; amd. Sec. 1, Ch. 443, L. 1975; amd. Sec. 10, Ch. 359, L. 1977.

Source: (1) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-2.

(2) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-3.

(3) Identical to the Model Penal Code 1962, section 240.0(8).

(4) Identical to the Model Penal Code 1962, section 240.0(1).

(5) Substantially the same as the Model Penal Code 1962, section 210.0(2).

(6) New.

(7) New.

(8) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-4.

(9) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-5.

(10) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-14.

(11) Identical to Illinois Criminal Code 1961, Chapter 38, section 15-4.

(12) Identical to Minnesota Statutes Annotated, Title 40A, section 609.765.

(13) Model Penal Code 1962, section 223.0(1).

(14) New. This definition covers homosexuality and bestiality.

(15) New.

(16) New.

(17) Illinois Criminal Code 1961, Chapter 38, section 2-8.

(18) Identical to the Model Penal Code 1962, section 240.0(2).

(19) Identical to the Model Penal Code 1962, section 240.0(19).

(20) Deleted by Sec. 10, Ch. 359, Laws of 1977. See 1977 Amendment Note.

(21) Model Penal Code 1962, section 251.2.

(22) Model Penal Code 1962, section 210.0(1).

(23) New.

(24) New.

(25) Revised Codes of Montana 1947, section 94-35-107.

(26) Substantially the same as the Model Penal Code 1962, section 2.01.

(27) Substantially the same as the New York Penal Law 1965, section 10.00(16).

(28) Substantially the same as the Model Penal Code 1962, sections 1.13(13), 2.02.

(29) Identical to the New York Penal Law 1965, section 130.00(5). Revised Codes of Montana 1947, section 94-4101(2) specified that the degree of mental deficiency be such as to render the victim "incapable of giving legal consent." Formulation in terms of capacity to give legal consent is circular and was rejected as failing to provide a meaningful guide. This definition limits criminality to mental disease or defect so serious as to render the victim "incapable of appreciating the nature of his conduct." A condition such as nymphomania which affects only the woman's capacity to "control herself sexually" where there is no physical or mental disability will not destroy consent, otherwise valid.

(30) Substantially the same as the New York Penal Law 1965, section 130.00(6). The victim need not be unconscious to be mentally incapacitated.

(31) New.

(32) New York Penal Law 1965, section 15.05(4); Model Penal Code 1962, sections 1.13(15), 2.02(2d).

(33) Identical to the Model Penal Code 1962, section 223.0(5); Illinois Criminal Code 1961, Chapter 38, section 15-7.

(34) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-8.

(35) Model Penal Code 1962, section 220.1(4).

(36) New.

(37) Model Penal Code 1962, section 1.04(1).

(38) Model Penal Code 1962, section 2.42.6(1).

(39) Identical to the Model Penal Code 1962, section 240.0(4).

(40) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-21.

(41) Identical to Illinois Criminal Code 1961, Chapter 38, section 15-2.

(42) Identical to the Model Penal Code 1962, section 240.0(5).

(43) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-13.

(44) Identical to the Model Penal Code 1962, section 240.0(6).

(45) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-15.

(46) Substantially the same as the New York Penal Law 1965, section 130.00(7).
(47) Substantially the same as the Model Penal Code 1962, section 2.01(4).
(48) Substantially the same as the New York Penal Law 1965, section 140.0(1).
(49) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-1.
(50) Model Penal Code 1962, section 223.0(7).
(51) Model Penal Code 1962, section 251.2(1).
(52) Substantially the same as the Model Penal Code 1962, section 240.0(7); New York Penal Law 1965, section 10.00 (15).
(53) Substantially the same as the Model Penal Code 1962, section 2.02(2a), (6).
(54) Substantially the same as the Model Penal Code 1962, section 210.0(3).
(55) Identical to the New York Penal Law 1965, section 130.00(3).
(56) New York Penal Law 1965, section 130.00(1), (2), (3). This definition includes abnormal intercourse, either homosexual or heterosexual by mouth or anus, as well as normal genital copulation. The definition is broader than former law, although "the infamous crime against nature" of Revised Codes of Montana 1947, section 94-4118 probably covers most abnormal sexual acts. The definition also adheres to the "slight penetration" rule of Revised Codes of Montana 1947, section 94-4103.
(57) Identical to Illinois Criminal Code 1961, Chapter 38, section 2-20.
(58) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 2-21.
(59) New.
(60) Identical to Illinois Criminal Code 1961, Chapter 38, section 15-6.
(61) New.
(62) New.
(63) Substantially the same as Illinois Criminal Code 1961, Chapter 38, section 15-5.
(64) Michigan Property Crimes Code 1967, section 3201.
(65) New.
(66) New York Penal Law 1965, section 10.00(13).
(67) Revised Codes of Montana 1947, section 94-9001.
(68) Deleted by Sec. 1, Ch. 405, Laws of 1975. See sec. 94-5-501(2).

Amendments

Chapter 190, Laws of 1975, substituted "controlled substance as defined in chapter 3 of Title 54, R. C. M. 1947, and alcoholic beverage" in subdivision (25) for "substance having an hallucinogenic, depressant, stimulating, or narcotic effect, taken in such quantities as to impair mental or physical capability"; and made a minor change in punctuation.

Chapter 405, Laws of 1975, deleted former subdivision (68) which read: "'Without consent' means: (a) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnaping, to be inflicted on anyone; or (b) the victim is incapable of consent because he is: (i) mentally defective or incapacitated; or (ii) physically helpless; or (iii) less than sixteen (16) years old". See sec. 94-5-501(2).

Chapter 443, Laws of 1975, inserted the second sentence in subdivision (28); and made a minor change in punctuation.

The 1977 amendment inserted "and unless a different meaning plainly is required, the following definitions apply in this title" before subdivision (1); inserted "is or" before "is not a matter of official record" in subdivision (11)(d); deleted subdivision (20) which read "'He, she, it.' The singular term shall include the plural and the masculine gender the feminine except where a particular context clearly requires a different meaning"; renumbered subdivisions (21) through (67) as (20) through (66), respectively; substituted "one or more persons" in present subdivision (20) for "one person"; inserted "or a secret" before "designed process" in subdivision (48)(j); inserted "official" before "proceeding" in subdivision (66); and made minor changes in style, phraseology and punctuation.

Convictions in Other Jurisdictions

A conviction under federal law cannot be the basis for disqualifying a voter unless such conviction would be classified as a felony under Montana law. Melton v. Oleson, — M —, 530 P 2d 466, overruling State ex rel. Anderson v. Fousek, 91 M 448, 8 P 2d 791.

"Occupied Structure"

Semitrailer attached to sleeper-cab tractor was an "occupied structure." State v. Shannon, — M —, 554 P 2d 743.

"Serious Bodily Injury"

Whether an injury involves a substantial risk of death, is a question of fact to be determined by the jury. State v. Fuger, — M —, 554 P 2d 1338.

DECISIONS UNDER FORMER LAW

Subdivision (15)—Federal Law

Under federal law, the maximum potential punishment determines whether an offense constitutes a felony or misde-

meanor as contra-distinguished from the prevailing Montana rule under which crimes are classified as felonies or misdemeanors by the punishment actually imposed. State ex rel. Anderson v. Fousek, 91 M 448, 8 P 2d 791, 84 ALR 303, overruled on other grounds in — M —, 530 P 2d 466.

—Felony or Misdemeanor

The potential maximum sentence determined the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses and punishment was in the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison, the offense was considered a misdemeanor under former section 94-114. State v. Atlas, 75 M 547, 244 P 477.

Subdivision (25)—Vodka

While former section 94-35-107 did not use the word vodka, any beverage containing more than one-half of one per cent of alcohol was an intoxicating liquor and court could take judicial notice of commonly accepted and generally understood definition of word "vodka" under section 93-501-1. State v. Wild, 130 M 476, 305 P 2d 325, 334.

Subdivision (28)—Fraudulent Intent

Under former section 94-118 proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; defendant who was sufficiently conscious to recognize fraudulent nature of check was of adequate mental ability to form an intent to defraud by issuing the check, knowing of its fraudulent nature. State v. Cooper, 146 M 336, 406 P 2d 691.

—General Intent

Effect of former section 94-105 was to make any required "intent to defraud" a general, rather than a specific, intent. State v. Cooper, 146 M 336, 406 P 2d 691.

—Instructions to Jury

Under former section 94-117 an instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, in that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first-degree, the very gist of which is the intent with which it was committed. State v. Schaefer, 35 M 217, 88 P 792, distinguished in 135 M 139, 147, 337 P 2d 924.

—Manifestation of Intent

Evidence that defendant accosted a nine-year-old girl on the street and asked her to come to his room and play with him, on arriving there locked the door, asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, was sufficient to warrant a finding by the jury that the defendant intended to arouse his sexual desires in a depraved manner. State v. Kocher, 112 M 511, 119 P 2d 35.

—Presumption of Intent

Intent is conclusively presumed from the occurrence of a statutory offense such as collection of unlawful fees from a county. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103.

—Specific Intent

Under former section 94-118, finding of jury that defendant was able to form specific intent to commit first-degree assault as required by statute was supported by evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty recounting recent events to police. State v. Lukus, 149 M 45, 423 P 2d 49.

Subdivision (29)—Burden of Proof

Under former section 94-119, the burden of proving insanity pleaded by a defendant charged with a crime was upon the defendant; an instruction that the state was required to prove beyond a reasonable doubt that defendant was sane at the time of the commission of the offense was error. State v. Vettere, 76 M 574, 248 P 179; State v. DeHaan, 88 M 407, 292 P 1109.

—Definition of Insanity

Under former section 94-119, insanity constituted any defect, weakness or disease of the mind which rendered it incapable of entertaining, in the particular instance, the criminal intent which was an ingredient of all crimes. State v. Narich, 92 M 17, 9 P 2d 477.

—Evidence of Insanity

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered from periodic heart attacks, did not warrant an instruction upon the question of his sanity. State v. Kuum, 55 M 436, 178 P 288.

Despite expert testimony that the defendant was suffering from epilepsy, ren-

dering him incapable of knowing of or remembering his actions during the incident giving rise to prosecution for second degree assault, evidence that defendant, after striking his victim with a gun, warned her not to say anything about it, concealed himself thereafter, and one month later detailed the entire event to a medical expert, was sufficient to support guilty verdict. State v. Dellaan, 88 M 407, 292 P 1109.

Under former section 94-201, defendant was entitled to plead insanity as bar to conviction for first degree murder, but failed to sustain burden of proof by preponderance of evidence, as required by statute, in view of evidence that his activities on the day of shooting were normal, that he was quite calm after shooting occurred and that he knew right from wrong at the time of the shooting, according to a psychiatrist. State v. Sanders, 149 M 166, 424 P 2d 127.

—Instructions to Jury

Trial courts in instructing juries on defense of insanity should make their instructions as plain and simple as possible, incorporate therein the appropriate code sections, supplementing the definition of insanity as indicated in the case of State v. Peel, 23 M 358, 59 P 169, and avoid numerous instructions which may be confusing and serve no useful purpose. State v. Narich, 92 M 17, 9 P 2d 477.

—Opinion of Lay Witness

Under former section 94-119, lay witnesses' opinion testimony as to defendant's sanity prior to the event giving rise to defendant's prosecution for homicide was admissible where lay witnesses were intimately acquainted with the defendant as in many instances such testimony is more helpful in arriving at conclusion as to defendant's sanity than expert opinion testimony based on hypothetical questions. State v. Simpson, 109 M 198, 95 P 2d 761, overruled on other grounds in State v. Knox, 119 M 449, 453, 175 P 2d 774.

Subdivision (30)—Insanity

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered from periodic heart attacks, did not warrant an instruction upon the question of his sanity. State v. Kuum, 55 M 436, 178 P 288.

Subdivision (31)—Federal Law

Under federal law, the maximum potential punishment determines whether an offense constitutes a felony or misdemeanor as contra-distinguished from the prevailing Montana rule under which crimes are classified as felonies or misdemeanors by the punishment actually imposed. State ex rel. Anderson v. Fousek, 91 M 448, 8 P 2d 791, 8 ALR 303, overruled on other grounds in — M —, 530 P 2d 466.

—Felony or Misdemeanor

The potential maximum sentence determined the grade of the crime until sentence was imposed where the offense was neither divisible into degrees nor inclusive of lesser offenses and punishment was within the discretion of the court or jury; if the sentence imposed was other than imprisonment in the state prison, the offense was considered a misdemeanor under former section 94-114. State v. Atlas, 75 M 547, 244 P 477.

Subdivision (32)—Criminal Negligence

In prosecution for involuntary manslaughter under former section 94-2507, criminality of the act resulting in death was established if the act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences irrespective of whether unlawful act was malum in se or merely malum prohibitum. State v. Strobel, 130 M 442, 304 P 2d 606, overruled on other grounds, 134 M 519, 525, 333 P 2d 1017.

—Evidence of Negligence

Whether defendant, while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by former section 94-2511 to render the killing excusable, was one for determination by the jury. State v. Kuum, 55 M 436, 178 P 288, distinguished in 85 M 544, 546, 281 P 352.

Evidence in a prosecution for involuntary manslaughter arising out of an automobile accident in city at nighttime, showing defendant driving at 15 miles per hour, that he did not see deceased, that he had not been drinking, that he was looking straight ahead but saw nothing to indicate the presence of the pedestrian, etc., was insufficient to warrant a verdict of guilty of such reckless disregard of human life as was required to constitute the offense under former section 94-2507, subdivision 2 and the information should have been dismissed. State v. Powell, 114 M 571, 576, 138 P 2d 949, distinguished in 134 M 519, 522, 333 P 2d 1017.

Evidence was sufficient to warrant jury finding under former section 94-2511 that "usual and ordinary caution" was not exercised where doctor testified that basal skull fracture and fatal transection of liver were caused by an extensive and

severe force. State v. Henrich, 159 M 365, 498 P 2d 124.

Subdivision (37)—Contempt of Court

A contempt of court, punishable by fine or imprisonment, or both, was a public offense under former section 94-112. State ex rel. Flynn v. District Court, 24 M 33, 35, 60 P 493.

—Ordinance Violation

The threatened violation of a town ordinance was not a "public offense" within the meaning of former section 94-112. State ex rel. Streit v. Justice Court, 45 M 375, 380, 123 P 405.

A valid city ordinance, passed by the municipality with the design of the legislature was a "law" as that term was used in former section 94-112, which defined a public offense as an act committed or omitted in violation of a law, and such ordinance had, within the territorial jurisdiction of the municipality, the same force and was to be treated as a legislative act. State ex rel. Marquette v. Police Court, 86 M 297, 309, 283 P 430.

An action by a city instituted in its police court by the filing of a complaint charging a violation of one of its ordinances, and seeking the imposition of a fine, was criminal in nature; the court acquired jurisdiction over defendant by the issuance and service of a warrant of arrest. State ex rel. Marquette v. Police Court, 86 M 297, 283 P 430, modifying City of Bozeman v. Nelson, 73 M 147, 237 P 528.

—Removal from Office

A proceeding for the summary removal of a county attorney for misconduct, even though instituted by a private person, was a public proceeding, and, though it was summary in its nature, was classified as a prosecution for a crime under former section 94-112. State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157.

An officer (county clerk) charged with willful neglect of duty was not entitled to jury trial in proceeding for his removal from office under former section 94-112. State ex rel. Bullock v. District Court, 62 M 600, 602, 205 P 955.

Subdivision (49)—Promissory Notes

Under former section 94-2710, an instruction in a prosecution for the larceny of promissory notes that the amount of money due on the notes or secured to be paid thereby and remaining unsatisfied was their value, was correct; instruction offered by defendant to the effect that evidence relating to the instrument should be disregarded because it had not been shown that they had any value, was properly refused where one of the notes was introduced in evidence and the value of the other was shown by books of account, thus making out a prima facie case for the state. State v. Cassill, 71 M 274, 279, 229 P 716.

Subdivision (53)—Fraudulent Intent

Under former section 94-118 proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; defendant who was sufficiently conscious to recognize fraudulent nature of check was of adequate mental ability to form an intent to defraud by issuing the check, knowing of its fraudulent nature. State v. Cooper, 146 M 336, 406 P 2d 691.

—General Intent

Effect of former section 94-105 was to make any required "intent to defraud" a general, rather than a specific intent. State v. Cooper, 146 M 336, 406 P 2d 691.

—Instructions to Jury

Under former section 94-117 an instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, in that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first-degree, the very gist of which offense is the intent with which it was committed. State v. Schaefer, 35 M 217, 88 P 792, distinguished in 135 M 139, 147, 337 P 2d 924.

—Manifestation of Intent

Evidence that defendant accosted a nine-year-old girl to whom he was a total stranger on the street, invited her to come to his room and play with him, on arriving there locked the door, asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, was sufficient to warrant a finding by the jury that the defendant intended to arouse his sexual desires in a depraved manner. State v. Kocher, 112 M 511, 119 P 2d 35.

—Presumption of Intent

Intent is conclusively presumed from the occurrence of a statutory offense such as collecting unlawful fees from a county. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103.

—State as Victim

By virtue of former section 94-105, which included bodies politic among those entities which one could criminally intend to defraud, the crimes of grand larceny and obtaining money by false pretenses,

as defined by former sections 94-2701 and 94-1805 respectively, could be committed against the state, since the gravamen of each offense was to defraud the true owner of his, or its, property. State v. Cline, — M —, 555 P 2d 724.

94-2-102. Voluntary act. A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing. Possession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his control.

History: En. 94-2-102 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, sections 4-1 and 4-2.

Commission Comment

The minimum elements of any offense (other than one in which absolute liability for an act alone is imposed) are described as a voluntary act and a specified state of mind. See R. C. M. 1947, section 94-117.

The word "act" is sometimes used loosely to describe not only the person's physical movement, but also certain attendant circumstances and the consequence of the movement. However, in the interest of accurate expression these three components should be separately designated, and "act" should be limited to the relevant physical movements. A further narrowing of the use of the term in a criminal code arises from the fact that a muscular movement may be voluntary ("willed") or involuntary—a physical reflex or compelled motion which is not accompanied by the volition of the person making the motion. Only the voluntary act gives rise to criminal liability. In this code, "act" is used in the narrow sense and with the accompanying mental state, is referred to as "conduct." An "omission" to take some action required by law is distinguished sometimes from an "act," since it denotes lack of physical movement. However, an omission necessarily is defined by describing the act of commission which is omitted; and if the distinction is made, then the phrase "act or omission" must be used each time reference is made to a person's physical behavior, unless the reference is only to a positive movement, or only to the lack of required movement. Consequently, the use of "act" to include "omission" seems reasonable, and clearly is more convenient. Perkins, "Negative Acts in Criminal Law," 22 Iowa L. Rev. 95 at 107 (1934). This usage, of course, does not preclude the specific reference to an omission when the failure to perform a duty imposed by law is the substance of a particular offense. The criminal law is concerned only with the voluntary phase —the purposeful or negligent omission to perform a duty which the person is capable of performing.

Possession is another aspect of behavior which, while it does not necessarily involve a physical movement is conveniently brought within the definition of "act" when it refers to maintaining control of a physical object. Again, only the voluntary aspect is significant—a consciousness of purpose, derived from knowingly procuring or receiving the thing possessed, or awareness of control thereof for a sufficient time to enable the person to terminate his control. An examination of the former Montana statutory provisions prohibiting possession indicates the suitability of this usage. Some of the provisions in the present law flatly prohibit possession of specified objects, without reference to any accompanying mental state. (E.g., section 94-8-211, concealed firearm; section 54-133, narcotics; section 94-8-404, gambling device; section 94-8-202, machine gun.) Others denounce possession with intention to accomplish a specified purpose, such as sale or the commission of another offense. (E.g., section 94-6-205, possession of burglary tools; section 94-8-110, obscenity.) A few analogous situations involve the ownership or possession of real property used for prohibited purposes.

94-2-103. General requirements of criminal act and mental state. (1) A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in subsections (27), (31), and (52) of 94-2-101.

(2) If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole, without distinguishing among

the elements thereof, the prescribed mental state applies to each such element.

(3) Knowledge that certain conduct constitutes an offense or knowledge of the existence, meaning, or application of the statute defining an offense is not an element of the offense unless the statute clearly defines it as such.

(4) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(a) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him;

(b) he acts in reliance upon a statute which later is determined to be invalid;

(c) he acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or

(d) he acts in reliance upon an official interpretation of the statute, regulation, or order defining the offense made by a public officer or agency legally authorized to interpret such statute.

(5) If a person's reasonable belief is a defense under subsection (4), nevertheless he may be convicted of an included offense of which he would be guilty if the law were as he believed it to be.

(6) Any defense based upon this section is an affirmative defense.

History: En. 94-2-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 11, Ch. 359, L. 1977.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, sections 4-3 and 4-8; also derived from Model Penal Code, section 2.04.

Commission Comment

The accurate description of the mental states which are elements of the various specific offenses is one of the most difficult problems in the preparation of a criminal code.

In a number of other states, efforts have been made to simplify the description of mental states, by defining a small number of terms and using them uniformly throughout the criminal code, with appropriate qualifying language where necessary to describe accurately a particular offense. Subsection (2) provides a general rule for interpretation of statutory references to mental state in defining specific offenses. Often, a single mental state word, such as "knowingly" is placed in a position where grammatically it may apply to all elements of the offense. To so apply it for the purpose of legal interpretation seems logical, since the purpose that it shall not apply to certain elements of the offense may be expressed readily by a different sentence structure. Subsection (3) states the accepted rule that in the absence of a statutory requirement, knowledge of the law is not an element of the offense. A person's liability for an offense does not depend upon his knowing that his conduct constitutes an offense, or knowing of the existence, meaning, or application of the defining statute. A reasonable reliance upon a statute later determined to be invalid, or upon an authoritative statutory interpretation, later determined to be invalid or erroneous is a defense. Clearly, the state should not punish as criminal, conduct which, according to a formally expressed statement of its duly authorized agents, is not illegal. Proof of the facts upon which such a defense is based should not be difficult, nor should determination of the reasonableness of the defendant's reliance; and since the enactment or interpretation relied upon would be of a public and official nature, collusion to avoid criminal liability seems unlikely. When ignorance or mistake is recognized as a defense the defendant may be convicted of an included offense which does not involve the mental state negatived by the ignorance or mistake.

Amendments

The 1977 amendment changed the references to subsections of 94-2-101 in subsection (1); and made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

Criminal Negligence

In prosecution for involuntary manslaughter under former section 94-2507, criminality of the act resulting in death was established if the act was done negligently in such a manner as to evince a disregard for human life or an indifference to consequences irrespective of whether unlawful act was malum in se or merely malum prohibitum. State v. Strobel, 130 M 442, 304 P 2d 606, overruled on other grounds, 134 M 519, 525, 333 P 2d 1017.

Evidence of Intent

Under former section 94-118, finding of jury that defendant was able to form specific intent to commit first-degree assault as required by statute was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into a nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty recounting recent events to police. State v. Lukus, 149 M 45, 423 P 2d 49.

Fraudulent Intent

Under former section 94-118, proof of intent to defraud could consist of reasonable inferences drawn from affirmatively established facts; where defendant was sufficiently conscious at the time of the utterance of check to recognize its fraudulent nature he was of adequate mental ability to form an intent to defraud. State v. Cooper, 146 M 336, 406 P 2d 691.

Insanity Affecting Intent

Under former section 94-117 insanity was defined as any weakness or defect of the mind rendering it incapable of entertaining in the particular instance the criminal intent; criminal responsibility was to be determined solely by defendant's capacity to conceive and entertain the intent to commit the particular crime. State v. Keerl, 29 M 508, 75 P 362.

Instructions to Jury

An instruction embodying the provisions of former sections 94-117 and 94-118 regarding the necessity of the presence of joint operation of act and intent to constitute a crime, should have been given in every criminal prosecution, especially when requested by defendant. State v. Allen, 34 M 403, 87 P 117.

Under former section 94-117, an instruction charging jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another it is presumed to have been committed with a malicious and guilty intent, and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not have been given in prosecution for assault in the first degree, a critical element of which is the intent with which the act is committed. State v. Schaefer, 35 M 217, 88 P 792.

Under former section 94-117, refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault under which general nonstatutory intent to do harm willfully, wrongfully and unlawfully is an element, but under which specific statutory intent to do any particular kind of degree of injury to victim is not an element. State v. Fitzpatrick, 149 M 400, 427 P 2d 300.

Since under former section 94-117, specific intent was not a necessary element of second degree assault, refusal of instruction thereon was proper even though defendant claimed that high degree of intoxication precluded formation of intent. State v. Warrick, 152 M 94, 446 P 2d 916.

Involuntary Manslaughter

Willful or evil intent was not an element of involuntary manslaughter under former section 94-117. State v. Pankow, 134 M 519, 333 P 2d 1017.

Manifestation of Intent

Evidence that defendant accosted a nine-year-old girl to whom he was a total stranger on the street, invited her to his room to play with him, on arriving there locked the door, asked her to remove her dress and then placed his hand upon her shoulder in an attempt to remove her dress, was sufficient to warrant a jury finding that the defendant intended to arouse his sexual desires in a depraved manner. State v. Kocher, 112 M 511, 119 P 2d 35.

Presumption of Intent

Under former section 94-117, intent was conclusively presumed from the commission of a statutory offense, as for collecting illegal fees, and where the statutes were not ambiguous, it was no defense that defendant acted on the advice of the attorney general. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103.

94-2-104. Absolute liability. A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in subsections (27), (31), and (52) of 94-2-101 only if the offense is punishable by a fine not exceeding $500 and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

History: En. 94-2-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 12, Ch. 359, L. 1977.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 4-9.

Commission Comment

This section is intended to establish strict limitations upon the elimination of a mental state as an element of an offense. Most states have numerous statutes which impose upon the courts the responsibility of determining, as to each such provision, either that mental state is or is not an element, or (particularly in the more serious offenses) that the legislature intended that a particular mental state be implied. (See the careful study of the Wisconsin statutes by Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625.) Many such provisions are found in legislation of a regulatory nature, involving the sale of specified kinds of property to designated classes of persons or to the public, the commission of nuisances, the violation of laws concerning motor vehicles, health and safety, and fish and game laws.

In the old code numerous statutes failed to specify the mental state required and no adequate rule existed for determining whether a particular provision, not interpreted by the court was to be regarded as implying a particular mental state or as imposing absolute liability. (The usual methods of interpretation are summarized in Remington, "Liability Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625 at 629 to 632.)

Section 94-2-104 represents only a partial solution of the problem—a restrictive rule of interpretation. Another part of the solution is in the rephrasing of code provisions which define specific offenses, to indicate clearly the intended mental state and the offenses in which mental state, for some cogent policy reason, is not an element.

Absolute liability is authorized for those offenses in which incarceration is not part of the penalty, and the fine is less than five hundred dollars ($500.00). Many of the old Montana code provisions which do not require proof of specified mental state are in this category, as are many of the penal provisions appearing outside of the Criminal Code. The difficulty of enforcing such provisions if a mental state must be proved may justify the conclusion that the omission of a mental state requirement is intended to create absolute liability. (See Model Penal Code, Draft No. 4, comment on ¶ 2.05 at page 145; Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55 at 68 to 72, 78 and 79 (1933)).

In addition to restricting absolute liability to offenses not punishable by incarceration or by a fine of more than five hundred dollars ($500.00), this section provides that only a clearly indicated legislative purpose to create absolute liability should be recognized, and in all other instances, a mental state requirement should be implied as an application of the general rule that an offense consists of an act accompanied by a culpable mental state, as provided in section 94-2-103(1), (2) and (3). (See Model Penal Code, Draft No. 4, comment on ¶ 2.05 at pages 145 and 146; Sayre, supra, at pages 68 to 72 and 79 to 83).

Amendments

The 1977 amendment changed the references to subsections of 94-2-101 to conform with the amendment of that section; and made minor changes in punctuation and style.

94-2-105. Causal relationship between conduct and result. (1) Conduct is the cause of a result if:

(a) without the conduct the result would not have occurred; and

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense, and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:

(a) the result differs from that contemplated only in the respect that

a different person or different property is affected, or that the injury or harm caused is less than contemplated; or

(b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

(3) If negligently causing a particular result is an element of an offense, and the result is not within the risk of which the offender is aware, or should be aware, either element can nevertheless be established if:

(a) the actual result differs from the probable result only in the respect that a different person or different property is affected, or that the actual injury or harm is less; or

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

History: En. 94-2-105 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 2.03.

Commission Comment

This section is concerned with offenses that are so defined that causing a particular result is a material element of the offense. Subsection (1) (a) treats cause-in-fact as the causal relationship normally regarded as sufficient to create culpability. When concepts of "proximate cause" dissociate the offender's conduct and the result which was cause-in-fact, the reason for limiting culpability is the conclusion that the actor's culpability with reference to the result, i.e., his purpose, knowledge, or negligence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offense. Problems of this kind should be faced as problems of the culpability required for conviction and not as problems of causation.

Subsection (1) (b) contemplates that the general rule of (1) (a) may be unacceptable when dealing with particular offenses. In this event additional causal requirements may be imposed explicitly. Subsections (2) and (3) are drafted on the theory that there is a need to systematize rules that have developed when there is a variance between the actual result and the result sought, contemplated or probable under the circumstances. These subsections assume that liability requires purpose, knowledge or negligence with respect to the result which is an element of the offense. Subsections (2) (b) and (3) (b) make no attempt to catalogue possibilities like intervening or concurrent causes, etc. They set out an ultimate criterion, whether the result was too accidental to have a bearing on the actor's liability or the gravity of the offense. Since the actor has sought a criminal result or has been negligent with respect to that result, he will be guilty of some offense even if he is not held for the actual result. There is an advantage to permit the jury to face the issue squarely with their own sense of justice, e.g., where the defendant shoots his wife and in the hospital she contracts a disease and dies. Her death may be thought to have been rendered substantially more probable by the defendant's conduct yet a jury could regard it as too remote to convict the defendant of murder. It should be noted that the maximum potential punishment for attempt is the same as for the underlying offense, thus placing greater emphasis on purpose than result. See section 94-4-103.

DECISIONS UNDER FORMER LAW

Instructions to Jury

An instruction charging the jury that when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent, and that the law presumes that a person intends the ordinary consequences of any voluntary act committed by him, may mislead the jury, and should not be given in a prosecution for assault in the first degree, a critical element of which was intent with which the act was committed. State v. Schaefer, 35 M 217, 221, 88 P 792.

94-2-106. Accountability for conduct of another. A person is responsible for conduct which is an element of an offense, if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in section 94-2-107, or both.

History: En. 94-2-106 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 5-1.

Commission Comment

This section states the general principle that criminal liability is based on conduct and that the conduct may be that of another person.

94-2-107. When accountability exists. A person is legally accountable for the conduct of another when:

(1) having a mental state described by the statute defining the offense, he causes another to perform the conduct, regardless of the legal capacity or mental state of the other person; or

(2) the statute defining the offense makes him so accountable; or

(3) either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable if:

(a) he is a victim of the offense committed unless the statute defining the offense provides otherwise; or

(b) before the commission of the offense, he terminates his effort to promote or facilitate such commission and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

History: En. 94-2-107 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 5-2.

Commission Comment

This section is a statement of principles of accessoryship although that term is not employed in the code. It provides a much fuller statement of applicable law in this important field and, in some respects, alters and modifies the old law.

The former statutory provisions R. C. M. 1947, sections 94-6423 and 94-6425 had as their primary purpose the elimination of the elaborate common-law distinctions between principals in the first degree, principals in the second degree, and the accessories before the fact. Section 94-2-107 accepts the approach of the existing law and endeavors to develop it in full and systematic fashion.

Subsection (2) makes clear a person may be held legally accountable in circumstances not otherwise included in section 94-2-107, where the particular statute so provides. In such case the particular provision prevails. An example of such a statute might be one imposing vicarious criminal liability on a tavern owner for the act of an employee resulting in sale of liquor to a minor.

Subsection (3) is a comprehensive statement of liability based on counseling, aiding and abetting which includes those situations that, at common law, involve the liability of principals in the second degree and accessories before the fact. Liability under this subsection requires proof of a "purpose to promote or facilitate . . . commission of the substantive offense." Moreover, "conspiracy" between the actor and defendant is not of itself made the basis of accountability for the actor's conduct, although the acts of conspiring may in many cases satisfy the particular requirements of this subsection. (See, e.g., Pinkerton v. United States, 328 US 640, 90 L Ed 1489, 66 S Ct 1180 (1946), Commentary, A.L.I., Model Penal Code Tent, Draft No. 1, 1953, 20-26.)

Subsection (3)(a) states that the person who is a "victim" of the criminal act does not, unless the particular statute so states, share the guilt of the actor. This is true even though the person is a "willing" victim and counseled commission of the crime. Thus, the victim of a blackmail plot who pays over money, even though he "aids"

the commission of the crime, or the girl under age of consent in statutory rape, even though she solicited the criminal act, are not deemed guilty of the substantive offense. Subsection (3)(a) does not prevent the extension of criminal liability to the victim if the particular statute so provides. Thus, if it be decided that a bribe-taker should be treated as guilty of bribery, this can be provided in the bribery section. All that is done in these provisions is to state the rule that persons falling under subsection (3)(a) are not guilty if there is no specific provision to the contrary.

Subsection (3)(b) poses the question: What can a person do who has aided and abetted in a criminal plot, to relieve himself of liability for the substantive crime? It appears desirable to provide some escape route, if for no other reason than to provide an inducement for disclosure of crimes before they occur. The problem here should be distinguished from the question in the law of conspiracy as to what actions are required for a person to dissociate himself from a conspiratorial agreement.

To obtain release from criminal liability the person must terminate his affirmative efforts to facilitate commission of the crime. In addition, he may be relieved if he is able wholly to deprive his contributions to the commission of an offense of their effectiveness. If a timely warning is given the police, the person should be relieved even if through negligence or act of God the police fail to prevent the crime. Finally, a general clause "otherwise makes proper effort to prevent the commission of the offense" is included. This will require interpretation according to the facts of the individual case.

This section should not conflict with the substance of Montana case law that the knowledge that a crime is about to be committed does not make the accused an accomplice (State v. Mercer, 114 M 142, 152, 133 P 2d 358) and that one who knows a felony has been committed, but does nothing to conceal it or harbor or protect the offender, is not an accessory to the commission of that felony (State v. McComas, 85 M 428, 433, 278 P 993).

Nonaccountability

Where defendant was present when his companion fatally beat another and defendant did little to restrain his companion, this alone was not sufficient to make the defendant criminally accountable for his companion's actions. State ex rel. Murphy v. McKinnon, — M —, 556 P 2d 906.

DECISIONS UNDER FORMER LAW

Constitutionality

Former section 94-6423 which abrogated the distinction between an accessory before the fact and the principal did not violate constitutional provision guaranteeing to an accused the right to demand the nature and cause of the accusation. State v. Geddes, 22 M 68, 87, 55 P 919.

Aiding and Abetting

One of a band of Indians hunting together who was present and saw another member of the band shoot a sheepherder to prevent his reporting the killing of a cow by the Indians was an accomplice to the crime, so that his statement implicating defendant was insufficient unless corroborated. State v. Spotted Hawk, 22 M 33, 55 P 1026.

The object of the former section 94-6423 was to put the principal and the agent upon the same legal ground, and to authorize the principal to be charged as if he himself had committed the felony which was in fact perpetrated by his agent upon advice and encouragement of the principal. State v. Geddes, 22 M 68, 88, 55 P 919.

Under former section 94-6423, the distinction between accessories before the fact and principals was abrogated and all were treated as principals. State v. De Wolfe, 29 M 415, 423, 74 P 1084, overruled on other grounds in State v. Penna, 35 M 535, 546, 90 P 787.

Where defendants charged with assault in the first degree showed by their own testimony that they went to the home of the victim to ascertain whether he had made a certain derogatory statement, one of them struck him for denying having made the statement and the other assaulted him for making the statement, each defendant was an accessory to the other and a principal in the carrying out of a common design. State v. Maggert, 64 M 331, 337, 209 P 989.

Defendants who, during the owner's absence, were in charge of a place where liquor was unlawfully sold could be found guilty as principals of maintaining a common nuisance. State v. Peters, 72 M 12, 231 P 392.

Defendant who referred and accompanied thieves to another who bought stolen cattle could be found guilty as a principal of receiving stolen property. State v. Huffman, 89 M 194, 296 P 789.

Where a verbal declaration of one codefendant that he and the other codefendant were partners was given in evidence, it was error for the court to refuse defendant's instruction that such verbal declara-

tion was insufficient to establish a partnership. Although existence of partnership was immaterial due to former sections 94-6423 and 94-204, the jury may have given full consideration to the declaration and found defendant guilty on the strength thereof. State v. Keller, 126 M 142, 246 P 2d 817, 821.

Under former sections 94-6423 and 94-204, evidence was sufficient to sustain a conviction of assault in the second degree where defendant was at the scene of the crime and was admittedly a participant therein; it is not necessary to show that he actually fired any one of the guns. State v. Simon, 126 M 218, 247 P 2d 481, 485.

Under former section 94-6423, a showing that the defendant aided or abetted in the taking of property from the person of another was sufficient to establish defendant's guilt of larceny. State v. Maciel, 130 M 569, 305 P 2d 335, 336.

Bartender who served drinks after hours and called prostitutes when customers arrived was in pari delicto and could not recover from his employer for injuries received in the course of that employment. Lencioni v. Long, 139 M 135, 361 P 2d 455.

Prison inmate who received custody of a guard from another inmate, then confined the guard against his will, could be found guilty of kidnaping as a principal even though the guard was originally seized by another and there was insufficient evidence of a preconceived plan of action. State v. Frodsham, 139 M 222, 362 P 2d 413.

Although circumstantial evidence was not sufficient to place defendant on the actual premises where the burglary occurred, it was sufficient to prove that defendant aided and abetted in the commission of the crime. In re McMaster, — M —, 529 P 2d 1391.

Entrapment

Where a stock detective solicited one to assist him in the larceny of cattle for the purpose of convicting another of the crime, and the person so solicited on arrival at the scene of the intended taking declined to participate, he was not a principal to the crime, and hence, the one upon whom the crime was sought to be fastened, could not, under former section 94-6423, have become his accessory. State v. Neely, 90 M 199, 211, 300 P 561, distinguished in 138 M 123, 126, 354 P 2d 1105.

Husband and Wife

Acquiescence by wife and her failure to protest when her husband unlawfully sold whiskey in her presence in their home were not enough to make her guilty as a principal under former section 94-204. State v. Cornish, 73 M 205, 235 P 702.

Instructions to Jury

In a prosecution for arson, where there was some testimony that defendant procured another to set the fire, instructions embodying the provisions of former sections 94-6423 and 94-204, were proper; court properly refused instructions directing the jury to find for the defendant unless satisfied beyond a reasonable doubt that he was present personally and set the fire himself. State v. Chevigny, 48 M 382, 385, 138 P 257.

Instructions substantially in the words of former sections 94-6423 and 94-204, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. State v. Wiley, 53 M 383, 387, 164 P 84.

An instruction defining "principals" as all persons who "aid or abet" in the commission of an offense, instead of "aid and abet" as used in former section 94-204, was incorrect. State v. McClain, 76 M 351, 246 P 956.

Where the state proceeded on the theory that defendant was present and directly committed the crime of horse stealing, not on the theory that he was not present but aided and abetted another, an instruction in the language of former section 94-204, defining principals to include those not present but aiding and abetting another, was not reversible error, though not proper on retrial. State v. Hamilton, 87 M 353, 363, 287 P 933.

The use of the disjunctive "or" in an instruction in a criminal case defining who are principals, saying that one who aids "or" abets another in the commission of an offense is a principal, instead of aids "and" abets, the conjunctive used in former section 94-204, was error. State v. Ludwick, 90 M 41, 300 P 558.

Knowledge

Mere presence at the commission of a crime does not render one an accomplice unless under the circumstances he had a duty to interfere. State v. McComas, 85 M 428, 278 P 993.

Under former section 94-6423, the mere knowledge in a person that a crime was about to be committed did not constitute him an accomplice; nor did the fact that one charged with receiving stolen property, on prior occasions may have purchased such property seem sufficient to make the receiver an accomplice in the particular theft nor even to give him the knowledge that it was to be committed. State v. Mercer, 114 M 142, 149, 133 P 2d 358.

Receiver of Stolen Property

Defendant who became an accomplice to the theft of a calf by encouraging and advising the thief became a principal to the crime under former section 94-6423 and was a constructive possessor of the stolen calf by virtue of the thief's actual possession; theory that constructive possessor could not "receive" same property from actual possessor did not preclude state from prosecuting accessory for being a receiver of stolen property upon his subsequent acquisition of actual possession of the calf. State v. Webber, 112 M 284, 116 P 2d 679, 136 ALR 1077.

Sufficiency of Pleadings

Under former section 94-6423 an information containing a single count charging the crime of second degree assault, as defined in former section 94-602, was proper where only one crime was involved, namely, second degree assault, with at least two different theories upon which to base a conviction, one by a direct assault and the other by aiding and abetting. State v. Zadick, 148 M 296, 419 P 2d 749, 751.

Sufficiency of Proof

An indictment for murder, charging defendant as principal, was sustained by proof that he was guilty of advising and encouraging the crime. State v. Geddes, 22 M 68, 86, 55 P 919.

Under an information charging receipt of stolen property by one who became a principal by aiding and abetting another in receiving it, there was no fatal variance between the crime as alleged and the proof, showing him to have taken part only as an accessory. State v. Huffman, 89 M 194, 203, 296 P 789.

94-2-108. Separate conviction of person accountable. A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable, although the other person claimed to have committed the offense has not been prosecuted or convicted, or has been convicted of a different offense or is not amenable to justice, or has been acquitted.

History: En. 94-2-108 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 5-3.

Commission Comment

Even at common law two persons, both principals in the first degree, could be tried separately and although one was acquitted, the state was not precluded from proceeding to trial and obtaining a conviction against the second. The same result is possible under this code but the classification of principals and accessories is eliminated.

94-2-109. Responsibility. A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existence of a mental state which is an element of the offense.

History: En. 94-2-109 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 53, Ch. 329, L. 1974.

Source: Derived from Revised Codes of Montana 1947, sections 94-201(1) and 94-119; Illinois Criminal Code, Chapter 38, section 6-3.

Commission Comment

Chapter 5 of Title 95, Competency of the Accused, completes the coverage of this section.

Subsection (2) is taken from Illinois Criminal Code, Chapter 38, section 6-3. This imposes a stricter limitation than the old code section 94-119(1). Instead of involuntary intoxication being a defense it is necessary for the accused to also prove that he was thereby made mentally incompetent. The second sentence of paragraph (2) makes it clear that intoxication is no defense but is merely a fact which the jury can consider in determining the existence of a particular mental state. When intoxication has proceeded so far as to render the accused incapable of forming the particular mens rea required for the offense, the defendant is entitled to be acquitted on that charge.

Amendments

The 1974 amendment deleted former subsection (1) which read: "No person is capable of committing any offense unless he has attained his sixteenth birthday at the time the act in question was committed. Any person who has not yet attained his eighteenth birthday shall be subject to the law as provided in Title 10, chapter 6, R. C. M. 1947"; and deleted subsection designation (2).

Repealing Clause

Section 54 of Ch. 329, Laws 1974 read: "Sections 10-601, 10-602, 10-603, 10-604.1, 10-605.1, 10-606, 10-607, 10-608, 10-608.1, 10-610, 10-611, 10-611.1, 10-612, 10-613, 10-614, 10-616, 10-617, 10-621, 10-622, 10-623, 10-624, 10-625, 10-626, 10-629, 10-630 and 10-633 are repealed."

DECISIONS UNDER FORMER LAW

Confession While Intoxicated

Under former section 94-119, confession of intoxicated defendant was voluntary and admissible in light of evidence that he was able to recite in great detail events occurring prior to and during act charged. State v. Chappel, 149 M 114, 423 P 2d 47.

Insanity

Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the day on which the homicide was committed, and that he suffered from periodic heart attacks, did not warrant an instruction upon the question of his sanity. State v. Kuum, 55 M 436, 178 P 288.

Malice and Intoxication

Under former section 94-119, in prosecution for felony murder, ample evidence presented to jury to justify conclusion that defendant, although intoxicated, was able to entertain intent to commit the robbery during which homicide occurred, precluded review on appeal of the question of defendant's state of intoxication and his ability to entertain intent to commit the robbery. State v. Reagin, 64 M 481, 210 P 86.

Under former section 94-119, intoxication was not an absolute defense; if however defendant could show that the state of his intoxication was such that he was incapable of forming a malicious intent, the charge would be mitigated to a lesser offense which did not include intent as an element. Where defendant, on the day previous to an assault, told the prosecuting witness that he was going to get a gun and kill him relative to a matter occurring a year previously, and on the day of the assault, referring to it again, viciously assaulted the victim, thus showing his capacity to harbor malice, his alleged intoxication was no defense. State v. Laughlin, 105 M 490, 73 P 2d 718.

Where defendant was intoxicated to such an extent as to render him incapable of entertaining the purpose, intent or malice requisite for first-degree murder, the crime was properly reduced to murder in second degree. State v. Palen, 119 M 600, 178 P 2d 862, explained in 150 M 399, 407, 436 P 2d 91.

Under former section 94-119, in murder prosecution, jury was properly instructed that if killing was done by defendant with malice aforethought, but defendant was incapable of premeditation and deliberation because of intoxication, the crime was second-degree murder, and that if defendant was so intoxicated at the time of killing that he was incapable of harboring malice aforethought, crime was manslaughter. State v. Brooks, 150 M 399, 436 P 2d 91.

Specific Intent

Since specific intent was not element of second-degree assault, the court was correct in refusing defendant's offered instruction that jury could take degree of intoxication into account in arriving at verdict in so far as it affected defendant's capacity for willfulness and intent under former section 94-119. State v. Warrick, 152 M 94, 446 P 2d 916.

Testimony of two witnesses that defendant was under the influence of alcohol was not sufficient to refute finding by jury that defendant was not so intoxicated as to be unable to form the requisite intent to commit larceny. State v. Austad, — M —, 533 P 2d 1069.

Voluntary Intoxication

Although as a general rule, courts do not approve the giving of abstract propositions of law as instructions to juries, where the sole defense of one charged with an attempt to commit rape was intoxication, the trial court did not err in giving an instruction on voluntary intoxication in the words of subdivision 1 of former section 94-119. State v. Stevens, 104 M 189, 65 P 2d 212, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

While voluntary intoxication was generally no defense to a criminal charge under former section 94-119, it was available as a defense where a specific intent was an essential element of the crime charged. Alden v. State, 234 F Supp 661, affirmed in 345 F 2d 530.

94-2-110. Substitutes for negligence and knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

History: En. 94-2-110 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section is intended to obviate any possible misunderstanding as to what mental state will satisfy the requirements of each statutory provision. Proof of the higher or more specific mental state will satisfy any lesser mental state that may be required by a particular statute.

94-2-111. Consent as a defense. (1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense.

(2) Consent is ineffective if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense;

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;

(c) it is induced by force, duress, or deception; or

(d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

History: En. 94-2-111 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 13, Ch. 359, L. 1977.

Source: New.

Commission Comment

Victim consent may eliminate criminal responsibility. However, not every consent is legally valid. The state has an obligation to protect the young and the helpless from their own incapacities. For reasons of public policy, the state may prohibit some conduct absolutely irrespective of anyone's consent.

Amendments

The 1977 amendment inserted "it is given by a person who" at the beginning of subsection (2)(b); and made minor changes in punctuation and phraseology.

94-2-112. Criminal responsibility of corporations. (1) A corporation may be prosecuted for the commission of an offense if, but only if:

(a) the offense is a misdemeanor, and is defined by sections 94-6-307, 94-6-308, 94-6-311, 94-6-312, 94-6-313, 94-8-108, 94-8-109, 94-8-111, 94-8-112, 94-8-113 of this code, or is defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation; and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, except that any limitation in the defining statute, concerning the corporation's accountability for certain agents or under certain circumstances, is applicable; or

(b) the commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation.

(2) A corporation's proof, that the high managerial agent having supervisory responsibility over the conduct which is the subject matter

of the offense exercised due diligence to prevent the commission of the offense, is a defense to a prosecution for any offense to which subsection (1)(a) refers, other than an offense for which absolute liability is imposed. This subsection is inapplicable if the legislative purpose of the statute defining the offense is inconsistent with the provisions of this subsection.

(3) For the purposes of this section:

(a) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of the corporation, or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.

History: En. 94-2-112 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 5-4.

Commission Comment

Section 94-2-112 deals with the criminal responsibility of private corporate bodies.

Subsection (1)(a) deals with the corporate liability for misdemeanor offenses, such other offenses as may be expressly included, and those which clearly indicate a legislative purpose to impose corporate liability where the offense is defined by a statute not included in the Criminal Code. In dealing with regulatory offenses, the broadest scope of liability is provided. The corporation is made criminally responsible for criminal conduct performed by any corporate employee acting within the scope of his office or employment and in behalf of the corporation. The chief justification for such broad liability in this class of cases is to provide an inducement for high managerial officers in the corporation to supervise the behavior of minor employees in such a way as to avoid criminal conduct on the part of corporate employees. In many of the regulatory offenses, the corporation which violates a criminal statute is not confronted by the threat of tort liability growing out of the same act. Thus, if the corporation is required to file a corporate report and fails to do so, the liability it will suffer may be criminal only. These provisions do not relieve the individual corporate employee from criminal liability for his own act. In many cases, criminal prosecution of the individual will prove more effective in enforcing the regulatory policy of the statute. There may be times, however, in which, while it is clear that someone in the corporate employ has committed the criminal act, it is impossible to identify the particular employee guilty of criminal behavior. In such case, the only sanction available is the imposition of a fine on the corporate body. There may also be cases in which the criminal act is committed by a corporate employee of a foreign corporation residing outside the jurisdiction. In such a case the only feasible course open to the Montana prosecutor would be a criminal action against the corporation.

Since, however, the major purpose of subsection (1)(a) is to encourage diligence on the part of managerial personnel to prevent criminal conduct on the part of corporate employees, it seems appropriate to permit the corporation to defend by proof that the criminal conduct occurred despite the exercise of due diligence on the part of supervisory personnel. Consequently, subsection (2) provides that proof of due diligence is a defense to the criminal charge against the corporation. The burden of proof in this case, is placed upon the corporate defendant. This defense is further qualified by the provision that if the statute in question clearly intends that the defense of due diligence should not be available to the corporation, the particular provision of the statute shall prevail over the language of subsection (2).

Subsection (1)(b) relates to the scope of liability of corporations for criminal offenses of a more serious character. It provides that when a corporation is indicted for a felony such as embezzlement, or involuntary manslaughter, the corporation may not be held liable unless the criminal conduct was performed or participated in by the board of directors or by a high managerial agent. The restriction on the scope of corporate liability in this class of cases is justified by the consideration that before the stigma of serious criminality attaches to a corporate body, the conduct should involve someone close to the center of corporate power. Moreover, in these cases, the argument for the necessity of corporate fines to stimulate diligent supervision of minor employees is considerably less persuasive. This is true because most of the serious felonies also involve the possibility of corporate tort liability and this possibility should provide sufficient inducement for

the exercise of proper supervision by managerial officials. The restriction of corporate liability in the case of serious felonies to acts of participating high managerial officials is supported by the case law of some American states and appears to be consistent with the English law on the same point. (E.g., People v. Canadian Fur Trappers Corp., 248 NY 159, 161 NE 455, 59 ALR 372 (1928); Rex v. I.C.R. Haulage Ltd. (1944) 1 K.B. 551; Welsh, "The Criminal Liability of Corporations," 62 L. Q. Rev. 345 (1946).) The definitions of "agent" and "high-managerial agent" defy precise definition because of the infinite variations in the organizational schemes of corporate bodies. The definition here provided, however, is probably more precise than that which has emerged from the case law. (See especially, People v. Canadian Fur Trappers Corp., 248 NY 159, 161 NE 455, 59 ALR 372 (1928).)

94-2-113. Accountability for conduct of corporation. (1) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf.

(2) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation.

History: En. 94-2-113 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 5-5.

Commission Comment

Section 94-2-113 should make clear that an individual acting for a corporation is fully responsible for his own criminal acts and is punishable accordingly.

CHAPTER 3

JUSTIFIABLE USE OF FORCE—EXONERATION

94-3-101. Definitions. (1) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(2) "Force likely to cause death or serious bodily harm" within the meaning of this chapter includes but is not limited to:

(a) the firing of a firearm in the direction of a person, even though no purpose exists to kill or inflict serious bodily harm; and

(b) the firing of a firearm at a vehicle in which a person is riding.

History: En. 94-3-101 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 7-8.

Commission Comment

This section is intended to make clear the status of the practice of firing in the direction of any person. In some circum-

stances a peace officer may be authorized to use deadly force. While firing into the air without endangering an offender's safety is permissible, firing so close to him that his safety is endangered is the use of deadly force, which can be justified only in the circumstances in which the officer is authorized to use deadly force. (See Perkins, "The Law of Arrest," 25 Iowa L. Rev. 201 at 270, 288, 289 (1940); Note, "Use of Deadly Force in Preventing Escape of Fleeing Minor Felon," 34 N.C. L. Rev. 122 (1955).)

94-3-102. Use of force in defense of person. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another, or to prevent the commission of a forcible felony.

History: En. 94-3-102 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 7-1.

Commission Comment

The law of self-defense has been interpreted in a large number of judicial decisions, agreeing in principle though differing somewhat in defining the borderlines such as the minimum situation in which the use of deadly force may be authorized. (The history of self-defense is traced in Perkins, "Self-Defense Re-examined," 1 U.C.L.A. L. Rev. 133 at 137 to 142 (1954).) This section presents the general rule as to defense of person contemplating the simplest and probably most common situation—that in which a person who has done nothing to provoke the use of force against himself is confronted immediately with unlawful force under such circumstances that he believes that he must use force to defend himself, and his belief is reasonable. This statement contains several propositions:

(1) The person must not be the aggressor (the situation considered in section 94-3-105);

(2) The danger of harm must be a present one, not merely threatened at a future time, or without the present ability of carrying out the threat;

(3) The force threatened must be unlawful—either criminal or tortious;

(4) A person must actually believe that the danger exists, that his use of force is necessary to avert the danger, and that the kind and amount of force which he uses is necessary; and

(5) His belief, in each of the aspects described, is reasonable even if it is mistaken. The privilege extends to the protection not only of the person using the force, but of other individuals unlawfully threatened with harm; and in determining whether the use of force is necessary, a person need not consider whether the danger might be avoided if he were to give up some legal right or privilege. If a person under these circumstances uses only nondeadly force for protection, no further legal restriction should be necessary. (See Perkins, supra, at pages 133 to 137.)

The privilege of using force likely to cause death or serious bodily harm (often called deadly force) is limited to cases in which the force imminently threatened apparently will cause death or serious bodily harm, or in which a violent offense is being committed which in its nature involves serious risk of serious bodily harm, such as rape, robbery, burglary, arson or kidnaping.

This section codifies prior Montana law in which the section is intended to test the right of self-defense as measured by what a reasonable person would have done under like or the same circumstances. (State v. Houk, 34 M 418, 423, 87 P 175.) A person attacked can act upon appearances and might justifiably kill his attacker, though not in actual peril if the circumstances are such that a reasonable man would be justified in acting the same way. Further, a person attacked with apparent murderous intent need not retreat and seek a place of safety before using deadly force on his attacker. (State v. Merk, 53 M 454, 460, 164 P 655.) However, whether the circumstances attending a homicide claimed to have been committed in self-defense, are such as to justify a defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering serious bodily harm at the hands of the deceased, is a question of fact for the jury; bare fear of an assault does not justify the killing. (State v. Harkins, 85 M 585, 602, 281 P 551.)

DECISIONS UNDER FORMER LAW

Defense of Others

The provisions of former section 94-2513 put persons acting in defense of others upon the same plane as those acting in defense of themselves. Every fact, therefore, which would be competent to establish justification in the one case would, for the same reasons, be competent to establish it in the other. State v. Felker, 27 M 451, 458, 71 P 668.

Excessive Force

Defendant who fired bullet through apartment door striking investigating police officer, who was privileged to open apartment door to limit of night latch and who announced that he was policeman, used excessive force and was properly convicted of first degree assault. State v. Lukus, 149 M 45, 423 P 2d 49.

Instructions to Jury

Court properly refused defendant's instruction relative to self-defense where there was no evidence whatever that defendant acted under reasonable apprehension of death or great bodily harm and where witnesses for state gave no indication that defendant acted in fear nor did defendant himself claim that he acted under any fear of harm. State v. Brooks, 150 M 399, 436 P 2d 91.

Instruction on self-defense was not required in the absence of evidence of apprehension of harm to herself by defendant but where all of defendant's evidence tended to establish accident or justifiable homicide as defense. State v. Eisenman, 155 M 370, 472 P 2d 857.

Prior Acts or Threats

Testimony as to prior threats by deceased, though not communicated to defendant, was admissible to characterize decedent's conduct. State v. Shadwell, 26 M 52, 66 P 508; State v. Felker, 27 M 451, 71 P 668, distinguished in 109 M 303, 313, 97 P 2d 330; State v. Whitworth, 47 M 424, 133 P 364, distinguished in 109 M 303, 313, 97 P 2d 330.

It was reversible error to instruct the jury to disregard prior threats by decedent unless the accused, at the time of the killing, was actually assailed, or believed he was in great bodily danger. State v. Shadwell, 26 M 52, 66 P 508.

On issue whether defendant, when he killed deceased, believed that deceased was about to assault his wife—defendant's sister—testimony showing that, to defendant's knowledge, deceased had made prior assaults on his wife, was admissible, and the fact that the prior assaults occurred more than two weeks before did not make evidence inadmissible as too remote. State v. Felker, 27 M 451, 71 P 668, distinguished in 88 M 21, 28, 289 P 1037.

Testimony as to prior acts of violence and threats by deceased communicated to defendants is admissible as to the defendant's state of mind when coupled with evidence of some overt act by the deceased. State v. Hanlon, 38 M 557, 100 P 1035, distinguished in 109 M 303, 313, 97 P 2d 330.

Fact that decedent had to defendant's knowledge inflicted serious injury to another man about a year before was admissible on question of defendant's apprehension of danger to himself, and refusal to admit such evidence was reversible error. State v. Jennings, 96 M 80, 28 P 2d 448.

Reasonable Fear

Under former section 94-2514, in a prosecution for murder, where the defendant relied upon the plea of self-defense, an instruction which made the measure of justification "that sense of danger appearing to the defendant, and to men or individuals of his race, standing, individuality, and intelligence," was properly refused where another instruction covered the reasonable man standard on self-defense. State v. Cadotte, 17 M 315, 320, 42 P 857.

An instruction in a prosecution for murder that the right of self-defense was to be measured by what a reasonable person would have done under like or the same circumstances, conformed to the requirements of former section 94-2513, and was sufficient to state the right of self-defense. State v. Houk, 34 M 418, 423, 87 P 175.

Under former section 94-2513, a person assailed could act upon appearances as they presented themselves to him, meet force with force, and even slay his assailant; and, though in fact he was not in any actual peril, yet if the circumstances were such that a reasonable man would be justified in acting as he did, the slayer will be held blameless. State v. Merk, 53 M 454, 460, 164 P 655.

Under former section 94-2514, whether the circumstances attending the homicide claimed by defendant to have been committed in self-defense, were such as to justify his fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased, was a question of fact for the jury; bare fear on his part of an assault by the latter, of a quarrelsome and violent disposition, was not alone insufficient to justify the killing. State v. Harkins, 85 M 585, 281 P 551.

Under former section 94-2514, where self-defense was pleaded to a charge of

homicide, the question whether the circumstances were such as to justify defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering great bodily harm at the hands of deceased, was for the jury. State v. Fine, 90 M 311, 316, 2 P 2d 1016.

A person has the right to defend himself against what he reasonably believes to be a threat of death or great bodily harm even though the danger is not real, and the failure to make this distinction in a self-defense instruction in an assault prosecution is reversible error. State v. Daw, 99 M 232, 43 P 2d 240.

Under former section 94-605, where the evidence in a prosecution for assault warrants the giving of instructions on self-defense relating to the rights of defendant in resisting an attack by three or more persons committing a tumultuous trespass, the court should have pointed out to the jury the essential differences between an assault by such a body of men and that by an individual. State v. Daw, 99 M 232, 238, 43 P 2d 240.

Reputation of Decedent

Evidence of reputation of decedent for turbulence and violence was admissible, even though unknown to defendant, where there was a question as to which party was the aggressor. State v. Jones, 48 M 505, 139 P 441, distinguished in 109 M 303, 313, 97 P 2d 330.

Retreat by Defendant

A person assailed with apparent murderous intent need not retreat and seek a place of safety before slaying his assailant. State v. Merk, 53 M 454, 460, 164 P 655.

Unarmed Assailant

Under former section 94-2513, where defendant pleading self-defense to a charge of murder was a much smaller and weaker man than deceased, the fact that after the first blow the latter lost his weapon did not deprive defendant of his right to claim self-defense in thereafter retaliating with a knife, since in view of the disparity in physique he could reasonably apprehend great bodily harm to himself even though his assailant was unarmed. State v. Jennings, 96 M 80, 88, 28 P 2d 448.

94-3-103. Use of force in defense of occupied structure. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon an occupied structure. However, he is justified in the use of force likely to cause death or serious bodily harm only if:

(1) the entry is made or attempted in violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to him or another then in the occupied structure; or

(2) he reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

History: En. 94-3-103 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 7-2.

Commission Comment

This aspect of justification seems to be rather well-settled: a person may prevent or repel with force another's unlawful entry into a dwelling, whether the dwelling is occupied by the person using such force or by someone else, and whether the trespasser uses force or enters without force; but the use of deadly force is limited to instances of violent or forcible felonies and violent entries with apparent threat of personal violence to someone in the occupied structure. The reasonable-belief and no-retreat principles apply.

DECISIONS UNDER FORMER LAW

Excessive Force

Defendant who fired bullets through apartment door striking investigating police officer was properly convicted of first-degree assault for use of excessive force where the police officer was privileged to open the apartment door to the limit of the night latch and where he announced that he was a policeman prior to the firing of the shot. State v. Lukus, 149 M 45, 423 P 2d 49.

Justifiable Force

Defendant was justified in pointing a loaded revolver at an unknown person entering his home after he had forcibly evicted an unauthorized occupant and had had timber stolen, and the fact that defendant surrendered his weapon after identifying the person entering indicated that he had no intention to fire except in defense of his home. State v. Nickerson, 126 M 157, 247 P 2d 188.

Possession Necessary for Defense

Under former section 94-605, subdivision 3, defendant who had been in peaceable possession of the premises, as owner thereof for months, had the right to defend such possession, provided he used no more force than was necessary for that purpose; it was error to refuse an instruction to that effect. State v. Howell, 21 M 165, 169, 53 P 314.

94-3-104. Use of force in defense of other property. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than an occupied structure) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

History: En. 94-3-104 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 7-3.

Commission Comment

The general principles of justification concerning the defense of person and occupied structure are applicable to a limited extent to the defense of real property other than an occupied structure, and personal property lawfully in the person's possession (or the possession of certain other persons): he may use force which he reasonably believes to be necessary to protect the property, but he may not use deadly force except to prevent the commission of a forcible felony.

The right of a person to use force in preventing a trespass upon or interference with another person's property is limited to property in the possession of a member of the immediate family or household of the person using the preventive force, or is property the person using the preventive force has a legal duty to protect. The right of a private person to arrest one who commits or attempts a criminal offense in his presence supplements the right to use force in the defense of other property. See R. C. M. 1947, section 95-611.

DECISIONS UNDER FORMER LAW

Game Law Violation

Landowner had a constitutionally protected right to kill elk out of season when necessary to prevent damage to his pasturage and other property and all other measures had failed. State v. Rathbone, 110 M 225, 100 P 2d 86.

94-3-105. Use of force by aggressor. The justification described in the preceding sections of this chapter is not available to a person who:

(1) is attempting to commit, committing, or escaping after the commission of a forcible felony; or

(2) purposely or knowingly provokes the use of force against himself, unless:

(a) such force is so great that he reasonably believes that he is in imminent danger of death or serious bodily harm, and that he has exhausted every reasonable means to escape such danger other than the use

of force which is likely to cause death or serious bodily harm to the assailant; or

(b) in good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

History: En. 94-3-105 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 7-4.

Commission Comment

Each of the preceding sections of this chapter has assumed that the person using force in defense has not committed an unlawful act which has inspired the use or threat of force against him, and has not otherwise provoked such force. This section concerns the much more limited right which a person has to defend himself, when he has committed an unlawful act or otherwise provoked the use of force. A person has no right of defense if he is attempting or committing a forcible felony, or is escaping after committing it; or if he has deliberately provoked the use of force against himself. Only a completed withdrawal, followed by a new encounter initiated by the other person, will reinstate a right of defense. (See Perkins, "Self-Defense Re-Examined," 1 U.C.L.A. L. Rev. 133 at 147 (1954).) However, if a person voluntarily engages in a fight or in some other manner, by words or actions provokes the use of force against himself which apparently will not involve the use of deadly force, but unexpectedly is threatened with deadly force, he has a qualified right to protect himself by using deadly force. First, however, the original provocateur must use any method which is reasonably available to avoid the use of deadly force including a "retreat to the wall."

Subsections (2)(a) and (b) outline the cases in which the aggressor's right of self-defense is reinstated. The first is that which obtains when the aggressor, not using deadly force, is suddenly confronted with deadly force and has retreated, as he reasonably believes, to the practical limit but nevertheless reasonably believes that he must use deadly force to prevent death or serious bodily harm to himself.

The second case is that in which the aggressor in good faith withdraws from the conflict and effectively communicates to the victim his intention to withdraw, but the victim continues or resumes the conflict. The relation between the participants should be regarded as reversed, the initial aggressor becoming the victim. Section (2)(b) applies only to the use of nondeadly force in self-defense. (See State v. Merk, 53 M 454, 460, 164 P 655.)

DECISIONS UNDER FORMER LAW

Withdrawal from Combat

Under former sections 94-2513 and 94-2514, if the party committing the homicide was the assailant, or engaged in mortal combat, he must in good faith have endeavored to decline any further struggle before the killing was done, otherwise he could not invoke self-defense. State v. Merk, 53 M 454, 164 P 655.

94-3-106. Use of force to prevent escape. (1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(2) A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm, which he reasonably believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

History: En. 94-3-106 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 7-9.

Commission Comment

An attempted escape by a person in custody after arrest and before being placed in confinement, or in a place of confine-

ment, requires the authorization of force necessary to recapture him. This section concerns the use of deadly force to prevent escape and not the use of force which is justifiable in making the original arrest.

The usual statement seems to be that a person lawfully arrested or confined may be killed if that is necessary to prevent escape; and no distinction is drawn between a felon and any other offender.

Recapture must be evaluated in the same manner as if it were an original arrest, and whether deadly force may be used to prevent an escape does not depend upon whether such force might have been authorized at the time of the original arrest. If the offense for which the person was arrested was not a forcible felony, but the offender was armed with a deadly weapon, deadly force might have been used to effect the arrest. If the offender was arrested and disarmed and later attempted to escape unarmed and without threatening death or serious bodily harm to anyone, deadly force to prevent his escape is not authorized. Conversely, if the offender was not armed or otherwise dangerous when arrested, but in attempting to escape he commits a forcible felony, or seizes an officer's gun and threatens to shoot anyone who opposes his escape, deadly force may be used to prevent the escape.

Subsection (2) concerns escape from a place of confinement, as distinguished from personal custody after arrest. Here, other persons are likely to be in the same position of legal restraint as the one attempting to escape and may be encouraged by a successful escape to make a similar attempt either immediately or at a later time. Also, a guard or other person in charge of prisoners cannot be expected to know the history of each prisoner and whether his offense was a forcible felony or whether he is likely to endanger the lives of others if his escape is successful. In addition, the sudden and unexpected nature of an escape from confinement leaves the guard no time to investigate into the person's possession of a deadly weapon. In view of the often desperate nature of an escape of this kind, the prisoner can be expected to use any deadly force which he finds available. Consequently, a less restrictive rule as to the use of deadly force to prevent escape seems logical with respect to a guard, as compared with the rule concerning a personal custodian after the arrest but before the confinement of an offender or suspect.

94-3-107. Use of force by parent. A parent or an authorized agent of any parent or a guardian, master, or teacher is justified in the use of such force as is reasonable and necessary to restrain or correct his child, ward, apprentice or pupil.

History: En. 94-3-107 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Revised Codes of Montana 1947, section 94-605(4).

Commission Comment.

This is a rewording of former section 94-605 (4). However "reasonable and necessary" was substituted for "reasonable in manner and moderate in degree."

DECISIONS UNDER FORMER LAW

Instructions

Stepfather charged with murder in alleged beating death of his stepchild was entitled to instructions on voluntary and involuntary manslaughter in view of testimony that his striking the child was for disciplinary purposes and that he never intended to hurt her. State v. Taylor, — M —, 515 P 2d 695.

Reasonable and Moderate

Under subdivision 4 of former section 94-605, a person standing in loco parentis was not entitled to a presumption that punishment was reasonable and moderate, but state must prove that parent's act was willful, wrongful and unlawful and, in order to convict, jury must find that punishment was clearly unreasonable and immoderate after considering all the circumstances including (1) the age and understanding of the child, (2) the nature and seriousness of the act being punished, (3) the instrument used for punishment and (4) the severity and permanent or temporary nature of the resulting injuries. State v. Straight, 136 M 255, 347 P 2d 482.

94-3-108. Use of force in resisting arrest. A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace

officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

History: En. 94-3-108 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 7-7.

Commission Comment

Section 94-3-108 states a corollary to the justification accorded to an officer in using force to make an arrest. Even if the arrest is unlawful, the person arrested is not privileged to resist the arrest with force. A resort to force invites the officer to use greater force to accomplish the arrest. The public interest in discouraging violence and insisting upon the use of peaceable methods for obtaining release from unlawful arrest clearly outweighs the right of self-help or any momentary individual satisfaction. (This was the view of the Uniform Arrest Act, ¶ 6: see Warner, "The Uniform Arrest Act," 28 Va. L. Rev. 316 at 330, 331 (1942).) A partial recognition of the inadvisability of sanctioning resistance in the case of an unlawful arrest appears in the old rule that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder, in the absence of express malice. (1 Wharton's Criminal Law (12th ed.) ¶¶ 542 and 853; 1 Bishop on Criminal Law (9th ed.) ¶ 868 and 1 Bishop's New Criminal Procedure (3rd ed.) ¶ 162.)

94-3-109. Execution of death sentence. A public servant who, in the exercise of his official duty, puts a person to death pursuant to a sentence of a court of competent jurisdiction, is justified if he acts in accordance with the sentence pronounced and the law prescribing the procedure for execution of a death sentence.

History: En. 94-3-109 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 7-10.

Commission Comment

This section states an obvious aspect of justification for homicide. It is included for the sake of completeness, and because it is one of the more commonly described statutory instances of justification. Section 94-3-109 is intended to state the essentials of the prior provision in language similar to that of the other sections of this chapter. However, in view of the deliberate nature of the homicide, the explicit legal instructions concerning the execution and the much more relaxed time element involved in an execution as compared with self-defense, arrest, or escape, no need exists for recognizing a reasonable but mistaken belief of the executioner as to his authority for or method of performing his duty.

94-3-110. Compulsion. A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm, if he reasonably believes that death or serious bodily harm will be inflicted upon him if he does not perform such conduct.

History: En. 94-3-110 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 7-11.

Commission Comment

Compulsion, coercion, or duress is another long-recognized basis for finding a person not guilty of an offense charged, although his conduct appears to be within the definition of the offense. The justification does not extend to action under threat of damage to property, or of injury less than serious bodily harm or even of death or serious bodily harm which is not imminent; but the person's reasonable fear of imminent death or serious bodily harm if mistaken, is within the principle. (See 1 Bishop on Criminal Law (9th ed.) ¶¶ 346 to 348.)

This established type of formulation has been criticized. However, to broaden the defense to accord completely with the "free will" theory would be to invite routine contentions of some kind of pressure, such as "threats of harm to property, reputation, health, general safety, and to acts done under the orders," with accompanying assertion of individual personality weakness. (Newman and Weitzer, supra, at 334.) Prof. Wharton, after stating the established restrictions upon the defense, comments: "It would be a most dangerous

rule if a defendant could shield himself from prosecution for crime by merely setting up a fear from or because of threat of a third person." (1 Wharton's Criminal Law (19th ed.), ¶ 384.)

94-3-111. Entrapment. A person is not guilty of an offense if his conduct is incited or induced by a public servant, or his agent for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public servant or his agent, merely affords to such person the opportunity or facility for committing an offense in furtherance of criminal purpose which such person has originated.

History: En. 94-3-111 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 7-12.

Commission Comment

The defense of entrapment generally follows the rule stated by the majority in the Sorrells case. (See "The Doctrine of Entrapment and Its Application in Texas," 9 Sw. L. J. 456 (1955); Note, 28 N.Y.U. L. Rev. 1180 (1953) recognizing three principal elements: (1) The idea of committing an offense originates, not with the suspect, but with the enforcement authorities, who (2) actively encourage the suspect to commit the offense, (3) for the purpose of obtaining evidence for his prosecution.)

Most of the cases in which entrapment has been alleged involved a course of conduct, resulting apparently in repeated offenses of the same type or in a continuing offense, such as violation of the Medical Practice Act, illegal sale of liquor or narcotics or explosives, larceny, and ticket scalping.

94-3-112. Affirmative defense. A defense of justifiable use of force, based on the provisions of this chapter is an affirmative defense.

History: En. 94-3-112 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 7-14.

Commission Comment

A defense based upon any of the provisions of this chapter is an affirmative defense, and if not put in issue by the prosecution's evidence, the defendant, to raise it as an issue, must present some evidence thereon.

DECISIONS UNDER FORMER LAW

Burden of Proof

Testimony of defendant that he had acted in self-defense did not shift burden of proof to state to prove the falsity of his testimony since defendant had burden of producing sufficient evidence on issue of self-defense to raise a reasonable doubt of his guilt. State v. Grady, — M —, 531 P 2d 681.

CHAPTER 4

INCHOATE OFFENSES

94-4-101. Solicitation. (1) A person commits the offense of solicitation when, with the purpose that an offense be committed, he commands, encourages or facilitates the commission of that offense.

(2) A person convicted of solicitation shall be punished not to exceed the maximum provided for the offense solicited.

History: En. 94-4-101 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 8-1.

Commission Comment

Solicitation is not a separate statutory offense under the old code although R. C. M. 1947, section 94-204 provided that any

person counseling, advising or encouraging children under fourteen years, lunatics, or idiots, to commit any offense shall be prosecuted and punished the same as if he had committed the offense. It seems desirable to include solicitation as an offense in the traditional triad of inchoate offenses as other states have done. In all cases the actor must have the requisite "purpose" of "promoting or facilitating" commission of an offense.

Subsection (2) provides the same maximum penalty for solicitation as may be imposed for the principal offense solicited.

DECISIONS UNDER FORMER LAW

Felony Murder Rule

Where defendant hired two men to set fire and burn his service station, and during the course of the arson the two men were burned and subsequently died, the defendant was guilty of first degree murder under the felony murder rule since any death directly attributable to a plot to commit arson makes all the conspirators in the arson plot equally guilty of first degree murder. State v. Morran, 131 M 17, 306 P 2d 679.

Instructions to Jury

An instruction that a person who "advised or encouraged" another in the commission of a crime was to be considered a principal, instead of "advised and encouraged," the phrase used in former section 94-204, was not prejudicially erroneous, since the words "advised" and "encouraged" are synonymous in popular meaning. State v. Allen, 34 M 403, 416, 87 P 177.

In a prosecution for arson, where there was some testimony that defendant procured another to set the fire, the giving of instructions embodying the provisions of former sections 94-204 and 94-6423 was proper, as was the refusal of others directing the jury to find for the defendant unless satisfied beyond a reasonable doubt that he was present personally and set the fire himself. State v. Chevigny, 48 M 382, 385, 138 P 257.

Instructions substantially in the words of former sections 94-204 and 94-6423, defining a principal and telling the jury that the distinction between a principal and an accessory had been abrogated by statute, were not improper as implying that a felony had been committed. State v. Wiley, 53 M 383, 387, 164 P 84.

Larceny

Defendant who encourages and advises the crime of larceny is guilty as a principal, so that the testimony of the thief must be corroborated to convict for the related crime of receiving stolen property. State v. Keithley, 83 M 177, 271 P 449.

The fact that defendant may have been guilty of larceny by advising and encouraging the thief does not prevent him from being prosecuted instead for receiving the same stolen property. State v. Webber, 112 M 284, 116 P 2d 679.

Presence on Scene

One who advised and encouraged commission of a crime may be found guilty without having been present at the actual commission of the crime. State v. Quinlan, 84 M 364, 275 P 750.

Even though there was no evidence placing defendant at scene of crime, he could be held as an accomplice to larceny in view of possession of stolen property and other corroborating evidence. State v. Gray, 152 M 145, 447 P 2d 475.

94-4-102. Conspiracy. (1) A person commits the offense of conspiracy when, with the purpose that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement has been committed by him or by a coconspirator.

(2) It shall not be a defense to conspiracy that the person or persons with whom the accused has conspired:

(a) has not been prosecuted or convicted; or
(b) has been convicted of a different offense; or
(c) is not amenable to justice; or
(d) has been acquitted; or
(e) lacked the capacity to commit the offense.

(3) A person convicted of the offense of conspiracy shall be punished not to exceed the maximum sentence provided for the offense which is the object of the conspiracy.

History: En. 94-4-102 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 8-2; also derived from Revised Codes of Montana 1947, sections 94-1101 and 94-7211.

Commission Comment

Section 94-4-102 provides for several changes in the law of conspiracy in Montana.

The purpose element in conspiracy has often proved elusive and difficult to identify because it is easily confused with the purpose element involved in the principal offense which is the object of the conspiracy. However, the very nature of the offense requires a purpose separate and distinct from the purpose required in a prosecution for the principal offense which is the object of the conspiracy. Since an agreement (by words, acts or understanding) is required, there must be (1) a purpose to agree, and the agreement must be accomplished with (2) a purpose that the offense which is the object of the agreement be committed. Statutes in other jurisdictions have attempted to spell out in more detail, and in various terminology, the two-fold nature of the purpose required. The commission felt that if the inchoate nature of conspiracy is kept in mind, the provision as drafted should be sufficiently clear. In addition, since the object of the conspiracy has been limited to criminal activity, there seems to be no compelling reason to express a statutory requirement of "corrupt motive" or "evil purpose."

Currently, acquittal of all conspirators but one absolves that one, since, theoretically, there must be at least two guilty parties to a conspiracy. However, this rationale is rejected as being too technical and overlooking the realities of trials which involve differences in juries, contingent availability of witnesses, the varying ability of different prosecutors and defense attorneys, etc. If the defendant obtains a full and fair trial what happened to another defendant at another time and place in another trial before a different judge and jury should not be a bar to a conviction.

Subsection (1) provides a defense if the accused would not be guilty of an offense if the conduct which is the object of the conspiracy is performed. Subdivision (2)(e) goes further and says that it is not a defense for the accused to say that his coconspirator would not be guilty of an offense if the conduct which is the object of the conspiracy were to be performed. Subdivision (2)(e) intended to deny to an accused who has no legal incapacity or immunity in relation to the principal offense, any rights, benefits, advantages, or defenses which the law may have conferred upon a coconspirator. This probably involves no change in the general rule of law which denies to an accused the legal disabilities of an accomplice, but probably (in conjunction with subdivision (2)(d)) involves a change in the present law of conspiracy where there are only two conspirators and the coconspirator has been acquitted because he lacks the capacity, due to some legal disability, to commit conspiracy.

One other important change should be noted: under subsection (1) conspiracy is committed when (with the required purpose) there is an agreement to commit any offense; this eliminates the possible application of the so-called "Wharton Rule" in conspiracy, which says that if the object of the agreement is a crime which (by its very nature) requires two or more persons to commit it, then the agreement does not amount to conspiracy because no greater danger is presented by the plurality of actors in the conspiracy than would be presented to the community in the commission of the principal offense. The commission felt that the Wharton Rule fails to take into account the preventive aspect of prosecuting conspiracies, that is, to discourage the more dangerous criminal activity of several persons by punishing the preliminary agreement to engage in such activity. That the criminal activity is of such nature as to inevitably require more than one person in its accomplishment seems the more reason to abrogate the Wharton Rule.

The problem of the extent of the conspiracy, as to multiple parties, multiple objects, or duration of the agreement has been a constant source of litigation, especially in the federal courts. An immense variety of factual situations are possible in this area, each with its own special considerations. Attempts to cover one or more of the possible fact situations by statute merely leads to the necessity of trying to cover more, so that the statutory provisions become so detailed as to risk noncoverage of fact situations through exclusion.

DECISIONS UNDER FORMER LAW

Allegations in Indictment

Under former section 94-1101, an indictment for a conspiracy to cheat and defraud a county had to allege the means by which the conspiracy was to be accomplished. An allegation that the defendants conspired "to cheat and defraud" was not sufficient. Territory v. Carland, 6 M 14, 15, 9 P 578.

Degrees of Crime

Different conspirators could be convicted of different degrees of homicide arising out of the same act. State v. Alton, 139 M 479, 365 P 2d 527.

Evidence against Coconspirator

After proof of a conspiracy, evidence of the acts or declarations of a conspirator relating to the object of the conspiracy may be admitted against a coconspirator. State v. Dotson, 26 M 305, 67 P 938.

Evidence of Conspiracy

Finding that there was a conspiracy was supported by evidence that within a few minutes' time prison inmates took complete control of the inside of the prison and made hostages of all custodial personnel inside. State v. Alton, 139 M 479, 365 P 2d 527.

Presence on Scene

Conspirator may be convicted of crime without having been present at the actual commission of a crime. State v. Quinlan, 84 M 364, 275 P 750.

Responsibility of Conspirator

Prison inmate who took active part in inmate uprising, including taking of hostages and acting as spokesman for the inmates, could be held responsible for killing of guard during the course of the uprising, even though he was not present at the killing and even though the inmate who had done the shooting was dead. State v. Alton, 139 M 479, 365 P 2d 527.

94-4-103. Attempt. (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

(2) It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(3) A person convicted of the offense of attempt shall be punished not to exceed the maximum provided for the offense attempted.

(4) A person shall not be liable under this section, if under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort.

(5) Proof of the completed offense does not bar conviction for the attempt.

History: En. 94-4-103 by Sec. 1, Ch. 513, L. 1973.

Source: Derived from Revised Codes of Montana 1947, section 94-4711.

Commission Comment

As under prior law, it is not necessary that the attempt fail in order to sustain a conviction under this section. It is important to note that the "double jeopardy" statute applies and the attempt is an "included offense" if the attempt is successful.

One charged with an attempt to commit a crime may properly be convicted even though the evidence shows that the crime was completed. (State v. Benson, 91 M 21, 25, 5 P 2d 223.)

Subsection (1) requires a purpose to commit a specific offense and an act toward the commission of that offense.

Subsection (2) is intended to codify the general rule that a factual or legal impossibility (as distinguished from an inherent impossibility) is no defense to attempt. The phrase "misapprehension of the circumstances" is intended to include both factual and legal circumstances. An example of inherent impossibility would be an attempt to kill by witchcraft and is not intended to be excluded as a defense. However, factual impossibility (attempting to pick an empty pocket), or legal impossibility (attempting to receive stolen goods which are not stolen) would be no defense.

This attempt statute is designed to cover all special attempt provisions in the old code, such as "attempted arson," "attempted burglary," etc.

Voluntary Abandonment

Fact that defendant had left scene of attempted break-in before police arrived and was apprehended two blocks from scene gave rise to possible inference of voluntary abandonment, but was not conclusive evidence as matter of law. State v. Radi, — M —, 542 P 2d 1206.

DECISIONS UNDER FORMER LAW

Completed Crime

One charged with an attempt to commit a crime could properly be convicted as charged, under former section 94-4710, even though the evidence showed that the crime had been completed. State v. Benson, 91 M 21, 5 P 2d 223.

Intent

Testimony that defendant, six days before, had solicited witness to join in a holdup, but without naming a specific victim, was insufficient to establish intent to rob when defendant committed a battery in a crowded bar but then did not do anything else toward the commission of a robbery. State v. Hanson, 49 M 361, 141 P 669.

Punishment

Under former section 94-4711, where the evidence was not before the appellate court, it was presumed that the trial court properly fixed the punishment on a conviction for attempt to commit burglary. State v. Mish, 36 M 168, 175, 92 P 459.

Since court could have sentenced defendant, if guilty of the infamous crime against nature, to term of thirty years, it could fix one-half that term upon conviction for attempt. State v. Stone, 40 M 88, 92, 105 P 89.

CHAPTER 5

OFFENSES AGAINST THE PERSON

Part One. Homicide

Part Two. Assault

Part Three. Kidnapping

Part Four. Robbery

Part Five. Sexual Crimes

Part Six. Offenses Against the Family

Part One
Homicide

94-5-101. Criminal homicide. (1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

(2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.

History: En. 94-5-101 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as the Model Penal Code, section 210.1.

Commission Comment

The criminal homicide section represents a complete departure from the old law, and the traditionally difficult concept of "malice aforethought." In an effort to eliminate this unsatisfactory terminology, the varying degrees of criminal homicide are differentiated by use of terms "deliberate homicide," "mitigated deliberate homicide" and "negligent homicide." This serves two purposes. First, these terms are more descriptive of the conduct proscribed. Second, judges, jurors and attorneys will not be misled as to the weight of prior law construing instructions on murder, manslaughter, etc.

The language used attempts to isolate the character of the offender's conduct and to differentiate the offenses according to the differing elements of that conduct. It is clear, for example, that causing death purposely, knowingly or negligently must, in the absence of justification, establish criminality. The section also purposes the abandonment of the traditional distinction between first and second-degree murder, deriving from the Pennsylvania reform of 1794, under which the determinants of capital or potentially capital murder are deliberate and premeditated purpose to kill, or specific felony-murders. The section in this regard includes the following features: (1) the exclusion from the capital class of certain murders where a clear ground of mitigation is established; (2) a specification of aggravating circumstances, at least one of which must be established before a capital sentence is possible; (3) a final determination by the court as to the existence of mitigating circumstances.

There is no requirement that death must occur within any stated period of time. Time will be limited only by the need to prove a causal relation between conduct and the resulting death. (See section 94-2-105.)

DECISIONS UNDER FORMER LAW

Cause of Death

Instruction to jury which permitted conviction of involuntary manslaughter based on drunken driving without a finding that defendant's intoxication was a proximate cause of the death was improper and reversible error. State v. Darchuck, 117 M 15, 156 P 2d 173.

If defendant's wrongful conduct hastens death or extinguishes whatever chance the victim had to survive, defendant may be convicted of homicide even though the victim might not have survived even if defendant had acted properly. State v. Mally, 139 M 599, 366 P 2d 868.

Circumstantial Evidence

Tentative identification of defendants as having committed robbery near the scene of a homicide, evidence that the homicide occurred in the course of a robbery, finding of the fatal weapon in possession of a defendant, and fact that defendants were fleeing the scene, were sufficient to support verdict of guilty of murder in the course of a robbery. State v. Miller, 91 M 596, 9 P 2d 474.

Instructions on Degrees of Murder

Trial court properly instructed jury on second degree murder where homicide occurred after an alleged rape had been committed as a result of victim's threats to expose defendant's acts; court properly refused instruction that acts committed would justify verdict of either first degree murder or acquittal. State v. Perry, — M —, 505 P 2d 113.

Time of Death

Under former section 94-2509, it was not necessary to allege in an information for murder the date upon which the death occurred as distinguished from the date of assault. All that was necessary in order to constitute the crime of murder, the other requisite facts being proven, was that the death of the party occurred within a year and a day after the stroke received or the cause of death administered. State v. Powers, 39 M 259, 102 P 583.

94-5-102. Deliberate homicide. (1) Except as provided in 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape, or any other felony which involves the use or threat of physical force or violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death or life imprisonment as provided in 95-2206.6 through 95-2206.15 or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years, except as provided in 95-2206.18.

History: En. 94-5-102 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 11, Ch. 338, L. 1977; amd. Sec. 4, Ch. 584, L. 1977.

Source: New.

Commission Comment

Section 94-5-102 relates only to conduct which is done deliberately; that is, purposely or knowingly. The enumerated offenses in subsection (b) broaden the old law dealing with felony-murders, R. C. M. 1947, section 94-2503, to include any felony which involves force or violence against an individual. Since such offenses are usually coincident with an extremely high homicidal risk, a homicide which occurs during their commission can be considered a deliberate homicide. The section is intended to encompass most homicides traditionally designated as second-degree murder. Subsection (2) changes the punishment, providing that a person "shall be punished by death . . . or by imprisonment . . . for any term not to exceed one hundred (100) years," thus seeking to expand the sentencing latitude of the judge.

Compiler's Notes

This section was amended twice in 1977, once by Ch. 338 and once by Ch. 584. Since the amendments do not appear to conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.

Amendments

Chapter 338, Laws of 1977, substituted "death or life imprisonment as provided in 95-2206.6 through 95-2206.15" in subsection (2) for "death as provided in section 94-5-105" and made minor changes in phraseology, punctuation and style.

Chapter 584, Laws of 1977, substituted "for a term of not less than 2 years or more than 100 years, except as provided in 95-2206.18" at the end of subsection (2) for "for any term not to exceed one hundred (100) years."

Constitutionality

Because it permits imposition of the death penalty only for a narrowly defined class of murders and kidnappings and permits the sentencing judge to consider mitigating circumstances before imposition of sentence, and because any case in which the death penalty is imposed is appealable to the supreme court or the sentence review division (section 95-2501 et seq.), this section is constitutional under the standards of Jurek v. Texas, — US —, 96 S Ct 2950, 49 L Ed 2d 929. State v. McKenzie, — M —, 557 P 2d 1023.

Felony Murder

Where defendant committed a robbery immediately after being involved with another in the beating death of the owner of the establishment robbed, but no causal

connection between the homicide and the robbery was shown, the felony-murder rule did not apply. State ex rel. Murphy v. McKinnon, — M —, 556 P 2d 906.

Information

In an information charging homicide, it is unnecessary to allege the means of producing death or the related felony, but merely whether it was committed purposely and knowingly, or committed while the defendant was engaged in commission of a felony. State ex rel. McKenzie v. District Court of Ninth Judicial Dist., — M —, 525 P 2d 1211.

Affidavit in support of motion for leave to file information direct which alleged only that defendant had entered a bar with a companion, that the companion had beaten the bar owner to death, that during such beating defendant had failed to restrain his companion, and that defendant had at least once said to the victim that "he had this coming," was insufficient to establish probable cause to believe that defendant had committed deliberate homicide, and leave to file the information should not have been granted. State ex rel. Murphy v. McKinnon, — M —, 556 P 2d 906.

DECISIONS UNDER FORMER LAW

Burden of Proof

Under former section 94-2503, to sustain a conviction of murder in the first degree, it was incumbent upon the state to show by the record not only that it discharged the burden resting upon it to establish the killing by defendant, but also that it proved deliberation and premeditation on his part. State v. Gunn, 85 M 553, 555, 281 P 757.

Degrees of Murder

Murder committed in the perpetration or attempt to perpetrate robbery, burglary, etc., was murder of the first degree under former section 94-2503 and murder so committed is not divisible into degrees; the court need not have instructed as to murder of the second degree or manslaughter. State v. Reagin, 64 M 481, 210 P 86; State v. Bolton, 65 M 74, 212 P 504.

As a general rule the district court, in a trial for homicide, need not have given an instruction on second degree murder where the killing was charged to have been perpetrated in the commission of one of the felonies enumerated in former section 94-2503, or where there was no evidence tending to show a lesser offense than murder in the first degree. State v. Le Duc, 89 M 545, 300 P 919.

The trial court did not err in giving an instruction on murder in the second degree under former section 94-2503, as against the contention of defendant that under his plea of self-defense he was either guilty of murder in the first degree or not guilty. State v. Le Duc, 89 M 545, 300 P 919.

Where the evidence in a prosecution for homicide under former section 94-2503 disclosed that the crime was committed during a robbery or an attempt to commit it, or failed to show that fact beyond a reasonable doubt, the only permissible verdict, under that section, on the one hand, was one of murder in the first degree, or, on the other, of acquittal, and under such conditions the court was not required to instruct on murder in the second degree; the rule was the same where the state relied on circumstantial evidence for conviction. State v. Miller, 91 M 596, 9 P 2d 474.

In murder prosecution under former section 94-2503, jury was properly instructed that if it found that killing was unlawfully done by defendant with deliberation, premeditation and malice aforethought, defendant was guilty of murder in first degree but if it believed that killing was unlawfully done with malice aforethought, although not deliberate and premeditated, or that defendant was incapable of premeditation and deliberation because of intoxication at time of killing, then crime was second degree murder. State v. Brooks, 150 M 399, 436 P 2d 91.

Deliberation and Premeditation

Where, under all the circumstances, it appeared unlikely that the defendant sought out the decedent to continue a previous affray but more likely that he accidentally came upon the decedent's party, verdict of guilty of first degree murder could not be upheld and the judgment was reduced to second degree. State v. Gunn, 89 M 453, 300 P 212.

Under former section 94-2503, after the state had made proof of the homicide charged the crime was presumed to be murder in the second degree and the burden then rested upon the state to introduce evidence satisfying the jury beyond a reasonable doubt that there was deliberation and premeditation to raise the crime to murder in the first degree. State v. Le Duc, 89 M 545, 300 P 919.

Where defendant was convicted of murder in the second degree under former section 94-2503, he was not prejudiced by an instruction that the deliberation and premeditation necessary to raise the crime to murder in the first degree could be formed in an instant, even though the instruction

was erroneous. State v. Le Duc, 89 M 545, 300 P 919.

Failure to Provide

Under former section 94-2501, an information charging a husband with a willful failure to provide for his wife and to protect her from the cold and inclement weather, as a result of which she died, sustained a conviction for murder in the second degree. Territory v. Manton, 7 M 162, 168, 14 P 637.

Felony Murder

Under former section 94-2503, homicide committed in the perpetration of or an attempt to perpetrate robbery was murder in the first degree, regardless of the absence of intent to commit the latter crime; the capability of entertaining the felonious intent to commit robbery was sufficient. State v. Reagin, 64 M 481, 210 P 86.

Evidence showing homicide in the course of a robbery could be introduced under an information charging willful, deliberate, unlawful, felonious and premeditated killing with malice aforethought. State v. Bolton, 65 M 74, 212 P 504.

Killing of a pursuer by bank robbers after a thirty-mile continuous and uninterrupted pursuit was first-degree murder within the felony-murder rule. State v. Jackson, 71 M 421, 230 P 370.

All who participated in a robbery, or an attempted robbery, during which a homicide was committed, were guilty of murder in the first degree under former section 94-2503, irrespective of which one of the participants fired the fatal shot. State v. Miller, 91 M 596, 9 P 2d 474.

Where all of the circumstances indicated homicide in the course of a robbery and the only real question was identification, request to instruct on lesser and included offenses was properly refused. State v. Miller, 91 M 596, 9 P 2d 474.

Evidence in a prosecution for murder at nighttime in the perpetration of burglary, supported by a full confession by defendant, was sufficient to warrant the extreme penalty under former section 94-2503. State v. Zorn, 99 M 63, 41 P 2d 513.

Defendant who hired two men to set fire and burn his service station, during the course of which the two men were burned and subsequently died, was guilty of first degree murder under the felony-murder rule since any death directly attributable to a plot to commit arson made all the conspirators in the arson plot equally guilty of first degree murder. State v. Morran, 131 M 17, 306 P 2d 679.

Under former section 94-2503, an information reciting commission of robbery and alleging that in perpetration of robbery, defendant killed deceased, charged murder in first degree rather than two separate and distinct crimes of robbery and premeditated murder. In re Petition of Dixson, 149 M 412, 430 P 2d 642, cert. den. 390 US 907, 88 S Ct 824.

Under the felony-murder rule in former section 94-2503, both parties were guilty of murder in first degree where evidence clearly showed that both had kidnaped and robbed victim but did not clearly show which of two had shot and killed victim. State v. Corliss, 150 M 40, 430 P 2d 632, cert. den. 390 US 961, 88 S Ct 1063.

Indictment

An indictment for murder good at common law was good under former section 94-2501. Territory of Montana v. Stears, 2 M 324; Territory of Montana v. Young, 5 M 242, 5 P 248; State v. Lu Sing, 34 M 31, 85 P 521; State v. McGowan, 36 M 422, 93 P 552.

Under former section 94-2501, in an information for murder, it was sufficient to allege that the killing was with malice aforethought; the elements of premeditation and deliberation were matters of proof. Territory of Montana v. Stears, 2 M 324; Territory of Montana v. McAndrews, 3 M 158; State v. Metcalf, 17 M 417, 43 P 182; State v. Lu Sing, 34 M 31, 85 P 521; State v. Hayes, 38 M 219, 99 P 434; State v. Nielson, 38 M 451, 100 P 229. See also State v. Guerin, 51 M 250, 152 P 747.

Under former section 94-2501, an information charging that accused committed a murder willfully, unlawfully, feloniously, and premeditatedly, and of his malice aforethought, charged murder in the first degree, even though it failed to use the word "deliberately." State v. Hliboka, 31 M 455, 457, 78 P 965.

It was not necessary under former section 94-2503, to allege that the acts of the accused were done deliberately to sustain a conviction of murder of the first degree, and allegations sufficient for a common-law indictment were sufficient for an information. State v. Lu Sing, 34 M 31, 85 P 521. See also State v. McGowan, 36 M 422, 93 P 552; State v. Wolf, 56 M 493, 185 P 556, distinguished in 142 M 459, 461, 384 P 2d 749.

Under former section 94-2501 an information stating that the defendant unlawfully, feloniously, willfully, premeditatedly, deliberately, and with malice aforethought, shot and killed a person named, a human being, sufficiently charged murder. State v. Crean, 43 M 47, 53, 114 P 603.

Instructions to Jury

In a prosecution for murder in the first degree under former section 94-2503, appellant could not complain of the failure of the court to instruct on the subjects of manslaughter or murder of the

second degree in the absence of an offer by him of instructions on those subjects. State v. Reagin, 64 M 481, 210 P 86.

In prosecutions for first degree murder, trial court did not err in refusing defendant's proposed instructions in the language of the section on proof of corpus delicti where the matter of proof beyond a reasonable doubt was included in another instruction. State v. Quigg, 155 M 119, 467 P 2d 692.

In prosecution for murder, trial court erred by giving instruction describing state's burden as "only that degree of proof," and proof beyond a reasonable doubt as "only such proof as may be" since the inclusion of the word "only" could tend to confuse a jury composed of laymen and in effect dilute the degree of guilt and proof the state is bound to establish. State v. Taylor, — M —, 515 P 2d 695.

Lesser Included Offense

Under former section 94-2503, where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279, 288.

Lying in Wait

Where defendant had robbed a bank and in the course of his escape drove his automobile into a coulee, stopped his machine and shortly thereafter shot and killed one of his pursuers when he appeared on the top of a hill, an instruction that homicide committed by lying in wait constituted murder in the first degree under former section 94-2503 was proper. State v. Jackson, 71 M 421, 230 P 370.

Malice Aforethought

Under former section 94-2501, the distinction between murder and manslaughter was that the element of malice aforethought entered into the former, while it was wanting in the latter. State v. Sloan, 22 M 293, 56 P 364.

Sufficient malice aforethought to support conviction of second degree murder was shown by defendant's firing of weapon at combatants, even though there was no specific intent to kill and even though the one killed was the one defendant sought to protect. State v. Chavez, 85 M 544, 281 P 352.

Sentence for Second-Degree Murder

Second-degree murder sentence of forty years in state prison imposed by trial judge under former section 94-2505 was not unduly harsh and unreasonable even when jury first attempted to return a verdict of ten years without parole. State v. Brooks, 150 M 399, 436 P 2d 91.

94-5-103. Mitigated deliberate homicide. (1) Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

(2) A person convicted of mitigated deliberate homicide shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18.

History: En. 94-5-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 5, Ch. 584, L. 1977.

Source: New.

Commission Comment

Section 94-5-103 specifies the circumstances under which the punishment for deliberate homicide is mitigated.

Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years."

DECISIONS UNDER FORMER LAW

Election of Charge

Trial court committed reversible error in failing to admonish jury to disregard testimony introduced to show evidence of intent in order to prove crime of voluntary manslaughter when, at end of defendant's case, trial court granted a motion requiring state to elect between charge of voluntary and involuntary manslaughter and the state elected to specify the charge as involuntary manslaughter; evidence admitted for purpose of proving intent was irrelevant to charge of involuntary manslaughter. State v. Newman, — M —, 513 P 2d 258.

Instructions

Where there was evidence showing defendant to be guilty of either murder of the first or second degree or manslaughter, the court had to give explicit instructions to the jury that a verdict of manslaughter as described by former section 94-2507 could be returned, under the rule that where the evidence warrants it, instructions must be given upon every offense included in the crime charged. State v. Mumford, 69 M 424, 222 P 447.

Where judge instructed the jury in the language of former section 94-2507, thereby giving the jury the definitions of both voluntary and involuntary manslaughter, defendant could not complain on ground there was no evidence of voluntary manslaughter where the jury found him guilty of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279.

Instruction that jury must have found beyond a reasonable doubt that the action of the "defendant contributed to or was the proximate cause of the death" of the decedent was an incorrect statement of law since the use of the word "or" could have been understood to have meant that the actions of the defendant need not have proximately caused the death but only contributed to it. State v. Newman, — M —, 513 P 2d 258.

Instruction reading in part "if you find . . . that the deceased . . . was laboring under the effects of a poor physical condition, or had an alcoholic problem, to such a degree that in all probability these factors would have ultimately shortened her life, and if you further find the defendant inflicted a blow or blows upon the deceased which hastened or accelerated her death . . . this is sufficient to constitute the crime of involuntary manslaughter as previously defined in these instructions," was defective as a comment on the evidence and because the instruction could be understood to mean that the actions of the defendant need not have proximately caused the death of decedent but only contributed to it. State v. Newman, — M —, 513 P 2d 258.

Stepfather charged with murder in alleged beating death of his stepchild was entitled to instructions on voluntary and involuntary manslaughter in view of testimony that his striking the child was for disciplinary purposes and that he never intended to hurt her. State v. Taylor, — M —, 515 P 2d 695.

Intoxication

In murder prosecution, jury was properly instructed that if killing was unlawfully done by defendant without malice or if he was so intoxicated at time of killing that he was incapable of harboring malice aforethought, crime was manslaughter as described by former section 94-2507. State v. Brooks, 150 M 399, 436 P 2d 91.

Sudden Quarrel

Former section 94-2507 was a recognition of the frailty of human nature, and had as its purpose the reduction of a homicide committed under the circumstances therein contemplated to the grade of manslaughter. State v. Messerly, 126 M 62, 244 P 2d 1054.

Sufficiency of Evidence

Evidence that defendant was wearing a peculiar sweatshirt which was later found wet and bloody near the scene of the murder along with a paring knife and a pair of wet and bloody trousers with the pockets ripped out, one of which pockets was later discovered and identified as part of the trousers belonging to defendant, was sufficient to sustain conviction of second degree murder. State v. Fitzpatrick, — M —, 516 P 2d 605.

94-5-104. Negligent homicide. (1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) A person convicted of negligent homicide shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-5-104 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 210.4.

Commission Comment

Section 94-5-104 is addressed to homicides caused by negligence as defined in section 94-2-101(32). The negligence applicable to criminal homicide requires that the homicidal risk be of such a nature and degree that to disregard it involves a "gross deviation" from the standard of conduct that a reasonable person would observe in the actor's situation.

This code provision is especially relevant to vehicular homicides, since it is inevitable that they will predominate in number. In this country, however, it has been very difficult to convict the negligent motorist of a criminal homicide. Several states have attempted with varying success to deal with the problem by enacting special legislation, but such legislation should not be necessary in Montana with proper application of this provision. Clear-

ly, if the evidence does not make out a case of negligence, as negligence is herein defined, there is no reason for creating criminal liability for homicide, as distinguished from any other traffic offense. However, because of the diverse facts surrounding negligent homicides the sentencing judge is given freedom to sentence the act either as a misdemeanor or a felony. See section 94-1-105.

DECISIONS UNDER FORMER LAW

Degree of Negligence

The negligent handling of a loaded firearm causing or contributing to the death of another person, could be found to support of conviction of involuntary manslaughter within the meaning of subdivision 2 of former section 94-2507. State v. Kuum, 55 M 436, 178 P 288.

Conviction of involuntary manslaughter in the commission of a lawful act under former section 94-2507 required a higher degree of negligence than to establish liability in a civil case; it required aggravated, culpable or gross negligence, or recklessness, a disregard for human life or an indifference to consequences, such a departure from the conduct of an ordinarily prudent or careful man under the circumstances as to be incompatible with a proper regard for human life. State v. Powell, 114 M 571, 138 P 2d 949.

Evidence in a manslaughter prosecution showing that defendant driver, blinded by bright lights of an approaching car, drove off the highway into a shallow depression filled with a pile of rocks hidden by brush, causing the car to sideswipe a tree, was insufficient to sustain conviction on theory of criminal negligence. State v. Bast, 116 M 329, 337, 151 P 2d 1009.

Where the court instructed the jury that in order to find the defendant guilty of manslaughter under former section 94-2507, it must find that the defendant committed an unlawful act, not amounting to a felony, and that the unlawful act was the proximate cause of the injury and death; and then in a later instruction defined criminal negligence as such that amounts to a wanton, flagrant, or reckless disregard of consequences or willful indifference of the safety or rights of others, the instructions taken as a whole are correct. For while the former may, standing alone, be inaccurate or even erroneous, yet as qualified and explained by other portions of the charge, in pari materia, it fully and fairly submitted the case to the jury. State v. Bosch, 125 M 566, 242 P 2d 477.

Instruction permitting conviction on findings that defendant was on wrong side of road and that decedent in no way contributed to the accident was reversible error in that it did not require union of act and criminal negligence and there was no instruction to consider the instructions as a whole. State v. Strobel, 130 M 442, 304 P 2d 606, explained in 134 M 519, 525, 333 P 2d 1017, 1021.

Defendant who deliberately drove his car around curve at a speed which he must have known was dangerous to the lives of himself and his passengers was properly convicted of involuntary manslaughter under former section 94-2507. State v. Pankow, 134 M 519, 333 P 2d 1017, 1019.

Lack of due caution or circumspection as required by former section 94-2507, in lawfully correcting child could be found from doctor's testimony that basal skull fracture and fatal liver transection required severe and extensive force. State v. Henrich, 159 M 365, 498 P 2d 124.

Double Jeopardy

Prosecution for involuntary manslaughter under former section 94-2507 was not barred by defendant's prior conviction upon guilty pleas to driving while intoxicated and operating motor vehicle with improper brakes arising from same accident. State v. McDonald, 158 M 307, 491 P 2d 711.

Failure to Provide

Failure of parents to provide food for baby, with resulting death from starvation, the baby weighing only ten ounces more at five months than at birth, was such culpable negligence as to show a disregard for human life or an indifference to consequences, and would support a conviction for involuntary manslaughter even without an intention to cause death. State v. Bischert, 131 M 152, 308 P 2d 969.

Husband's failure to provide medical attention for wife for two days after she fell and sustained serious injuries was such culpable negligence as to support conviction for involuntary manslaughter, even though wife protested that she did not need attention, where she was in semi-comatose condition and obviously did need attention. State v. Mally, 139 M 599, 366 P 2d 868.

In prosecution for involuntary manslaughter based on failure to provide medical attention, the state had no duty to prove that defendant could pay for medical attention and it was a matter of defense to show that defendant could neither pay for attention nor obtain it under the poor relief laws. State v. Mally, 139 M 599, 366 P 2d 868.

Where wife died from subdural hematoma after a period of unconsciousness, husband's failure to summon medical assistance for period of twenty-eight hours was not such degree of culpable negligence as to support a conviction of involuntary manslaughter under former section 94-2507 where unconsciousness appeared to have been from intoxication, wife appeared to be breathing well, and friend advised only bed rest. State v. Decker, 157 M 361, 485 P 2d 695.

Indictment and Information

An information charging that defendant "did willfully, unlawfully, knowingly and feloniously kill one B., a human being, contrary to the form" etc., was sufficient to charge manslaughter under former section 94-2507, even though it did not specify whether the crime had been either voluntarily or involuntarily committed. State v. Gondeiro, 82 M 530, 268 P 507, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

Instructions to Jury

Defendant could not complain of jury instruction in the language of former section 94-2507, including the definitions of both voluntary and involuntary manslaughter, on ground there was no evidence of voluntary manslaughter, where the jury found him guilty only of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279.

When court withdrew murder charge and submitted case to jury on question of manslaughter, it should have modified its instruction on intent to cover intent required for manslaughter, but failure to do so was not prejudicial to defendant convicted only of involuntary manslaughter. State v. Allison, 122 M 120, 199 P 2d 279.

Intent

In prosecution for involuntary manslaughter under former section 94-2507 the issue was one of criminal negligence rather than intent, and instruction that "intent is not an element of involuntary manslaughter" was proper. State v. Souhrada, 122 M 377, 204 P 2d 792.

Willful or evil intent was not an element of involuntary manslaughter under former section 94-2507. State v. Souhrada, 122 M 377, 204 P 2d 792; State v. Messerly, 126 M 62, 244 P 2d 1054; State v. Pankow, 134 M 519, 333 P 2d 1017.

In murder prosecution, jury was properly instructed that if killing was unlawfully done by defendant without malice or if he was so intoxicated at the time of killing that he was incapable of harboring malice aforethought, crime was manslaughter as described by former section 94-2507. State v. Brooks, 150 M 399, 436 P 2d 91.

Juvenile Defendant

Driving while intoxicated was an unlawful act within the meaning of former section 94-2507 even though, because defendant was a juvenile, he could have been prosecuted only under the Juvenile Act. State v. Medicine Bull, 152 M 34, 445 P 2d 916.

Lesser Included Offense

Where defendant was charged with murder in the second degree it was permissible for the jury to find him guilty of involuntary manslaughter under former section 94-2507. State v. Allison, 122 M 120, 199 P 2d 279.

94-5-105. Repealed.

Repeal

Section 94-5-105 (Sec. 1, Ch. 513, L. 1973; Sec. 1, Ch. 262, L. 1974; Sec. 14, Ch. 359, L. 1977), relating to death sentence for deliberate homicide, was repealed by Sec. 16, Ch. 338, Laws 1977.

94-5-106. Aiding or soliciting suicide. (1) A person who purposely aids or solicits another to commit suicide, but such suicide does not occur commits the offense of aiding or soliciting suicide.

(2) A person convicted of the offense of aiding or soliciting a suicide shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-5-106 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

If the conduct of the offender made him the agent of the death, the offense is criminal homicide notwithstanding the consent or even the solicitations of the victim. See sections 94-5-101 through 94-5-105.

Rather than relying on aiding or soliciting an attempted homicide, this section sets forth the specific formula to make

such acts punishable. The rationale behind the felony sentence for the substantive offense of aiding or soliciting suicide is that the act typifies a very low and dangerous regard for human life.

Part Two

Assault

94-5-201. Assault. (1) A person commits the offense of assault if he:

(a) purposely or knowingly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a weapon; or

(c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or

(d) purposely or knowingly causes reasonable apprehension of bodily injury in another. The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be caused shall be presumed in any case in which a person knowingly points a firearm at or in the direction of another whether or not the offender believes the firearm to be loaded.

(2) A person convicted of assault shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-5-201 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 211.1.

Commission Comment

This section codifies what is generally known as "simple assault." The section makes several changes in the old assault law. The primary change is that it sets forth the elements of the offense of assault specifically rather than assigning to the offense conduct not covered by other more serious assault provisions. Another change is that the offense must be committed purposely, knowingly or negligently, thus maintaining the intent element consistent with the other proposed statutes dealing with offenses against the person. It should be noted that "battery," i.e., actual bodily injury or contact of some kind, is an essential element of the offense of assault in all instances except those arising under subdivision (1)(d). The type of apprehension required as an element of the offense under subdivision (1)(d) is apprehension of bodily injury, and not apprehension of mere physical contact. (See section 94-2-101 (54), bodily injury.)

DECISIONS UNDER FORMER LAW

Instructions

Instructing jury on assault by willfully inflicting grievous bodily harm when defendant had been charged with assault with intent to prevent or resist his lawful detention or apprehension was harmless error where the evidence conclusively demonstrated defendant's guilt of the offense charged. State v. Jones, — M —, 505 P 2d 97.

Instructions to Jury

Where the only evidence of assault was by pointing a firearm, defendant was guilty of assault in the second degree under former section 94-602 or not guilty at all, so that it was error to give an instruction on the law applicable to assault in the third degree as defined in former section 94-603. State v. Karri, 84 M 130, 276 P 427.

It was error to refuse defendant's instructions defining assault in the third degree under former section 94-603, and instead to instruct the jury as to assault in the first and second degree under former sections 94-601 and 94-602 respectively, but omitting any instructions defining what felony was intended to be committed by assaulting a person with a gun. Since the jury had no way of knowing what felony, if any, the defendant intended to commit upon a person by pointing a gun at him, the jury should have been allowed to consider whether or not defendant was guilty of third

degree assault. State v. Quinlan, 126 M 52, 244 P 2d 1058, overruled on other grounds in 158 M 102, 111, 489 P 2d 99.

Intent

A verdict finding a defendant guilty of an assault with corrosive acids and caustic chemicals, which failed to find that the assault was committed willfully or maliciously, or with intent to injure, was a verdict of guilty of assault in the third degree under former section 94-603. State v. District Court, 35 M 321, 324, 89 P 63.

94-5-202. Aggravated assault. (1) A person commits the offense of aggravated assault if he purposely or knowingly causes:

(a) serious bodily injury to another;

(b) bodily injury to another with a weapon;

(c) reasonable apprehension of serious bodily injury in another by use of a weapon; or

(d) bodily injury to a peace officer.

(2) A person convicted of aggravated assault shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18.

History: En. 94-5-202 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 6, Ch. 584, L. 1977.

Source: Substantially the same as Model Penal Code, section 211.1(2).

Commission Comment

This section covers assaults committed under circumstances of aggravation. The elements of assault generally must be present in addition to the aggravating factor of causing serious bodily injury (See section 94-2-101(54) with purpose or knowledge. It should be noted that the crime of battery is merged within the assault provision by direct reference to physical contact, bodily injury and serious bodily injury in section 94-5-201(a) and (b) and (c) and section 94-5-202(a) and (b). Classical assault in a tort sense is included in sections 94-5-201(d) and 94-5-202(c).

Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed twenty (20) years"; and made minor changes in phraseology.

Sentence

Where defendant was convicted under this section of beating his two-year-old foster child, the trial court did not abuse its discretion in sentencing him to fifteen years imprisonment, even though a psychiatrist testified that defendant was suffering from a treatable neurosis at the time of the beating, had undergone treatment and was no longer a threat to anyone, and even though the court had relied on information concerning the victim's condition which was later contested in defendant's petition to the sentence review division. State v. Mann, — M —, 546 P 2d 515.

"Substantial Risk of Death"

The question of whether the victim of an offense under this section incurred a "substantial risk of death" as a result of his injuries is one of fact to be determined by the jury and does not depend on whether he ultimately lives or dies. State v. Fuger, — M —, 554 P 2d 1338.

Weapons Used

Multiple counts of aggravated assault under subdivision (1)(b), specifying various probable weapons, are unnecessary to inform the defendant of the charges against him since an information of aggravated assault naming weapons in the alternative fulfills the notice requirements. State ex rel. McKenzie v. District Court of Ninth Judicial Dist., — M —, 525 P 2d 1211.

DECISIONS UNDER FORMER LAW

Grievous Bodily Harm

Instruction defining term "grievous bodily harm" as used in subdivision 3 of former section 94-602 to include any injury calculated to interfere with the health or comfort of the person injured, and that the word "grievous" means atrocious, aggravated, harmful, painful, hard to bear and serious in nature, was proper. State v. Laughlin, 105 M 490, 73 P 2d 718.

Instructions to Jury

Defendant charged with second degree assault under former section 94-602 but convicted only of third degree assault

under former section 94-603 was not prejudiced by jury instruction comprising all the subdivisions of section 94-602. State v. Farnham, 35 M 375, 89 P 728.

Intent

It was not necessary to allege, in an information for an assault and battery in the second degree, as defined in subdivision 3 of former section 94-602, that "the assault was committed with the intent to inflict grievous bodily harm," beword "intent" in defining the crime. State cause the statute did not include the v. Broadbent, 19 M 467, 48 P 775. See also State v. Bloor, 20 M 574, 52 P 611; State ex rel. Webb v. District Court, 37 M 191, 95 P 593.

In cases of assault of the first degree under former section 94-601 where the specific charge in the information was "assault with intent to kill," the instruction should have omitted all reference to murder or manslaughter, and advised jurors, in lieu thereof, that, to sustain the information, they must find, beyond a reasonable doubt, that the assault was committe' with intent to kill. State v. Schaefer, 35 M 217, 88 P 792, distinguished in 135 M 139, 147, 337 P 2d 924.

Evidence was insufficient to justify a conviction of second degree assault with a deadly weapon under former section 94-602 where it was disclosed that the defendant was hunting jack rabbits at the time; that he never knew the prosecuting witness prior to the day of the alleged assault; that the rifle was extremely sensitive and would fire upon being brushed against an object such as clothing or even a change in temperature might fire the gun; and that the defendant was an instructor in firearms in the army during the war and would not have missed from the distance of eight feet had he been aiming at the prosecuting witness. State v. Smith, 126 M 124, 246 P 2d 227.

In prosecutions for first degree assault under former section 94-601, the element of felonious intent had to be determined from the facts and circumstances of the particular case; criminal intent is rarely susceptible of direct or positive proof and therefore must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence. State v. Madden, 128 M 408, 276 P 2d 974.

Proof of specific intent was necessary in second degree assault charges only under subdivisions 1, 2 and 5 of former section 94-602. State v. Straight, 136 M 255, 347 P 2d 482.

That defendant was able to form specific intent to commit first degree assault under former section 94-601 was properly inferred from evidence that, although intoxicated, defendant turned off lights inside apartment, reached into nearby drawer and prepared revolver for action, surrendered to police, walked out of apartment under own power with hands in air and after arrest had no difficulty in recounting recent events to police. State v. Lukus, 149 M 45, 423 P 2d 49.

Refusal to instruct that in every crime there must exist union or joint operation of act and intent or criminal negligence as provided by statute was not error in prosecution for second degree assault as defined in subdivision 4 of former section 94-602 which required only general nonstatutory intent to do harm willfully, wrongfully and unlawfully and did not require specific statutory intent to do any particular kind or degree of injury to victim. State v. Fitzpatrick, 149 M 400, 427 P 2d 300.

In prosecution for first-degree assault under former section 94-601, instruction dealing with intent and proof thereof was properly given since intent was essential element of crime. State v. Gallagher, 151 M 501, 445 P 2d 45.

Specific intent was not a necessary element of second degree assault under former section 94-602 upon showing of willful or wrongful infliction of grievous bodily harm upon another, and court properly refused instruction thereon notwithstanding statute providing that there must be unity of act and intent since latter statute was not applicable if specific intent was not an ingredient of crime charged. State v. Warrick, 152 M 94, 446 P 2d 916.

Dismissal of first degree assault charge under former section 94-601 was properly refused where there was evidence to support finding of jury that defendant had necessary intent. State v. Bentley, 155 M 383, 472 P 2d 864, distinguished in 157 M 452, 458, 486 P 2d 863.

Intent was to be judged objectively in first degree assault cases under former section 94-601 and not by the secret motive of the actor or some undisclosed purpose merely to frighten. State v. Cooper, 158 M 102, 489 P 2d 99, overruling State v. Quinlan, 126 M 52, 244 P 2d 1058.

Lesser Included Offense

In a prosecution for assault in the first degree under former section 94-601 the court could properly submit to the jury the question whether, in the evidence, the defendant, if not guilty as charged, was not guilty of assault in the second degree. State v. Papp, 51 M 405, 153 P 279.

Where the only evidence of assault was by pointing a firearm, defendant was either

guilty of second degree assault under former section 94-602 or not guilty of any offense, so that the giving of an instruction on third degree assault under former section 94-603 was error. State v. Karri, 84 M 130, 276 P 427.

Where the facts disclosed by the evidence under an information charging first degree assault under former section 94-601 constituted at least a second degree assault under former section 94-602 as found by the jury, or no offense at all, court was correct in not giving an instruction on third degree assault as described by former section 94-603, particularly where the record did not disclose any request for such an instruction. State v. Satterfield, 114 M 122, 132 P 2d 372.

Trial court properly refused to instruct jury on third degree assault under former section 94-603 and limited jury's determination to conviction on second degree assault under former section 94-602 or acquittal, where grievous bodily harm was inflicted and only issue was whether act causing injury was accidental. State v. Manning, 160 M 50, 499 P 2d 771.

Pleadings

An information charging defendant with having willfully, unlawfully, and feloniously assaulted a person with a piece of iron pipe, with intent to inflict grievous bodily harm, was sufficient to charge the defendant with an assault with intent to commit a felony under former section 94-602, and gave the district court jurisdiction to try the cause. State v. Farnham, 35 M 375, 89 P 728.

An information charging that defendant "did willfully, unlawfully, wrongfully, intentionally, and feloniously assault one S., by throwing said S. from a moving streetcar, with intent to inflict grievous bodily harm upon said S.," was sufficient to charge assault in the second degree, under subdivision 3 of former section 94-602. State v. Tracey, 35 M 552, 90 P 791.

An information charging assault in the first degree with a deadly weapon under former section 94-601 was sufficient, the words following descriptive of the weapon, "to wit, an instrument about a foot long with a knob on the striking end," being surplusage, the only effect of which was to confine the prosecution to proof that the assault was committed with the instrument described and not with some other. State v. Maggert, 64 M 331, 209 P 989.

In charging the crime of assault in the second degree under former section 94-602, by willful or wrongful wounding or inflicting grievous bodily harm upon another, either with or without a weapon, the use of the word "feloniously" was not an adequate substitute for "willfully" or "wrongfully." State v. Williams, 106 M 516, 79 P 2d 314.

Information charging defendant with unlawfully threatening another by pointing a loaded revolver at him charged a criminal offense under former section 94-602. State v. Storm, 124 M 102, 220 P 2d 674.

Information charging that defendant committed assault in the second degree under former section 94-602 by willfully, wrongfully, unlawfully, and feloniously assaulting a human being by wounding and inflicting grievous bodily harm contrary to form, force and effect of statute, sufficiently informed defendant of the crime with which he was charged. State v. Straight, 136 M 255, 347 P 2d 482.

Under former section 94-6423 information containing single count charging second degree assault under former section 94-602 was proper where only that crime was involved with at least two different ways of committing it; one by a direct assault and the other by aiding and abetting. State v. Zadick, 148 M 296, 419 P 2d 749.

Probable Cause

Denial of state's second application for leave to file information charging assault on ground that probable cause was not shown was an abuse of discretion where supplementary proof as to probable cause in the form of affidavits of deputy county attorney and six witnesses and copy of police report were filed, and where the district court, had, in denying first application for failure to have witnesses endorsed thereon, commented that probable cause existed. State ex rel. McLatchy v. District Court, 144 M 216, 395 P 2d 245.

While mere recital of injuries was not medically precise or overwhelmingly persuasive, but did show that injuries had been inflicted and that doctor, who was to testify at trial, had examined the victim, there was sufficient evidence stated in the information to establish probable cause that a second degree assault under former section 94-602 had been committed. State ex rel. Pinsoneault v. District Court, 145 M 233, 400 P 2d 269.

Sentence

Defendant was properly given eighteen-year sentence for assault in first degree under former section 94-601 where he plead guilty to three prior felony convictions. State v. McLeod, 131 M 478, 311 P 2d 400.

Sufficiency of Evidence

Where evidence did not show that defendant pointed gun at sheriff after he

was handed paper by deputy which purported to be a warrant but was not, evidence was insufficient to support a conviction under either subdivision 4 or 5 of former section 94-602. State v. Storm, 124 M 102, 220 P 2d 674.

Evidence was sufficient to justify a conviction of second degree assault under former section 94-602, when it was shown that defendant was with a group of boys who fired a barrage of shots at a house and some of the pellets hit the house; fact that prosecuting witness had moved to a position away from line of fire did not prevent the attack from being an assault upon him. State v. Simon, 126 M 218, 247 P 2d 481.

Evidence that defendant had previously threatened to kill sheriff and shortly thereafter pointed a loaded rifle at his stomach at point blank range and said he was going to shoot him supported conviction of first degree assault under former section 94-601. State v. Cooper, 158 M 102, 489 P 2d 99.

Where testimony indicated that only use of pistol by defendant was in restraining three girls who were hard to manage, used foul language, had taken sunglasses off racks with no apparent interest in purchasing any, spent a long time in the restroom, attempted to sell defendant and his helper magazines, and that one of the girls had thrown a pop bottle in the general direction of the defendant, and there was no substantial evidence as to the fear or apprehension of the girls, trial court's conviction of second degree assault under former section 94-602 was reversed. State v. Sanders, 158 M 113, 489 P 2d 371, distinguished in — M —, 552 P 2d 616.

Variance between Charge and Proof

In a case in which the information charged assault with intent to commit rape, it was correct to instruct that the jury could find defendant guilty of either assault in the second degree or not guilty, and the instruction did not have to be that defendant was either guilty of assault with intent to commit rape or not guilty. State v. Collins, 88 M 514, 294 P 957.

Where defendant was charged with assault in the second degree as defined in subdivision 4 of former section 94-602 by use of a weapon likely to cause grievous bodily harm, it was error to introduce evidence that defendant in pointing firearm was resisting a lawful arrest by sheriff in violation of subdivision 5 of that section. State v. Storm, 124 M 102, 220 P 2d 674.

Even though, in an information charging second degree assault under former section 94-602, it was not charged specifically that a belt was used in the assault, admission of evidence that a belt was used was not error. State v. Straight, 136 M 255, 347 P 2d 482.

94-5-203. Intimidation. (1) A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

(a) inflict physical harm on the person threatened or any other person or on property; or

(b) subject any person to physical confinement or restraint; or

(c) commit any criminal offense; or

(d) accuse any person of an offense; or

(e) expose any person to hatred, contempt, or ridicule; or

(f) take action as a public official against anyone or anything or withhold official action, or cause such action or withholding.

(2) A person commits the offense of intimidation if he knowingly communicates a threat or false report of a pending fire, explosion, or disaster which would endanger life or property.

(3) A person convicted of the offense of intimidation shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-5-203 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 12-6.

Commission Comment

Intimidation requires a specific purpose to cause another to perform "or to omit" the performance of any act (such as testifying), and the threat must be "com-

municated" with that purpose. It is also required that the act threatened, if performed, would be "without lawful authority." The section anticipates, therefore, that the accused is apprehended and prosecuted for intimidation before the harm threatened is performed. If the substantive harm occurs, the accused is subject to prosecution and punishment for the more serious offense, or both intimidation and such offense. This section is all inclusive and includes public officials acting without authority.

The maximum penalty is relatively harsh, but since there is no minimum sentence the judge is able to fix the penalty to suit the crime.

DECISIONS UNDER FORMER LAW

Instructions to Jury

The giving of an instruction defining the word "extortion" in the language of former section 94-1602 was not objectionable, in an action to recover money paid under duress, it not being error to give instructions containing abstract statements of statutory law where the facts are few and simple. Edquest v. Tripp & Dragstedt Co., 93 M 446, 19 P 2d 637.

Threat To Discharge Worker

The right of an employee to work is not property, and therefore a complaint charging a foreman with extorting money from an employee by a threat to discharge him did not charge the crime of extortion under former section 94-1602. In re McCabe, 29 M 28, 73 P 1106.

Part Three

Kidnapping

94-5-301. Unlawful restraint. (1) A person commits the offense of unlawful restraint if he knowingly or purposely and without lawful authority restrains another so as to interfere substantially with his liberty.

(2) A person convicted of the offense of unlawful restraint shall be fined not to exceed five hundred dollars ($500), or be imprisoned in the county jail for any term not to exceed six (6) months or both.

History: En. 94-5-301 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section is intended to deal with the problem of false imprisonment; however, unlawful restraint is a more accurate name for the offense which embodies restraining another without authority of law. The principal distinctions between this section and the old code provision of R. C. M. 1947, section 94-3576 are the inclusion of the requirements of knowledge and purpose, and the substantial reduction in penalty.

DECISIONS UNDER FORMER LAW

Civil Liability

False imprisonment was treated as a tort and also as a crime under former section 94-3576, the definition being the same in either case. The liability of a wrongdoer did not depend primarily upon his mental attitude. Kroeger v. Passmore, 36 M 504, 93 P 805.

Former section 94-3576 which defined the crime of false imprisonment, defined also the civil wrong resulting from it; therefore, in order to make out a case for damages, the plaintiff had to allege a violation of his personal liberty, and that such violation was without legal justification. Slifer v. Yorath, 52 M 129, 155 P 1113.

Official Restraint

Warden could not be held liable for failure to allow good behavior time to convict and thus detaining him unlawfully when the prison board had not awarded the good behavior time. Stephens v. Conley, 48 M 352, 138 P 189.

Where, after an officer obtained the custody of another by a privileged arrest, he failed to use due diligence in taking him promptly before a proper court or magistrate, his misconduct made him liable to the person arrested only for such harm as was caused thereby but not for the arrest or for keeping him in custody prior to such misconduct; false imprisonment as defined by former section 94-3576 did not exist until the moment the imprisonment became unlawful. Cline v. Tait, 113 M 475, 129 P 2d 89.

In an action for false imprisonment brought by plaintiff against a sheriff and the surety on his official bond based on

unnecessary delay in taking plaintiff before a magistrate, it was necessary that the plaintiff prove that a magistrate was available on the particular day when the false imprisonment allegedly occurred. Rounds v. Bucher, 137 M 39, 349 P 2d 1026, 98 ALR 2d 962.

Release of Civil Claim

Where plaintiff compromised an action against the sheriff and his surety for false imprisonment and executed a release of defendants captioned "release in full of all claims" and reciting that plaintiff accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, a subsequent false imprisonment action against the county attorney was properly dismissed on motion for judgment on the pleadings, nothing appearing in the release reserving plaintiff's right to proceed against the county attorney. Beedle v. Carolan, 115 M 587, 148 P 2d 559.

94-5-302. Kidnapping. (1) A person commits the offense of kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force.

(2) A person convicted of the offense of kidnapping shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years, except as provided in 95-2206.18.

History: En. 94-5-302 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 7, Ch. 584, L. 1977.

Source: New.

Commission Comment

Both the Illinois Criminal Code and the Model Penal Code kidnaping provisions are marked by great detail in defining the offense. Under the Illinois Code, kidnaping may be either simple (misdemeanor or felony) or aggravated (felony), and there is a third offense entitled unlawful restraint (misdemeanor). The Model Penal Code contemplates offenses called kidnaping, felonious restraint, false imprisonment, and interference with custody. A detailed statement of the circumstances required for each offense is given in each provision.

It is possible that such a detailed treatment of the kidnaping provisions will lead to difficulties in interpreting ambiguous conduct and relating it to the stated offenses. Too often conduct which seems criminal escapes the precise language of the statutes. The commission concluded that a carte blanche approach whereby the offenses of kidnaping and unlawful restraint are given broad definition was warranted. Any leniency justified by the character of such ambiguous conduct could best be considered and given effect in the sentence imposed. If this approach is utilized the range of punishment that may be imposed should be substantial.

It should be noted that subsection (1) conforms with current Montana law, that a showing of actual physical violence or threat of personal injury are not required to prove the force necessary to establish the crime. (State v. Walker, 139 M 276, 362 P 2d 548, 550.)

Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 10 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed ten (10) years"; and made minor changes in punctuation and style.

DECISIONS UNDER FORMER LAW

Force or Threat

Defendant was guilty of confining prison guard secretly against his will under former section 94-2602 where the evidence showed that defendant, an inmate of the state prison, walked behind prison guard with a knife, after another inmate had disarmed the guard, until the inmates had placed the guard in isolation. State v. Frodsham, 139 M 222, 362 P 2d 413.

On the trial of defendant charged with kidnaping a prison guard contrary to former section 94-2602 a showing of actual physical violence or threat of personal injury was not required to prove the force necessary to establish the crime. State v. Walker, 139 M 276, 362 P 2d 548.

Pleadings

An information under former section 94-2602 was sufficient if it contained a statement of facts constituting the offense charged in ordinary and concise language so as to enable a person of common understanding to know what was intended. State v. Randall, 137 M 534, 353 P 2d 1054, 100 ALR 2d 171.

Information charging kidnaping "with intent" to confine clearly charged violation of former section 94-2602, rather than former section 94-2601, which required that defendant "attempt or cause" confinement. State v. Corliss, 150 M 40, 430 P 2d 632, cert. den. 390 US 961, 88 S Ct 1063.

Secret Confinement

The requirement of secrecy in former section 94-2602 was met where prison inmates took guards as hostages and held them at an undisclosed place within the prison. State v. Randall, 137 M 534, 353 P 2d 1054, 100 ALR 2d 171.

Willfulness

Where defendant was charged with kidnaping a prison guard under former section 94-2602, it was a question for the jury whether defendant was acting under duress or coercion because of threats made to him by other convicts participating in riot. State v. Walker, 139 M 276, 362 P 2d 548.

94-5-303. Aggravated kidnapping. (1) A person commits the offense of aggravated kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward or as a shield or hostage;

(b) to facilitate commission of any felony or flight thereafter;

(c) to inflict bodily injury on or to terrorize the victim or another;

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) Except as provided in 95-2206.18, a person convicted of the offense of aggravated kidnapping shall be punished by death or life imprisonment as provided in 95-2206.6 through 95-2206.15 or be imprisoned in the state prison for a term of not less than 2 years or more than 100 years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years.

History: En. 94-5-303 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 12, Ch. 338, L. 1977; amd. Sec. 8, Ch. 584, L. 1977.

Source: Substantially the same as Model Penal Code, section 212.1.

Commission Comment

This section is derived almost exclusively from the Model Penal Code, section 212.1, and is generally intended to answer the question of when the crime of kidnaping should be punished by death. The section proposes to maximize the kidnaper's incentive to return the victim alive, by making the capital penalty apply only when the victim is not released, alive, in a safe place and not suffering from serious bodily injury.

Compiler's Notes

This section was amended twice in 1977, once by Ch. 338 and once by Ch. 584. Since the amendments do not appear to conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.

Amendments

Chapter 338, Laws of 1977, substituted "death or life imprisonment as provided in 95-2206.6 through 95-2206.15" in subsection (2) for "death as provided in section 94-5-304"; and made minor changes in punctuation and style.

Chapter 584, Laws of 1977, inserted "Except as provided in 95-2206.18" at the beginning of subsection (2); substituted "a term of not less than 2 years or more than" in the middle, and at the end, of subsection (2) for "any term not to exceed"; and made minor changes in phraseology, punctuation and style.

Multiple Counts

It was not necessary to charge defendant with ten separate counts of kidnaping, specifying weapons used or the related felony, where a single count based on subdivision (1)(b) specifying the felonies of aggravated assault and sexual intercourse without consent, and a single count based on the statutory language of subdivision (1)(c) would fulfill the notice requirement of the statute. State ex rel. McKenzie v. District Court of Ninth Judicial Dist., — M —, 525 P 2d 1211.

94-5-304. Repealed.

Repeal

Section 94-5-304 (Sec. 1, Ch. 513, L. 1973; Sec. 1, Ch. 126, L. 1974), relating to death sentence for aggravated kidnapping, was repealed by Sec. 16, Ch. 338, Laws 1977.

94-5-305. Custodial interference. (1) A person commits the offense of custodial interference if, knowing that he has no legal right to do so, he takes, entices or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed ten (10) years. A person does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to trial.

History: En. 94-5-305 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

Violation of lawful custody, especially of children, requires special legislation notwithstanding its similarity in some respects to kidnaping. The interest protected is not freedom from physical danger or terrorization by abduction, since that is adequately covered by sections 94-5-302 and 94-5-303, but rather the maintenance of parental custody against all unlawful interruption, even when the child is a willing, undeceived participant in the attack on the parental interest. The problem is further distinguishable from kidnaping by the fact that the offender will often be a parent or other person favorably disposed toward the child. One should be especially cautious in providing penal sanctions applicable to estranged parents struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Despite these distinctive aspects of child-stealing and the existence of special provisions on the subject in most jurisdictions, the problem is frequently covered by kidnaping and the penalties and exceptions do not adequately reflect the special circumstances.

Part Four

Robbery

94-5-401. Robbery. (1) A person commits the offense of robbery if, in the course of committing a theft, he:

(a) inflicts bodily injury upon another;

(b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or

(c) commits or threatens immediately to commit any felony other than theft.

(2) A person convicted of the offense of robbery shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18.

(3) "In the course of committing a theft" as used in this section includes acts which occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission.

History: En. 94-5-401 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 9, Ch. 584, L. 1977.

Source: Substantially the same as Model Penal Code, section 222.1.

Commission Comment

With some verbal changes the Montana draft on robbery parallels that of the Model Penal Code, section 222.1.

Common-law robbery was theft of property from the person or in the presence of the victim by force or by putting him in fear either of immediate bodily injury or of certain other grievous harms. The above draft does not explicitly include the traditional basis for classifying robbery as taking property from the person or in the presence of a person, but approaches the crime as one of immediate danger to the person and relies on the condition of violence or threatened violence to distinguish the crime from ordinary theft. The gist of the offense is taking by force or threat of force.

The above provision would apply where property was not taken from the person or from his presence. For example, an offender might threaten to shoot the victim in order to compel him to telephone directions for the disposition of property located elsewhere. Further, it is immaterial whether property is or is not obtained. This seems compatible with the theory of treating robbery as an offense against the person rather than against property. Hence, a completed robbery may occur even though the crime is interrupted before the accused obtained the goods, or if the victim had no property to hand over. The section includes armed robbery. Further, subdivision (1)(b) encompasses the use of a toy or unloaded gun, since such a device can be employed to threaten serious injury and may be effective to create fear of such injury.

Amendments

The 1977 amendment substituted "a term of not less than 2 years or more than 40 years, except as provided in 95-2206.18" in subsection (2) for "any term not to exceed forty (40) years"; and made minor changes in phraseology and punctuation.

Knowingly or Purposely

The mental state required to commit the offense defined in subdivision (1)(b) of this section is "knowingly or purposely," and the jury need not consider "intent" as well, since the first two terms are substitutes for the older terms "intentionally" and "feloniously." State v. Klein, — M —, 547 P 2d 75.

DECISIONS UNDER FORMER LAW

Conspiracy Evidence

Where defendant, while attempting to open the safe on a train, robbed a mail clerk, evidence as to details of the attempted train robbery and a conspiracy therefor was admissible to show the entire transaction in prosecution for robbery of clerk under former section 94-4301. State v. Howard, 30 M 518, 77 P 50.

Felonious Taking

An instruction defining robbery under former section 94-4301, which omitted to state "the taking" must be felonious, was prejudicially erroneous. State v. Oliver, 20 M 318, 50 P 1018. See also State v. Rodgers, 21 M 143, 53 P 97.

Evidence that victim had a certain amount of money in a wallet in his vest pocket nine days before an assault and that after the assault his vest was torn and the wallet and money were gone supported inference that the money was taken after the assault, thus that there was a robbery within the meaning of former section 94-4301. State v. Olson, 87 M 389, 287 P 938.

Force or Fear

The taking of personal property from the person or immediate presence of another, without resistance on his part, did not bring the offense within the definition of robbery under former section 94-4301; it was necessary that the element of force or fear be present to constitute the crime. State v. Paisley, 36 M 237, 92 P 566.

Since former section 94-4301 did not define the degree of force necessary to constitute the taking of personal property from the person or immediate presence of another, to constitute the crime of robbery, an information charging such offense was not required to allege the degree of force used. State v. Paisley, 36 M 237, 92 P 566.

Though the crime of robbery under former section 94-4301 could be accomplished only by means of force or fear, proof of an assault without showing that it was resorted to as a means to prevent resistance fell far short of establishing the crime of an attempt to commit robbery. State v. Hanson, 49 M 361, 141 P 669.

It is reasonable to presume fear where victim is forced to look down the barrel of a 45-caliber automatic pistol held by a stranger whose purpose is to rob him. State v. Erickson, 141 M 118, 375 P 2d 314, 316.

Pleadings

An indictment which charged that the defendant committed the robbery by force and intimidation and by putting the person robbed in fear, was sufficient under former section 94-4301. State v. Clancy, 20 M 498, 52 P 267.

An information on a prosecution for robbery under former section 94-4301, which charged that the property was taken by means of force and putting in fear, and that it was taken from the person in possession, and from the im-

mediate presence of a specified person, did not charge more than one offense. State v. Howard, 30 M 518, 77 P 50.

Punishment

Fifty-year sentence was warranted for defendant who had two previous convictions for burglary in another state. State v. Paisley, 36 M 237, 92 P 566.

Since there was no maximum penalty stated in former section 94-4303, it was presumed that person may be incarcerated for lifetime on conviction of robbery. Petition of Eldiwitw, 153 M 468, 457 P 2d 909.

In view of maximum punishment of life imprisonment presumably provided by former section 94-4303, former section 94-115 providing five-year maximum for felonies not otherwise punished did not apply, and ten-year sentence was authorized. Petition of O'Rourke, 154 M 265, 461 P 2d 1.

Part Five

Sexual Crimes

94-5-501. Definitions. As used in 94-5-503 and 94-5-505, the term "without consent" means:

(1) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or

(2) the victim is incapable of consent because he is:

(a) mentally defective or incapacitated;

(b) physically helpless; or

(c) less than 16 years old.

History: En. 94-5-501 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 405, L. 1975; amd. Sec. 15, Ch. 359, L. 1977.

Amendments

The 1975 amendment designated the former section as subsection (1) and added subsection (2).

The 1977 amendment deleted former subsection (1) which read "In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply"; and made minor changes in style and phraseology.

Without Consent

An instruction defining lack of consent to include "consent having been overcome by threats, or putting in fear of his [victim's] safety" was not prejudicial to defendant in a prosecution for deviate sexual conduct without consent, where the threats made all related to the victim's physical well being; it would have been better to charge in the words of the statute. State v. Ballew, — M —, 532 P 2d 407.

94-5-502. Sexual assault. (1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months.

(3) If the victim is less than sixteen (16) years old and the offender is three (3) or more years older than the victim, or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

History: En. 94-5-502 by Sec. 1, Ch. 513, L. 1973.

Source: Derived from Model Penal Code, section 213.4.

Commission Comment

This section is a substantial change from the old law. It carries out the rationale behind section 213.4 of the Model

Penal Code. This section deals with acts of sexual aggression which do not involve the element of "penetration" found in R. C. M. 1947, former section 94-4103. The range of activity covered extends from unauthorized fondling of a woman's breasts to homosexual manipulation of a boy's genitals. The old law did not differentiate sexual from other assault, except assault in connection with rape or lewd and lascivious acts upon children. The following considerations favor special treatment of indecent assault within the sexual offense category: (1) The individualized treatment of sexual misconduct with children is consistent with current legislation; (2) Societal concern with indecent assault focuses on the outrage, disgust or shame engendered in the victim rather than fear of physical injury; and (3) the gist of the offense being a sexual imposition, although of a lesser degree. The important features of this section require an actual touching and leave for separate consideration cases of indecent exposure, etc. Although contact must be with the victim it need not be contact between the offender and the victim. Thus, subjecting another to sexual contact with a third person is covered. It covers situations of nonconsent only.

There is a maximum penalty of twenty years if the victim is under sixteen years and the defendant is three years or more older, covering the situation where sexual contact takes a deviate form in regard to children. The rationale behind heavy punishment of "lewd acts upon children" or statutory rape is victimization of immaturity. To give effect to the victimization rationale, an age differential in favor of the male is provided. Thus, a youth who had sexual contact with a fifteen-year-old girl would have to be eighteen years or older before such act is a criminal event.

DECISIONS UNDER FORMER LAW

Constitutionality

The legislature has the power to prohibit the commission of lewd and lascivious acts upon children under certain ages, and former section 94-4106, defining and prescribing punishment for such offense was constitutional. State v. Kocher, 112 M 511, 119 P 2d 35; State v. Jensen, 153 M 489, 458 P 2d 782.

Age of Defendant

The portion of former section 94-4106 giving an exemption of prosecution to a person under the age of eighteen years was a matter of defense, and negation thereof was not a necessary part of the information. State v. Davis, 141 M 197, 376 P 2d 727.

Assault and Attempted Rape Distinguished

Aggressive, indecent, immoral and grossly offensive contact without the consent of the female and with intent to induce her consent to sexual intercourse constituted simple assault but did not constitute attempt to rape in violation of former section 94-4101 where defendant could have accomplished his purpose by force but desisted when the female resisted. State v. Hennessy, 73 M 20, 234 P 1094.

Civil Action for Assault

In an action for damages for attempted rape the testimony of plaintiff should be considered in the light of all the attendant circumstances, as should also the question whether her subsequent conduct was the usual and natural conduct of an outraged woman as bearing upon the credibility of her direct testimony, such charges being easily made, often inspired by malice, hidden motives or revenge, and hard to disprove. Cullen v. Peschel, 115 M 187, 142 P 2d 559.

Evidence of Other Offenses

In prosecution under former section 94-4106 for lewd and lascivious acts upon the person of a child below the age of sixteen years, committed on or about March 19, 1955, it was improper to permit state to show similar acts on August 4, 1951, and in June 1951 in the state of California because of the remoteness in time. State v. Nicks, 134 M 341, 332 P 2d 904, 77 ALR 2d 836.

In prosecution for attempted statutory rape, evidence that defendant could have been charged on a previous occasion and had been warned against association with under-age girls was inadmissible and its prejudice could not be overcome either by warnings to jury or by rebuttal evidence produced by defendant. State v. Tiedemann, 139 M 237, 362 P 2d 529, distinguished in 144 M 401, 396 P 2d 821, and in 155 M 119, 467 P 2d 692.

Where defendant was charged with violation of former section 94-4106, testimony of other women concerning similar improper acts committed by defendant on them was admissible, since such testimony showed continuous pattern of behavior on part of defendant. State v. Jensen, 153 M 233, 455 P 2d 631.

Intent

Evidence that defendant invited a nine-year-old girl, a stranger to him, to his room, locked the door, asked her to remove her dress and placed his hand on her shoulder as if to unbutton her dress,

showed that he had intent to arouse or gratify the passions of himself or the girl, and it was not essential that there be "flesh-to-flesh" contact. State v. Kocher, 112 M 511, 119 P 2d 35.

Evidence that defendant, while intoxicated, attempted to induce children to enter his automobile, entered their car and sat with them, trying to get them to shake hands with him, but departed when told to by one of the children, did not prove intent to arouse or gratify passions within the meaning of former section 94-4106, even when bolstered by psychiatric testimony that defendant was a sexual deviate and ought to be confined. State v. Green, 143 M 234, 388 P 2d 362.

Punishment

A defendant convicted of a lewd and lascivious act upon a child under former section 94-4106 was properly sentenced to a term of not less than ten years pursuant to the second offense law, on proof that he had previously been convicted of lewd and lascivious acts upon a child. In re Davis' Petition, 139 M 622, 365 P 2d 948.

94-5-503. Sexual intercourse without consent. (1) A person who knowingly has sexual intercourse without consent with a person of the opposite sex not his spouse commits the offense of sexual intercourse without consent.

(2) A person convicted of sexual intercourse without consent shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in the state prison for any term of not less than 2 years or more than 40 years, except as provided in 95-2206.18.

(4) An act "in the course of committing sexual intercourse without consent" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this section, except:

(a) evidence of the victim's past sexual conduct with the offender;

(b) evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution under this section.

(6) If the defendant proposes for any purpose to offer evidence described in subsection (5)(a) or (5)(b), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (5).

(7) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.

History: En. 94-5-503 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 2, L. 1975; amd. Sec. 1, Ch. 129, L. 1975; amd. Sec. 1, Ch. 94, L. 1977; amd. Sec. 16, Ch. 359, L. 1977; amd. Sec. 10, Ch. 584, L. 1977.

Source: Derived from Model Penal Code, section 213.0.

Commission Comment

The section provides no age limit on the male offender but section 94-2-109 and the juvenile law R. C. M. 1947, Title 10, provide jurisdictional limitations. Deviate forms of sexual intercourse are included by definition (see section 94-2-101(56)) since these forms of sexual aggression are equally abhorrent. Sexual relations between married people are excluded. The section imposes an increased penalty if bodily injury occurs or there is a three or more year variation between the age of an under sixteen-year-old victim and the actor.

Compiler's Notes

This section was amended three times in 1977 by Chs. 94, 359, and 584. Since the amendments do not appear to conflict,

the Code Commissioner has made a composite section embodying the changes made by all amendments.

Amendments

Chapter 2, Laws of 1975, substituted "A person" and "a person not his spouse" in subsection (1) for "A male person" and "a female not his spouse."

Chapter 129, Laws of 1975, made the same substitutions made by chapter 2; and added subsections (5) and (6).

Chapter 94, Laws of 1977, rewrote the last paragraph which read: "If the issue of failure to make a timely complaint or immediate outcry is raised, the jury shall be informed that such fact, standing alone, may not bar conviction."

Chapter 359, Laws of 1977, inserted "of the opposite sex" after "with a person" in subsection (1); designated the last two paragraphs as subsections (6) and (7); and made minor changes in phraseology, punctuation and style.

Chapter 584, Laws of 1977, substituted "a term of not less than 2 years or more than 20 years, except as provided in 95-2206.18" at the end of subsection (2) for "any term not to exceed twenty (20) years"; substituted "any term of not less than 2 years or more than 40 years, except as provided in 95-2206.18" at the end of subsection (3) for "any term not to exceed forty (40) years"; and made minor changes in phraseology, punctuation and style.

Continuous Resistance Unnecessary

Law did not require that a woman put her life into jeopardy by continuous resistance to rape; testimony of victim that she submitted only after being told that her struggles would be futile because defendant would not let her go until he had finished was sufficient to show lack of consent. State v. Glidden, — M —, 529 P 2d 1384.

DECISIONS UNDER FORMER LAW

Constitutionality

This section is not unconstitutionally vague and ambiguous since the terms used are all defined in the Criminal Code. State v. Ballew, — M —, 532 P 2d 407.

Fact that former statute referred to "male persons" who had sexual intercourse with a "female" did not render it unconstitutional on account of an arbitrary distinction based solely on sex; since most perpetrators of act sought to be prohibited were male and most victims female, the classification was reasonable, and the fact that its application might result in some inequality was not sufficient grounds to invalidate it. State v. Craig, — M —, 545 P 2d 649.

Corroboration of Confession

Where defendant in a prosecution for statutory rape under former section 94-4101 virtually enticed prosecutrix from her home and placed her in a house of unsavory reputation, kept her there for three or four days and did not disclose her whereabouts to her father who was searching for her, and in addition made a confession, these circumstances and a statement by a third party that parties had intercourse were sufficient to prove the corpus delicti and sustain conviction, despite the fact that prosecutrix, third party and defendant all repudiated prior statements to officers that the parties had intercourse. State v. Traufer, 109 M 275, 97 P 2d 336.

Federal Law as to Indians

In the prosecution of an Indian under former section 94-4101, for the crime of rape committed upon a thirteen-year-old female Indian on a reservation, an information which failed to charge that force had been employed or that consent of the victim was lacking failed to state an offense under the federal law which adopted the state law definition of rape. United States v. Rider, 282 F 2d 476.

Force and Violence

Evidence was insufficient to justify a conviction for rape charged to have been accomplished by violence and force, where it appeared that the prosecuting witness failed to make any outcry or to offer any physical resistance which required force to overcome, within the meaning of subdivision 3 of former section 94-4101. State v. Needy, 43 M 442, 117 P 102.

An information for rape under former section 94-4101, alleging that the act was committed by force and against the will and consent of the female, was sufficient, under subdivisions 3 and 4 of that section, and authorized proof that the act was committed under the circumstances provided for in either subdivision. State v. Morrison, 46 M 84, 125 P 649.

To warrant conviction for an attempt to commit rape by force under former section 94-4101, the evidence had to be sufficient to establish beyond a reasonable doubt that the defendant assaulted the prosecutrix with the intention to accomplish his purpose at all events and notwithstanding any resistance on her part; acquittal was required absent intent in the mind of the assailant to overcome by force all resistance which might be offered. State v. Hennessy, 73 M 20, 234 P 1094.

Evidence adduced in a prosecution for an attempted rape by force under former section 94-4104 was insufficient to sustain a verdict of guilty, it presenting a case of urgent solicitation rather than of an intention by the use of force to overcome the resistance of the prosecutrix. State v. Hennessy, 73 M 20, 234 P 1094.

Under former section 94-4101, an information charging rape accomplished by violence and force, and against the will and consent of the prosecuting witness, was sufficient and warranted proof either of resistance overcome by violence or superior force, or of threats of a nature to excuse nonresistance. State v. Whitmore, 94 M 119, 21 P 2d 58.

Under former section 94-4101, there was no variance between an information charging the commission of rape by violence and force, and the evidence of the prosecutrix that she was rendered helpless by a blow in the face which stunned her prior to the commission of the offense, even though she was unconscious or semiconscious during its commission; such proof of her condition as a reason for nonresistance bringing the case within subdivision 3 of that section, i.e., rape, where the resistance of the female is overcome by violence or force. State v. Whitmore, 94 M 119, 21 P 2d 58.

Indictment and Information

In an indictment for rape under former section 94-4101, it was not necessary to allege that the female injured was not the wife of the defendant. State v. Williams, 9 M 179, 23 P 335; State v. Morrison, 46 M 84, 125 P 649.

Instructions to Jury

Instruction in rape case prosecuted under former section 94-4101, which intimated to jury that impact of guilty verdict could be lessened by court's imposition of light sentence was prejudicial to defendant, since punishment should not be a concern to jury in determining defendant's guilt or innocence. State v. Zuidema, 157 M 367, 485 P 2d 952, overruling State v. Metcalf, 153 M 369, 457 P 2d 453.

Juvenile Defendant

Since former section 94-4101 was repealed by implication by Laws of 1943, Ch. 227 (10-601 et seq.), and the amendments thereof, in so far as it was in conflict with the substance and intent thereof, the district criminal court was prohibited from trying child under the age of sixteen years charged with rape. He was solely under the exclusive jurisdiction of the juvenile court. State ex rel. Dahl v. District Court, 134 M 395, 333 P 2d 495.

Penetration

It was not error to instruct the jury in the language of former section 94-4103 that any penetration, however slight, was sufficient, or to add that "Proof of emission is not necessary." State v. Bouldin, 153 M 276, 456 P 2d 830.

Threats

Physical resistance by prosecutrix was not necessary element of rape where evidence supported conviction under subdivision 4 of former section 94-4101, which simply required that there be threats of immediate and great bodily harm, accompanied by apparent power of execution. State v. Metcalf, 153 M 369, 457 P 2d 453, overruled on other grounds in 157 M 367, 373, 485 P 2d 952.

Unconscious Victim

The term "unconscious" as used in subdivision 5 of former section 94-4101, defining the crime of rape, did not have reference to the loss of physical or mental faculties on the part of the female through assault and violence; the subdivision referred only to a situation where the victim was unconscious of the nature of the act. State v. Whitmore, 94 M 119, 21 P 2d 58.

Under-Age Victim

Under former section 94-4101, the question of force was immaterial where the prosecuting witness was under the statutory age of consent. State v. Bowser, 21 M 133, 53 P 179.

Under former section 94-4101, where an information in a rape case charged that defendant had carnal knowledge of a female under the statutory age of consent, violently, and against her will, and there was ample evidence that the female was under that age, it was not incumbent on the state to prove also that she resisted defendant's assault, and that he violently overcame her resistance, even though it had been so alleged. State v. Mahoney, 24 M 281, 61 P 647.

Under former section 94-4101, any man who accomplished an act of sexual intercourse with a female under the age of eighteen years, when such female was not his wife, was guilty of the crime of statutory rape. The corpus delicti was sufficiently proved by the testimony of the prosecutrix that she had sexual intercourse with the accused at the time and place set forth in the information. State v. Reid, 127 M 552, 267 P 2d 986.

Prima facie case of statutory rape was established by victim's testimony that defendant had sexual intercourse with her, corroborated by medical finding of sperm in vagina. State v. Anderson, 156 M 122, 476 P 2d 780.

94-5-504. Indecent exposure. (1) A person who, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm commits the offense of indecent exposure.

(2) A person convicted of the offense of indecent exposure shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-5-504 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 213.5.

Commission Comment

The special case of genital exposure for sexual gratification has been placed in this article along with other types of sexual aggression. It is not meant to include "indecent" brevity of attire, but rather "lewdness" which requires an awareness of the likelihood of affronting observers and is often a threat or prelude to overt sexual aggression.

94-5-505. Deviate sexual conduct. (1) A person who knowingly engages in deviate sexual relations, or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed ten (10) years.

(3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

History: En. 94-5-505 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

The section includes both homosexuality and bestiality. There has been a reduction in the penalty because it was felt that the severe penalty was more a product of revulsion than the social harm in fact committed. The Model Penal Code recommends that bestiality be made a misdemeanor. The Illinois Code contains no provision on the subject. Subsection (3) increases the penalty if the human-victim participant in the bestiality or homosexuality acts without consent. To appreciate the meaning and scope of "without consent" see sections 94-2-101(68) and 94-5-506(3).

Instructions to Jury

Where there was no specific reason to distrust the testimony of the complaining witness, it was not reversible error in a prosecution under this section to refuse an instruction that the witness' testimony should be viewed with caution since a sex offense is easily charged and difficult to disprove. State v. Ballew, — M —, 532 P 2d 407.

DECISIONS UNDER FORMER LAW

Corroboration of Victim

Evidence that defendant and a teenage boy spent a great deal of time together, that defendant had made many gifts to the boy, that the boy had been nervous and lost his appetite, that defendant and the boy were in separate beds in the same room when arrested, and that boy had relaxed sphincter muscles of the anus, was insufficient to corroborate boy's testimony as to perpetration of crime against nature on him. State v. Keckonen, 107 M 253, 84 P 2d 341.

Corroborating evidence to the testimony of the victim showing only that victim, a young boy, slept with the defendant and stayed overnight at defendant's house on several occasions, was insufficient to sustain conviction of violation of former section 94-4118, as it showed nothing more than opportunity to commit the crime. State v. Gangner, 130 M 533, 305 P 2d 338.

Penetration

Ambiguous testimony by eight-year-old victim as to whether anus was penetrated, uncorroborated by medical examination, was insufficient to support conviction of

completed infamous crime against nature. State v. Shambo, 133 M 305, 322 P 2d 657.

The infamous crime against nature prohibited by former section 94-4118 could be committed by penetration of the mouth. State v. Dietz, 135 M 496, 343 P 2d 539.

94-5-506. Provisions generally applicable to sexual crimes. (1) When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than 14 years old.

(2) Whenever the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as husband and wife regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) In a prosecution under the preceding sections on sexual crimes (94-5-502 through 94-5-504) in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally incapacitated, it is a defense to such prosecution that the victim was a voluntary social companion of the defendant and the intoxicating substance was voluntarily and knowingly taken.

History: En. 94-5-506 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 17, Ch. 359, L. 1977.

Source: Substantially the same as Model Penal Code, section 213.6.

Commission Comment

This section rejects the concepts of "virtue," "chastity," or "good repute" as possible defenses in sex crimes but does envision cases of precocious fourteen (14) year old girls and even very young prostitutes who might be the "victimizers," rather than the victims.

Subsection (2) precludes a prosecution for rape where the woman is living with the accused as his wife, regardless of the legal validity of their marital status. Nor is it possible to prosecute where the spouses have been living apart without benefit of a judicial order. There is the possibility of consent in the resumption of sexual relations coupled with the special danger of fabricated accusations.

Conditions affecting a woman's capacity to "control" herself sexually will not involve criminal liability if her own actions were voluntary in bringing about the result.

Amendments

The 1977 amendment substituted "exclusion" in the first sentence of subsection (2) for "extension"; substituted "husband" in the first sentence of subsection (2) for "man"; and made minor changes in phraseology and punctuation.

DECISIONS UNDER FORMER LAW

Age of Victim

In a prosecution for rape under subdivision 1 of former section 94-4101 (female under the age of eighteen years), it was immaterial that she consented to the act, that defendant was ignorant of her age or that she misrepresented her age to him, or that she was lacking in chastity, or at the time was an inmate of a house of prostitution, nonage on her part being sufficient to warrant conviction. State v. Duncan, 82 M 170, 266 P 400.

Part Six

Offenses Against the Family

94-5-601. Repealed.

Repeal

Section 94-5-601 (Sec. 1, Ch. 513, L. 1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

94-5-602. Prostitution. (1) A person commits the offense of prostitution if such person engages in or agrees or offers to engage in sexual intercourse with another person for compensation, whether such compensation is received or to be received, or paid or to be paid.

(2) A person convicted of prostitution shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-5-602 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 80, L. 1975.

Source: New.

Commission Comment

The prior law reflects the common-law concern for prostitution—i.e. the public nuisance aspects of open solicitation. The requirement that the solicitation be public seems at odds with the modern conception that prostitution, discreetly or indiscreetly carried on, ought to be controlled. Thus section 94-5-603(1)(a) reflects the position that professional prostitution is criminal even if carried on in private. Section 94-5-603(1)(b) adopts the idea that prostitution should be controlled when it manifests itself in public solicitation, which may be an annoyance to passers by and an outrage to the moral sensibilities of a large part of the public. The penalty is a misdemeanor, the same as prior law.

Amendments

The 1975 amendment incorporated the text of former subdivision (1)(a) into the body of subsection (1); added "whether such compensation is received or to be received, or paid or to be paid" to subsection (1); deleted former subdivision (1)(b) which read: "loiters in or within view of any public place for the purpose of being hired to engage in sexual intercourse"; and made minor changes in style.

94-5-603. Promoting prostitution. (1) A person commits the offense of promoting prostitution if he purposely or knowingly commits any of the following acts:

(a) owns, controls, manages, supervises, resides in or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business; or

(b) procures an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or

(c) encourages, induces, or otherwise purposely causes another to become or remain a prostitute; or

(d) solicits a person to patronize a prostitute; or

(e) procures a prostitute for a patron; or

(f) transports a person into or within this state with the purpose to promote that person's engaging in prostitution, or procures or pays for transportation with that purpose; or

(g) leases or otherwise permits a place controlled by the offender alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or

(h) lives in whole or in part, upon the earnings of a person engaging in prostitution, unless the person is the prostitute's minor child or other legal dependent incapable of self-support.

(2) A person commits the offense of aggravated promotion of prostitution if he purposely or knowingly commits any of the following acts:

(a) Compels another to engage in or promote prostitution.

(b) Promotes prostitution of a child under the age of eighteen (18) years, whether or not he is aware of the child's age.

(c) Promotes the prostitution of one's spouse, child, ward or any person for whose care, protection or support he is responsible.

(3) A person convicted of promoting prostitution shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. A person convicted of aggravated promotion of prostitution shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

(4) Evidence. On the issue whether a place is a house of prostitution the following, in addition to all other admissible evidence, shall be admissible:

(a) Its general repute; the repute of the persons who reside in or frequent the place; or the frequency, timing and duration of visits by nonresidents.

(b) Testimony of a person against his spouse shall be admissible under this section.

History: En. 94-5-603 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 2, L. 1975.

Source: New.

Commission Comment

This section creates a comprehensive single offense of promoting prostitution, embracing many different acts of collaboration with or exploiting of prostitutes found in prior law as separate offenses. Many undesirable consequences under prior law were possible: accumulation of sentences based on separate convictions for what are really parts of a single criminal transaction, e.g., procuring, transporting, receiving money; unfair double trials, as where a county attorney proceeds for transporting after losing on a procuring charge.

In general the subsidiary clauses of section 94-5-603 are based on prior legislation. Subsection (1)(a) covers R. C. M. 1947, sections 94-3607 and 94-3608. Subsection (1)(b) covers R. C. M. 1947, sections 94-4110, 94-4111, 94-4112, 94-4113 and 94-4114. Subsection (1)(c) also covers the circumstances embraced in R. C. M. 1947, sections 94-4110, 94-4112, and 94-4115. Subsection (1)(d) covers R. C. M. 1947, section 94-3610; subsection (1)(e) covers R. C. M. 1947, section 94-4114. Subsection (1)(f) deals with transportation that promotes prostitution. At the level of interstate and foreign commerce, the federal Mann Act strikes at the organized business of interstate prostitution. This subsection covers local transporting and makes it clear that the transporter must have the purpose to promote, in addition to the knowledge that his action facilitates prostitution. Subsection (1)(g) adopts the principle of prior law, R. C. M. 1947, section 94-3608 making the landlord criminally responsible if he knowingly lets premises for the purpose of prostitution. This subsection is not meant to impose a duty of inquiry or of criminal liability for negligent failure to discover the illicit use of leased premises. Subsection (1)(h) is based on R. C. M. 1947, section 94-4117 which provides for punishment of those who derive their livelihood from the prostitution of others, excepting minor children and dependent adults. Promoting prostitution is a misdemeanor, but a more severe penalty is provided if aggravating circumstances are present.

Special rules of evidence to provide for admission of evidence of repute of alleged houses of prostitution, as well as incriminating testimony against a spouse, are necessary to prove the offense. Abrogation of the common-law privilege of the defendant to bar his spouse from testifying against him has special utility in prosecuting pimps who are not infrequently married to the prostitute.

Amendments

The 1975 amendment substituted "one's spouse" for "his wife" in subdivision (2)(c).

Effective Date

Section 3 of Ch. 2, Laws 1975 provided the act should be in effect from and after its passage and approval. Approved February 6, 1975.

DECISIONS UNDER FORMER LAW

Inducement

An attempt to induce a female to take up her residence in another state for immoral purposes, which was complete before transportation had commenced, was punishable under former section 94-4110 and not under the Mann Act. State v. Reed, 53 M 292, 163 P 477.

Interstate Transportation

Former section 94-4109 prohibiting the importation or exportation of females for immoral purposes was wholly void since Congress had legislated upon the matter in the Mann Act (U. S. C. Tit. 18, §§ 2421-2424). Ex parte Anderson, 125 M 331, 238 P 2d 910.

Procuring

Evidence that defendant obtained and paid rent on prostitute's apartment, forced her to stay there, procured for her and took all money was sufficient for conviction under former section 94-4110. State v. Crockett, 148 M 402, 421 P 2d 722.

Receiving Prostitute's Earnings

Where defendant had given his note for money he obtained from a prostitute, he was not guilty of a violation of former section 94-4116, prohibiting the accepting of money from such persons without consideration, even though he later refused to pay the note placed in a bank for collection. State v. Jones, 51 M 390, 153 P 282.

Knowingly and without consideration taking or receiving from a prostitute any of her earnings was a separate and distinct offense under former section 94-4116 from that of living upon her earnings. State v. Kanakaris, 54 M 180, 169 P 42.

Defendant with independent means who was in no way dependent on a prostitute was not guilty of living on her earnings in violation of former section 94-4117 even though he received money from her. State v. Kanakaris, 54 M 180, 169 P 42.

Provision in former section 94-4116 making the acceptance of money from a prostitute presumptive evidence of lack of consideration was valid. State v. Pippi, 59 M 116, 195 P 556.

Evidence that defendant cashed check given to prostitute by male brought to her by defendant who coerced her to prostitute for him was sufficient to support conviction under former section 94-4114. State v. Crockett, 148 M 402, 421 P 2d 722.

94-5-604. Bigamy. (1) A person commits the offense of bigamy if, while married, he knowingly contracts or purports to contract another marriage, unless at the time of the subsequent marriage:

(a) the offender believes on reasonable grounds that the prior spouse is dead; or

(b) the offender and the prior spouse have been living apart for five (5) consecutive years throughout which the prior spouse was not known by the offender to be alive; or

(c) a court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the offender does not know that judgment to be invalid; or

(d) the offender reasonably believes that he is legally eligible to remarry.

(2) A person convicted of bigamy shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-5-604 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 230.1.

Commission Comment

This section has a broader coverage than prior law in that it applies to anyone who has "contracted a marriage." It is possible to contract a marriage which is a legal nullity. A man could marry a woman who, unknown to him, is already married to another and could marry again without bothering to divorce the first woman. Or a man could marry successively two women who, by reason of youth or mental defect, are incapable of contracting marriage. In each case he demonstrates a disposition to plural marriage, unless he comes within the good faith defense of subsection (1)(c). The concept of marriage in this section includes common-law marriage contracted in a jurisdiction that recognizes this form of marriage. Subsection (1)(a) absolves the defendant in a bigamy case that he believed his spouse to be dead. On policy grounds there is no valid reason to stigmatize or punish remarriage by people who in good faith believe themselves to be widows or widowers.

Subsection (1)(b) creates an exception based on a five-year conclusive presumption of death. Subsections (1)(c) and (d) provide that one who has a reasonable basis for believing himself

legally eligible to marry does not commit a criminal offense by a second marriage. Questions of the validity of foreign divorces are so perplexing that lawyers and the courts are often divided on the legal issues. It is well-settled that a single person who marries a divorced person is not liable to punishment if he made a reasonable mistake as to the legal validity of the other's divorce. It seems harsh to subject a defendant, who remarries following an out-of-state divorce, to a criminal bigamy prosecution where a person sophisticated in law might be unsure as to the validity of the foreign divorce. This section is intended to avoid such a result.

DECISIONS UNDER FORMER LAW

Prior Bigamous Marriage

A bigamous marriage, though void for civil purposes, is still valid for criminal purposes until pronounced void by a competent court, and a third marriage without a decree declaring the second marriage void was bigamous even though defendant had obtained a divorce from his first wife and even though the second marriage was void from the beginning for civil purposes. State v. Crosby, 148 M 307, 420 P 2d 431; Crosby v. Ellsworth, 431 F 2d 35.

94-5-605. Marrying a bigamist. (1) A person commits the offense of marrying a bigamist if he contracts or purports to contract a marriage with another knowing that the other is thereby committing bigamy.

(2) A person convicted of the offense of marrying a bigamist shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any period not to exceed six (6) months, or both.

History: En. 94-5-605 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section also applies to someone who purports to contract a marriage. Like prior law, this section punishes the knowing participation in a bigamous marriage. The punishment has been reduced to a misdemeanor which should provide sufficient deterrent.

94-5-606. Incest. (1) A person commits the offense of incest if he knowingly marries or cohabits or has sexual intercourse with an ancestor, a descendant, a brother or sister of the whole or half blood. "Cohabit" means to live together under the representation of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationships of parent and child by adoption.

(2) A person convicted of incest shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-5-606 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section is patterned after the Model Penal Code. The uncle-aunt-nephew-niece cases are excluded from the category of "felonious incest," in view of the severity of the penalty.

The marriage regulations of R. C. M. 1947, section 48-105 circumscribe marriage more strictly than the criminal incest law, but different considerations justify a more limited scope in criminal incest vis a vis a marriage contract. Relations between uncles and under-age nieces would be "sexual intercourse without consent." "Ancestor" and "descendant" include all persons in lineal ascent and descent from one body.

DECISIONS UNDER FORMER LAW

Marital Status of Parties

There was no substantial change in the charge under former section 94-705 where the court allowed the state to amend an information charging defendant with incest by changing "fornication" to "adultery." Whether the defendant was married or unmarried at the time was not a material ingredient of the offense. In either event the defendant was guilty, if the intercourse charged was proved. State v. Kuntz, 130 M 126, 295 P 2d 707.

Single Act

A single act of sexual intercourse was sufficient to support a conviction under former section 94-705 and it was not necessary that fornication be open as required under the section making fornication a crime. Territory v. Corbett, 3 M 50.

94-5-607. Endangering the welfare of children. (1) A parent, guardian, or other person supervising the welfare of a child less than 16 years old commits the offense of endangering the welfare of children if he knowingly endangers the child's welfare by violating a duty of care, protection, or support.

(2) A parent or guardian or any person who is 18 years of age or older, whether or not he is supervising the welfare of the child, commits the offense of endangering the welfare of children if he knowingly contributes to the delinquency of a child less than 16 years old by:

(a) supplying or encouraging the use of intoxicating substances by the child; or

(b) assisting, promoting, or encouraging the child to:

(i) abandon his place of residence without the consent of his parents or guardian;

(ii) enter a place of prostitution; or

(iii) engage in sexual conduct.

(3) A person convicted of endangering the welfare of children shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of endangering the welfare of children shall be fined not to exceed $1,000 or imprisoned in the county jail for any term not to exceed 6 months, or both.

(4) On the issue of whether there has been a violation of the duty of care, protection, and support, the following, in addition to all other admissible evidence, is admissible: cruel treatment; abuse; infliction of unnecessary and cruel punishment; abandonment; neglect; lack of proper medical care, clothing, shelter, and food; and evidence of past bodily injury.

(5) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of endangering the welfare of children paid to or for the benefit of the person or persons whose welfare the defendant has endangered.

History: En. 94-5-607 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 85, L. 1975; amd. Sec. 1, Ch. 218, L. 1977; amd. Sec. 18, Ch. 359, L. 1977.

Source: New.

Commission Comment

This section penalizes a limited class of misbehavior by a parent or other person legally responsible for the care and supervision of children. This offense can be committed only by an act or omission in violation of a legal duty. That legal duty may be one which does not itself carry a penal sanction; this section adds the penal sanction when violation of the duty creates a known danger to the child. Although the commission recognizes that prosecution of parents will seldom be a constructive solution to intra-family problems, it seems worthwhile to retain a penal sanction for gross breach of parental responsibility. Also provision is made that any criminal fine levied against the offender may be used to aid the disadvantaged minor. The age designation is arbitrary but consistent with the other provisions in the code intended to protect children.

Compiler's Notes

This section was amended twice in 1977, once by Ch. 218 and once by Ch. 359. Since the amendments do not appear to

conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.

Amendments

The 1975 amendment inserted subsection (2); designated former subsections (2) to (4) as (3) to (5); and added the second sentence in subsection (3).

Chapter 218, Laws of 1977, substituted "any person who is 18 years of age or older, whether or not he is supervising the welfare of the child" near the middle of subsection (2) for "other person"; substituted "child" for "youth" near the end of subsection (2); divided portions of subdivision (2)(b) into separate items; deleted "leave or" after "encouraging a child to" at the end of the introductory paragraph of subdivision (2)(b); deleted "or to enter places exclusively for adults" at the end of subdivision (2)(b); and made minor changes in phraseology and punctuation.

Chapter 359, Laws of 1977, substituted "child less than 16 years old" near the end of subsection (2) for "youth"; deleted "Evidence" at the beginning of subsection (4); and made minor changes in phraseology, punctuation and style.

Effective Date

Section 2 of Ch. 85, Laws 1975 provided the act should be in effect from and after its passage and approval. Approved March 19, 1975.

94-5-608. Nonsupport. (1) A person commits the offense of nonsupport if he fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child, or other dependent.

(2) A person commits the offense of aggravated nonsupport if:

(a) the offender has left the state to avoid the duty of support; or

(b) the offender has been previously convicted of the offense of nonsupport.

(3) A person convicted of nonsupport shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of aggravated nonsupport shall be imprisoned in the state prison for any term not to exceed 10 years.

(4) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of nonsupport paid to or for the benefit of any person that the defendant has failed to support.

History: En. 94-5-608 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 19, Ch. 359, L. 1977.

Source: New.

Commission Comment

This section confines the criminal offense of nonsupport to failure to provide support which the accused knows he is legally obliged to provide. The policy of the former law is retained, that is, the section is designed to compel the defendant to perform his duty rather than make him an object of exemplary punishment. Exemplary punishment is of doubtful efficacy in complex family situations, where many forces, both social and economic, may combine to excuse the behavior. The fact that nonsupport can be prosecuted lays the basis for intervention by the county attorney, who can thus provide legal aid to indigent families and coerce the accused to support his family. The problem of enforcing support obligations of defendants who leave their families and go to another state has been largely solved by the Uniform Reciprocal Enforcement of Support Act. However, extraditing the defendant on a felony criminal charge is still possible under the aggravating circumstances of subsection (2).

Amendments

The 1977 amendment added "or" to the end of subsection (2)(a); substituted "any person" for "person or persons" in subsection (4); and made minor changes in style.

94-5-609. Unlawful transactions with children. (1) A person commits the offense of unlawful transactions with children if he knowingly:

(a) sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances; or

(b) sells or gives intoxicating substances to a child under the age of majority; or

(c) being a junk dealer, pawnbroker or secondhand dealer he receives or purchases goods from a child under the age of majority without authorization of the parent or guardian.

(2) A person convicted of the offense of unlawful transactions with children shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined not to exceed one thousand dollars ($1,000) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-5-609 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section is merely a partial recodification of a number of statutes on unlawful transactions with children. (See R. C. M. 1947, sections 94-35-106 to 94-35-106.2, 94-3702 and 69-1902.) Other statutes relating to children were repealed. (See R. C. M. 1947, sections 94-35-138, 94-35-137 and 94-35-208.) The substance of still other statutes relating to children were placed elsewhere in the code.

Compiler's Notes

Section 2, Ch. 264, Laws 1977, proposes to amend this section to read as follows: "94-5-609. Unlawful transactions with children. (1) A person commits the offense of unlawful transactions with children if he knowingly:

"(a) sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances;

"(b) sells or gives intoxicating substances other than alcoholic beverages to a child under the age of majority;

"(c) sells or gives alcoholic beverages to a person under 19 years of age; or

"(d) being a junk dealer, pawnbroker, or secondhand dealer he receives or purchases goods from a child under the age of majority without authorization of the parent or guardian.

"(2) A person convicted of the offense of unlawful transactions with children shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both."

Section 4, Ch. 264, Laws 1977 provides: "Sections 1, 2, and 3 of this act [amending sections 4-6-104, 94-5-609, and 94-5-610], if approved by the electors of the state of Montana, are effective January 1, 1979."

Section 5, Ch. 264, Laws 1977, provides: "The question of whether this act will become effective shall be submitted to the electors of the state of Montana at the general election to be held November 7, 1978, by printing on the ballot the full title, and the following:

☐ FOR raising the legal drinking age to 19.

☐ AGAINST raising the legal drinking age to 19."

DECISIONS UNDER FORMER LAW

Entrapment

Entrapment was no defense in a prosecution for selling liquor to a minor even though a public officer gave the minor money and instructed him to buy whiskey, whereupon the minor entered defendant's bar, offered to buy and was sold whiskey, where the officers did not induce the sale by defendant or mislead him as to the minor's age. State v. Parr, 129 M 175, 283 P 2d 1086, 55 ALR 2d 1313.

Furnishing Liquor

Evidence that defendant poured drinks containing intoxicating liquor and set them out on a dresser in his hotel room and that a minor picked one up and consumed it supported conviction under former section 94-35-106. State v. Clark, 87 M 416, 288 P 186.

Intoxicating Beverage

Information charging defendant with selling intoxicating liquor to minor was sufficient even though it did not specify the kind of liquor furnished. State v. Baker, 87 M 295, 286 P 1113.

Information charging sale of intoxicating beverage to minor was sufficient when it described the beverage as "beer," and it

was not necessary to allege the percentage of alcohol. State v. Winter, 129 M 207, 285 P 2d 149.

In prosecution for violation of former section 94-35-106, corpus delicti was established by evidence that the defendant poured minor a drink from a bottle marked "Vodka." State v. Moore, 138 M 379, 357 P 2d 346.

License

In prosecution for selling intoxicating liquor to a minor, it was immaterial whether defendant was licensed under the alcoholic beverage laws, and amendment of information to insert allegation that defendant was an employee of a licensee was surplusage and not prejudicial to defendant. State v. Winter, 129 M 207, 285 P 2d 149.

Misrepresentation of Age

In a prosecution under former section 94-35-106 for furnishing liquor to a minor, misrepresentation of age by the minor was no defense and it was immaterial what precautions defendant took to ascertain the buyer's age. State v. Paskvan, 131 M 316, 309 P 2d 1019.

Minor who misrepresented his age to obtain liquor was guilty of violation of section 4-3-306, rather than being an accomplice under former section 94-35-106, and it was not necessary to corroborate his testimony as to his own age. State v. Paskvan, 131 M 316, 309 P 2d 1019.

Other Transactions

In prosecution for selling liquor to a particular minor, testimony by six other minors as to purchases by them from defendant was admissible under proper instructions to jury. State v. Gussenhoven, 116 M 350, 152 P 2d 876.

Punishment

Amount of punishment imposed for selling intoxicating liquor to a minor under former section 94-35-106 was for the legislature and not for review by supreme court. State v. Gussenhoven, 116 M 350, 152 P 2d 876.

94-5-610. Unlawful possession of intoxicating substance by children. (1) A person who has not reached the age of majority commits the offense of possession of intoxicating substance if he knowingly has in his possession an intoxicating substance, except a person who has not reached the age of majority does not commit the offense of possession of an intoxicating substance when in the course of his employment, he bags, carries or transports beer for customers at a grocery store.

(2) A person convicted of the offense of possessing an intoxicating substance shall be fined not to exceed $50 or be imprisoned in the county jail for any term not to exceed 10 days, or both. If proceedings are held in the youth court, the preceding penalty does not apply and the offender shall be treated as an alleged youth in need of supervision as defined in 10-1203(13). In such case, the youth court may enter its judgment under 10-1222.

History: En. 94-5-610 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 87, L. 1974; amd. Sec. 1, Ch. 536, L. 1977.

Source: Substantially the same as Revised Codes of Montana 1947, section 94-35-106.2.

Commission Comment

This section is merely a recodification of the present statute on this subject.

Compiler's Notes

Section 3, Ch. 264, Laws 1977, proposes to amend this section to read as follows: "94-5-610. Unlawful possession of intoxicating substance by children. (1) A person under the age of 18 years commits the offense of possession of intoxicating substance if he knowingly has in his possession an intoxicating substance other than an alcoholic beverage. A person under the age of 19 commits the offense of possession of an intoxicating substance if he knowingly has in his possession an alcoholic beverage, except that he does not commit the offense when in the course of his employment it is necessary to possess alcoholic beverages.

"(2) A person convicted of the offense of possessing an intoxicating substance shall be fined not to exceed $50 or be imprisoned in the county jail for any term not to exceed 10 days, or both."

Section 4, Ch. 264, Laws 1977 provides: "Sections 1, 2, and 3 of this act [amending sections 4-6-104, 94-5-609, and 94-5-610], if approved by the electors of the state of Montana, are effective January 1, 1979."

Section 5, Ch. 264, Laws 1977, provides: "The question of whether this act will be-

come effective shall be submitted to the electors of the state of Montana at the general election to be held November 7, 1978, by printing on the ballot the full title, and the following:

☐ FOR raising the legal drinking age to 19.

☐ AGAINT raising the legal drinking age to 19."

Amendments

The 1974 amendment added the exception at the end of subdivision (1); and made a minor change in punctuation.

The 1977 amendment added the last two sentences of subsection (2); and made minor changes in style.

94-5-611, 94-5-612. (11023, 11024) Repealed.

Repeal

Sections 94-5-611 and 94-5-612 (Sec. 41, p. 184, Bannack Stat.; Sec. 481, Pen. C. 1895; Sec. 29, Ch. 513, L. 1973), relating to producing a miscarriage, was repealed by Sec. 77, Ch. 359, Laws 1977.

94-5-613. Short title. This act shall be known and may be cited as the "Montana Abortion Control Act."

History: En. 94-5-613 by Sec. 1, Ch. 284, L. 1974.

Title of Act

An act regulating abortions; providing for keeping of records of abortions; declaring the right to refuse to participate in abortions; protecting the life of the fetus; providing penalties, and an effective date.

94-5-614. Statement of purpose. The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life.

History: En. 94-5-614 by Sec. 2, Ch. 284, L. 1974.

94-5-615. Definitions. As used in this act the following definitions apply:

(1) "Department" means the department of health and environmental sciences provided for in Title 82A, chapter 6.

(2) "Facility" means a hospital, health care facility, physician's office, or other place in which an abortion is performed.

(3) (a) "Informed consent" means voluntary consent to an abortion by the woman upon whom the abortion is to be performed only after full disclosure to her by the physician who is to perform the abortion of such of the following information as is reasonably chargeable to the knowledge of the physician in his professional capacity:

(i) the stage of development of the fetus, the method of abortion to be utilized, and the effects of such abortion method upon the fetus;

(ii) the physical and psychological effects of abortion; and

(iii) available alternatives to abortion, including childbirth and adoption.

(b) Informed consent may be evidenced by a written statement in a form prescribed by the department and signed by the physician and the woman upon whom the abortion is to be performed in which the physician certifies that he has made the full disclosure provided above and in which

the woman upon whom the abortion is to be performed acknowledges that the above disclosures have been made to her and that she voluntarily consents to the abortion.

(4) "Abortion" means the performance of, assistance or participation in the performance of, or submission to an act or operation intended to terminate a pregnancy without live birth.

(5) "Viability" means the ability of a fetus to live outside the mother's womb, albeit with artificial aid.

History: En. 94-5-615 by Sec. 3, Ch. 284, L. 1974; amd. Sec. 38, Ch. 187, L. 1977.

Amendments

The 1977 amendment added "provided for in Title 82A, chapter 6" to subsection (1); inserted the subdivision designations under subsection (3); changed the designations of the subheadings under subdivision (3)(a) from letters to roman numerals; and made minor changes in style, punctuation and phraseology.

Repealing Clause

Section 39 of Ch. 187, Laws 1977 read "Sections 41-2101 through 41-2108, 69-1924, and 82-1232, R.C.M. 1947, are repealed."

94-5-616. Consent to abortion. (1) No abortion may be performed upon any woman in the absence of informed consent.

(2) No abortion may be performed upon any woman in the absence of:

(a) the written notice to her husband, unless her husband is voluntarily separated from her;

(b) the written notice to a parent, if living, or the custodian or legal guardian of such woman, if she is under eighteen (18) years of age and unmarried.

(3) The above informed consent or consent is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(4) No executive officer, administrative agency or public employee of the state of Montana or of any local governmental body has power to issue any order requiring an abortion or shall coerce any woman to have an abortion, nor shall any person coerce any woman to have an abortion.

(5) Violation of subsection (1), (2) or (4) of this section is a misdemeanor.

(6) The use of the prescribed departmental form of informed consent required by section 3 [94-5-615(3)] shall not be mandatory until July 1, 1974. Prior thereto, a written statement fairly setting forth the content specified by section 3 [94-5-615(3)] shall be in compliance therewith.

History: En. 94-5-616 by Sec. 4, Ch. 284, L. 1974.

94-5-617. Protection of life and health of infant. (1) A person commits the offense of criminal homicide, as defined in sections 94-5-101 through 94-5-104, if he purposely, knowingly, or negligently causes the death of a premature infant born alive, if such infant is viable.

(2) Whenever a premature infant which is the subject of abortion if is born alive and is viable, it becomes a dependent and neglected child subject to the provisions of state law, unless:

(a) the termination of the pregnancy is necessary to preserve the life of the mother; or

(b) the mother and her spouse, or either of them, have agreed in writing in advance of the abortion, or within seventy-two (72) hours thereafter, to accept the parental rights and responsibilities of the premature infant if it survives the abortion procedure.

(3) No person may use any premature infant born alive for any type of scientific research, or other kind of experimentation except as necessary to protect or preserve the life and health of such premature infant born alive.

(4) The department shall make regulations to provide for the humane disposition of dead infants or fetuses.

(5) Violation of subsection (3) of this section is a felony.

History: En. 94-5-617 by Sec. 5, Ch. 284, L. 1974; amd. Sec. 13, Ch. 338, L. 1977.

Amendments

The 1977 amendment substituted "94-5-104" for "94-5-105" in subsection (1).

94-5-618. Control of practice of abortion. (1) No abortion may be performed within the state of Montana:

(a) except by a licensed physician;

(b) after the first 3 months of pregnancy, except in a hospital licensed by the department;

(c) after viability of the fetus, unless in appropriate medical judgment the abortion is necessary to preserve the life or health of the mother. An abortion under this subsection (1)(c) may only be performed if:

(i) the foregoing judgment of the physician who is to perform the abortion is first certified in writing by him, setting forth in detail the facts upon which he relies in making such judgment; and

(ii) two other licensed physicians have first examined the patient and concurred in writing with such judgment.

The foregoing certification and concurrence is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(2) The timing and procedure used in performing an abortion under subsection (1) (c) of this section must be such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in 94-2-101(31). The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health of the mother.

(3) No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

(4) Violation of subsections (1) and (2) of this section is a felony. Violation of subsection (3) of this section is a misdemeanor.

History: En. 94-5-618 by Sec. 6, Ch. 284, L. 1974; amd. Sec. 20, Ch. 359, L. 1977.

Amendments

The 1977 amendment changed the reference in subsection (2) to conform to the amendment of section 94-2-101; and made minor changes in phraseology, punctuation and style.

94-5-619. Reporting of practice of abortion. (1) Every facility in which an abortion is performed within the state of Montana shall keep on file upon a form prescribed by the department a statement dated and certified by the physician who performed the abortion setting forth such information with respect to the abortion as the department by regulation shall require; including, but not limited to, information on prior pregnancies; the medical procedure employed to administer the abortion; the gestational age of the fetus; the vital signs of the fetus after abortion, if any; and if after viability, the medical procedures employed to protect and preseve the life and health of the fetus.

(2) The physician performing an abortion shall cause such pathology studies to be made in connection therewith as the department shall require by regulation, and the facility shall keep the reports thereof on file.

(3) In connection with an abortion, the facility shall keep on file the original of each of the documents required by this act relating to informed consent, consent to abortion, certification of necessity of abortion to preserve the life or health of the mother, and certification of necessity of abortion to preserve the life of the mother.

(4) Such facility shall within thirty (30) days after the abortion file with the department a report upon a form prescribed by the department and certified by the custodian of the records or physician in charge of such facility setting forth all of the information required in subsections (1), (2), and (3) of this section, except such information as would identify any individual involved with the abortion. The report shall exclude copies of any documents required to be filed by subsection (3) of this section, but shall certify that such documents were duly executed and are on file.

(5) All reports and documents required by this act shall be treated with the confidentiality afforded to medical records, subject to such disclosure as is permitted by law; except that statistical data not identifying any individual involved in an abortion shall be made public by the department annually, and the report required by subsection (4) of this section to be filed with the department shall be available for public inspection except in so far as it identifies any individual involved in an abortion. Names and identities of persons submitting to abortion shall remain confidential among medical and medical support personnel directly involved in the abortion, and among persons working in the facility where the abortion was performed whose duties include billing the patient or submitting claims to an insurance company, keeping facility records, or processing abortion data required by state law.

(6) The department shall report to the attorney general any apparent violation of this act.

(7) The reports required by this section shall not be mandatory for any abortion performed prior to July 1, 1974.

History: En. 94-5-619 by Sec. 7, Ch. 284, L. 1974.

94-5-620. Refusal to participate in abortion. (1) No private hospital or health care facility shall be required contrary to the religious or moral tenets or the stated religious beliefs or moral convictions of its staff or governing board to admit any person for the purpose of abortion or to permit the use of its facilities for such purpose. Such refusal shall not give rise to liability of such hospital or health care facility, or any personnel or agent or governing board thereof, to any person for damages allegedly arising from such refusal, nor be the basis for any discriminatory, disciplinary, or other recriminatory action against such hospital or health care facility, or any personnel, agent, or governing board thereof.

(2) All persons shall have the right to refuse to advise concerning, perform, assist, or participate in abortion because of religious beliefs or moral convictions. If requested by any hospital or health care facility, or person desiring an abortion, such refusal shall be in writing signed by the person refusing, but may refer generally to the grounds of "religious beliefs and moral convictions." The refusal of any person to advise concerning, perform, assist, or participate in abortion, shall not be a consideration in respect of staff privileges of any hospital or health care facility, nor a basis for any discriminatory, disciplinary, or other recriminatory action against such person, nor shall such person be liable to any person for damages allegedly arising from refusal.

(3) It shall be unlawful to interfere or attempt to interfere with the right of refusal authorized by this section. The person injured thereby shall be entitled to injunctive relief, when appropriate, and shall further be entitled to monetary damages for injuries suffered.

(4) Such refusal by any hospital or health care facility or person shall not be grounds for loss of any privileges or immunities to which the granting of consent may otherwise be a condition precedent, or for the loss of any public benefits.

(5) As used in this section, the term "person" includes one or more individuals, partnerships, associations, and corporations.

History: En. 94-5-620 by Sec. 8, Ch. 284, L. 1974.

94-5-621. Other regulations. The department shall make regulations for a comprehensive system of reporting of maternal deaths and complications within the state of Montana resulting directly or indirectly from abortion, subject to the provisions of section 7 [94-5-619(5)] of this act.

History: En. 94-5-621 by Sec. 9, Ch. 284, L. 1974.

94-5-622. Penalties. (1) A person convicted of criminal homicide under this act is subject to the penalties prescribed by sections 94-5-101 through 94-5-104.

(2) A person convicted of a felony other than criminal homicide under this act is subject to a fine not to exceed one thousand dollars

($1,000), or imprisonment in the state prison for a term not to exceed five (5) years, or both.

(3) A person convicted of a misdemeanor under this act is subject to a fine not to exceed five hundred dollars ($500), or imprisonment in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-5-622 by Sec. 10, Ch. 284, L. 1974; amd. Sec. 14, Ch. 338, L. 1977.

Amendments

The 1977 amendment substituted "94-5-104" in subsection (1) for "94-5-105."

Separability Clause

Section 15 of Ch. 338, Laws 1977 read "If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Repealing Clause

Section 16 of Ch. 338, Laws 1977 read "Sections 94-5-105, 94-5-304, and 95-2206.1, R.C.M. 1947, are repealed."

94-5-623. Legislative intent. It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation.

History: En. 94-5-623 by Sec. 11, Ch. 284, L. 1974.

94-5-624. Severability. It is the intent of the legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all the valid applications that are severable from the invalid applications.

History: En. 94-5-624 by Sec. 12, Ch. 284, L. 1974.

Effective Date

Section 13 of Ch. 284, Laws 1974 provided the act should be in effect from and after its passage and approval. Approved March 25, 1974.

CHAPTER 6

OFFENSES AGAINST PROPERTY

Part 1—Criminal Mischief and Arson

Part 2—Criminal Trespass and Burglary

Part 3—Theft and Related Offenses

Part 1

Criminal Mischief and Arson

94-6-101. Repealed.

Repeal

Section 94-6-101 (Sec. 1, Ch. 513, L. 1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

94-6-102. Criminal mischief. (1) A person commits the offense of criminal mischief if he knowingly or purposely:

(a) injures, damages or destroys any property of another or public property without consent; or

(b) without consent tampers with property of another or public property so as to endanger or interfere with persons or property or its use; or

(c) damages or destroys property with the purpose to defraud an insurer; or

(d) fails to close a gate previously unopened which he has opened, leading in or out of any inclosed premises. This does not apply to gates located in cities or towns.

(2) A person convicted of the offense of criminal mischief shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender commits the offense of criminal mischief and causes pecuniary loss in excess of one hundred fifty dollars ($150), or injures or kills a commonly domesticated hoofed animal, or causes a substantial interruption or impairment of public communication, transportation, supply of water, gas, or power, or other public services, he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-6-102 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 88, L. 1975.

Source: New.

Commission Comment

This section defines the behavior that is punishable because it harms or threatens to harm property. In so far as the section deals with purposeful, unjustified actual harm to property, it corresponds to the traditional "malicious mischief" offense. This section would include killing, maiming, or poisoning livestock. The section is more comprehensive and requires proof of a different mental state than prior law.

Subsection (2) classifies some criminal mischief a felony by providing imprisonment up to ten (10) years in the state prison for causing pecuniary loss in excess of one hundred fifty ($150) dollars. Under the old malicious mischief section (R. C. M. 1947, section 94-3301) the amount of loss required for a felony conviction was only fifty ($50) dollars and there was a mandatory minimum penalty of one year. This section has changed the minimum amount necessary for a felony conviction to conform with changing values.

Amendments

The 1975 amendment inserted "or public property" after "property of another" in subdivisions (1)(a) and (b).

DECISIONS UNDER FORMER LAW

Burning of Jail

Prisoner who started fire in jail portion of the courthouse which fire spread and consumed the entire building was properly charged with second degree arson rather than with destroying a jail. Petition of Weiss, — M —, 511 P 2d 1319.

Lesser Included Offenses

The malicious destruction of property was not included in the crime of willful and malicious burning of property, as defined by former section 94-3303. State v. Sieff, 54 M 165, 168 P 524.

Maiming of Animal

To constitute the act of "maiming" an animal, a felony within the meaning of former section 94-1208, permanent injury must have been inflicted. State v. Benson, 91 M 21, 5 P 2d 223.

Evidence that defendant fired a load of shot into horse at a distance of ten feet and at a point nearest the heart supported an inference of intent to kill or maim and a conviction for attempt to maim under former section 94-1208. State v. Benson, 91 M 21, 5 P 2d 223.

94-6-103. Negligent arson. (1) A person commits the offense of negligent arson if he purposely or knowingly starts a fire or causes an explosion, whether on his own property or property of another and thereby negligently:

(a) places another person in danger of death or bodily injury; or

(b) places property of another in danger of damage or destruction.

(2) A person convicted of the offense of negligent arson shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender places another person in danger of death or bodily injury, he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-6-103 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

Section 94-6-103 differs substantially from the current Model Arson Law. First, it eliminates the grading of arson into degrees by reference to the class of property destroyed. Second, it prohibits negligent uses of fire or explosives which endanger persons or property unaccompanied by injury or damage, and third, it includes the burning of one's own property in circumstances where there is a high risk that the fire will spread to property of others or where the burning of lesser forms of property is accomplished in close proximity to occupied structures.

The provisions of subsection (1) are to be construed as pertaining to affirmative knowing and purposeful acts and are not intended to include omissions to report, control or combat a fire which has placed a person in danger of bodily injury or death, or an occupied structure in danger of damage or destruction. If a person starts a fire negligently or fails to control a fire thus placing persons or property in danger the act is made punishable by R. C. M. 1947, section 28-115.

94-6-104. Arson. (1) A person commits the offense of arson when, by means of fire or explosives, he knowingly or purposely:

(a) damages or destroys an occupied structure which is property of another without consent; or

(b) places another person in danger of death or bodily injury.

(2) A person convicted of the offense of arson shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

History: En. 94-6-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 261, L. 1975.

Source: New.

Commission Comment

This section, together with section 94-6-103, Negligent Arson, is intended to completely replace the old Model Arson Law which classifies offenses in an illogical and arbitrary fashion. The burning of an empty, isolated dwelling could result in a twenty (20) year sentence under R.

C. M. 1947, section 94-502, while setting fire to a crowded church or theater or jail could yield only a maximum sentence of ten (10) years under R. C. M. 1947, section 94-503. Moreover, it makes little sense to treat the burning of miscellaneous personal property, whether out of malice or to defraud insurers a special category of crime apart from the risks associated from burning. To destroy a valuable painting or manuscript by burning it in a hearth or furnace cannot be distinguished criminologically from any other method of destruction.

Amendments

The 1975 amendment inserted "which is property" after "structure" in subdivision (1)(a).

DECISIONS UNDER FORMER LAW

Lesser Included Offense

The malicious destruction of property was not included in the crime of willful and malicious burning of property, as defined by former section 94-3303. State v. Sieff, 54 M 165, 168 P 524.

94-6-105. [Transferred.]

Compiler's Notes

Section 74, Ch. 359, Laws of 1977, renumbered this section as sec. 94-8-209.3.

Part 2

Criminal Trespass and Burglary

94-6-201. Definition. (1) "Enter or remain unlawfully." A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when he is not licensed, invited, or otherwise privileged to do so. A person who enters or remains upon land does so with privilege unless notice is personally communicated to him by an authorized person or unless such notice is given by posting in a conspicuous manner.

(2) In no event shall civil liability be imposed upon the owner or occupier of premises by reason of any privilege created by this section.

History: En. 94-6-201 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 21, Ch. 359, L. 1977.

Source: New.

Commission Comment

The core of the common-law concept of burglary was breaking and entering a dwelling house at night with intent to commit a felony therein. The scope of the offense has enlarged until under prevailing law, the offense may be committed by entry alone, in daytime as well as by night, in any building, structure, or "vehicle."

In this code "occupied structure" is narrowly defined to include buildings where people are living or working and where intrusions are most alarming and dangerous. For example, the definition does not include barns, or derelict and abandoned buildings unsuited for human occupancy. In the case of a mine or ship, for example, occupancy would have to be proved. "Entering or remaining unlawfully" is a concept which takes a middle ground between prevailing law requiring breaking and its complete elimination in some modern legislation.

Amendments

The 1977 amendment substituted "section" at the end of subsection (2) for "action"; and made minor changes in style, phraseology and punctuation.

DECISIONS UNDER FORMER LAW

Uninclosed Range Land

The proviso to former section 94-35-237, requiring the marking of boundaries as a prerequisite to criminal liability for driving herds onto private land, did not change the rule relating to civil liability that a herder must determine the boundaries of private land at his peril. Herrin v. Sieben, 46 M 226, 127 P 323, overruled on other grounds in 131 M 494, 501, 311 P 2d 982, 986.

94-6-202. Criminal trespass to vehicles. (1) A person commits the offense of criminal trespass to vehicles when he purposely or knowingly and without authority enters any vehicle or any part thereof.

(2) A person convicted of the offense of criminal trespass to vehicles shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-6-202 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 21-2.

Commission Comment

The section is intended to cover a troublesome area of criminal activity which is easily identifiable and well-known to the police. The section covers only trespass to vehicles, aircraft or watercraft. If the trespass involves damage to a vehicle, the separate offense of criminal mischief (94-6-102) is committed.

94-6-203. Criminal trespass to property. (1) A person commits the offense of criminal trespass to property if he knowingly:

(a) enters or remains unlawfully in an occupied structure; or

(b) enters or remains unlawfully in or upon the premises of another.

(2) A person convicted of the offense of criminal trespass to property shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-6-203 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 21-3.

Commission Comment

This section covers criminal trespass to land without regard to the nature, use or location of the land. Criminal trespass is committed only if the offender, immediately prior to entry, receives oral or written notice that such entry is forbidden, or he remains upon the land after being notified to leave. The section differs substantially from R. C. M. 1947, section 94-3308, "Malicious injuries to freehold," in that no specific act causing damage need be alleged, only the unlawful presence of the offender. Should damage occur during the trespass, the offender could be prosecuted under section 94-6-102, Criminal Mischief.

DECISIONS UNDER FORMER LAW

Hunting on Posted Land

A person who hunted on inclosed land without the consent of one entitled to its possession was a trespasser, and where the land was posted warning against hunting, was in violation of former section 94-3309. Herrin v. Sutherland, 74 M 587, 241 P 328.

94-6-204. Burglary. (1) A person commits the offense of burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.

(2) A person commits the offense of aggravated burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit a felony therein, and

(a) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he or another participant in the offense is armed with explosives or a weapon; or

(b) in effecting entry or in the course of committing the offense, or in immediate flight thereafter he purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

(3) A person convicted of the offense of burglary shall be imprisoned in the state prison for any term not to exceed ten (10) years. A person convicted of the offense of aggravated burglary shall be imprisoned in the state prison for any term not to exceed forty (40) years.

History: En. 94-6-204 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 260, L. 1975.

Source: New.

Commission Comment

The definition of a burglarious entry, i.e., "unprivileged entry" takes a middle ground between the common-law requirement of "breaking" and the complete elimination of that requirement in some modern statutes. The basic concept of "breaking" seems to be an unlawful intrusion, or as defined in section 94-6-201, "entering or remaining unlawfully." This definition is meant to exclude from burglary the servant who enters his employer's house meaning to steal silver; the shoplifter who enters a store during business hours to steal from the counter; the fireman who forms the intent, as he breaks down the door of a burning house, to steal some of the householder's belongings and similar acts in which the defendant is lawfully on the premises.

Where breaking is not required there has been a tendency to hold that guilt may be established by proof that the proscribed intent was secretly entertained in the mind of the entrant although apart from this secret intent the entrance at that time and place would have been authorized. For example, in People v. Brittain, 142 Cal 8, 75 P 314, it was held one could be convicted of burglary for entering a store with larcenous intent. The commission rejects this view and approves of the decision of State v. Starkweather, 89 M 381, 297 P 497 as a more practical result.

Amendments

The 1975 amendment inserted "unlawfully" after "remains" in subsection (2).

"Occupied Structure"

Semitrailer attached to sleeper-cab tractor was an "occupied structure" within meaning of this section, and therefore, defendant who entered it and removed a number of cases of beer was properly convicted of burglary. State v. Shannon, — M —, 554 P 2d 743.

DECISIONS UNDER FORMER LAW

Breaking

Former section 94-901 did not require a breaking of the enclosure but only an unlawful entry, and the word "break" in an information was surplusage. State v. Dixson, 80 M 181, 260 P 138.

Building

A sheep wagon covered, enclosed by four walls and used as a dwelling by a sheep herder was a "building" within the meaning of former section 94-901, even though it was on wheels rather than affixed to the ground, and it could be the object of a burglary. State v. Ebel, 92 M 413, 15 P 2d 233.

Burning of Jail

Prisoner who started fire in jail portion of the courthouse which fire spread and consumed the entire building was properly charged with second degree arson rather than with destroying a jail. Petition of Weiss, — M —, 511 P 2d 1319.

Corpus Delicti

Proof that furnishings in a billiard hall were in order when it was locked up at night, that the furnishings were in disorder when the hall was unlocked the next morning, and that some articles were missing, established the corpus delicti of burglary under former section 94-901 even without proof of the means by which entry was effected, and defendant's confession became admissible. State v. Dixson, 80 M 181, 260 P 138.

Degrees of Burglary

On prosecution of an information under former section 94-901 which did not state the degree of the offense or whether it was committed by day or night, where neither the verdict nor the judgment of conviction specified the degree of the offense but the judgment included a sentence that was authorized only for first degree burglary, it was presumed that the judgment was supported by evidence that the offense was committed at night. State v. Mish, 36 M 168, 92 P 459; State ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220.

Description of Property

In information for burglary under former section 94-901, charging entry with intent to commit larceny, then describing the property taken, the description was surplusage and there was no charge of the actual commission of larceny. State v. Board, 135 M 139, 337 P 2d 924.

Evidence of Other Offenses

Evidence of defendant's possession of a comb taken in a previous burglary of the same structure was inadmissible since

mere possession did not prove defendant's guilt of the previous burglary beyond a reasonable doubt, and its admission in a prosecution under former section 94-901 for a subsequent burglary was prejudicial. State v. Ebel, 92 M 413, 15 P 2d 233.

Evidence of Purchase of Valuable Goods

Defendant's watch and ring together with purchase receipt for same were properly admitted in evidence for purpose of showing a substantial change in defendant's pecuniary circumstances subsequent to the burglary, and their admission raised no inference that the items had been stolen. State v. Pepperling, — M —, 533 P 2d 283.

Felony

Since former section 94-903 provided for imprisonment in the state prison for burglary, it was a felony, and dismissal of the first information did not bar a subsequent prosecution on a second information. State v. McGowan, 113 M 591, 131 P 2d 262.

Forcible Entry

Defendant who exceeded invitation given as a business invitee and stayed in pharmacy after business was closed became a trespasser; subsequent theft of goods from pharmacy constituted a burglary. State v. Watkins, — M —, 518 P 2d 259.

Identification of Money

Inability of witness to identify his money positively did not render the money inadmissible, where the money stolen consisted of uncirculated bills and rolls of Indian head pennies, and the money in defendant's possession corresponded in a close and peculiar way. State v. Pepperling, — M —, 533 P 2d 283.

Information and Indictment

Allowing prosecution to amend charges in information from first degree burglary to burglary on motion presented on day of trial was not error since elements of crime and proof required for conviction remained the same. State v. Stewart, — M —, 507 P 2d 1050.

Intent

Instruction charging jury to acquit if it found that defendant entered building with lawful intent was properly refused in the absence of evidence that defendant may have had that intent. State v. Larson, 75 M 274, 243 P 566.

It was not necessary to a conviction under former section 94-401 that express intent to commit larceny or any felony be proved; rather, it may be manifested by all the circumstances. State v. Board, 135 M 139, 337 P 2d 924.

Entry to tavern after closing hours with unauthorized duplicate key, and defendant's subsequent apprehension outside tavern with checks and currency identified as having come from tavern safe, showed felonious intent. State v. Harris, 159 M 425, 498 P 2d 1222.

Defendant's intent to commit larceny from van was established by evidence that a pair of bolt cutters with a padlock in its jaws was found in defendant's car which was backed up to side door of van, a group of tools had been stacked near door of van in anticipation of removal, defendant had been seen leaving the van, and there was no justification for defendant to have entered van. State v. Austad, — M —, 533 P 2d 1069.

Possession of Stolen Property

Proof of the corpus delicti, together with evidence that the property taken was found in defendant's possession and that defendant made inconsistent and partially incriminating statements as to the manner in which the property came into his possession, supported a conviction under former section 94-901. State v. Kinghorn, 109 M 22, 93 P 2d 964.

It was permissible for court to instruct, in prosecution for burglary under former section 94-901, that one found in possession of property from burglarized premises is bound to explain possession in order to remove the effect of possession as a circumstance pointing to guilt. State v. Branch, 155 M 22, 465 P 2d 821.

Probable Cause for Information

Evidence that accused was arrested in the company of one in whose car stolen property was found several hours later was not sufficient proof to justify filing of an information for burglary under former section 94-901. State ex rel. Wilson v. District Court, 159 M 439, 498 P 2d 1217.

Proof of Entry

Evidence that a tire and chains were taken from an automobile inside a barn, that a letter addressed to defendant was found next to automobile, and that part of the stolen property was found on defendant's premises, supported conviction under former section 94-901 for burglary of barn. State v. Larson, 75 M 274, 243 P 566.

Sufficiency of the Evidence

Evidence that defendant was flushed from hiding at 9:20 p.m., several hours after dark, that only preliminary work toward opening a safe had been completed and that a flashlight was among tools left behind at scene of burglary sufficiently established "nighttime requirement" to support conviction of first

degree burglary. State v. Solis, — M —, 516 P 2d 1157.

Evidence that defendants were driving car described by eyewitness as having been involved in a burglary, that defendant had a fresh cut on his arm and glass fragments in his shoes which matched broken glass at rear entrance of burglarized premises and that a footprint inside the premises matched the defendant's shoe was sufficient to support conviction of burglary. State v. Black, — M —, 516 P 2d 1163.

Search of defendant's premises which revealed a pistol matching the make, model and serial number of pistol reported stolen, a narcotics label with the pharmacy owner's initials, which labels were kept on the narcotics in the safe at the drugstore, and an attache case containing numerous drugs along with watches and cigarette lighters constituted sufficient evidence to sustain conviction of burglary of pharmacy. State v. Watkins, — M —, 518 P 2d 259.

Although mere possession of recently stolen property did not raise a presumption of guilt, where it was accompanied by other incriminating circumstances such as familiarity with the burglarized premises, unexplained possession of large sum of money, and fact that defendant suddenly left the state the day after the crime had been committed, there was sufficient evidence to support the conviction. State v. Pepperling, — M —, 533 P 2d 283.

Time of Entry

Under former sections 94-901 and 94-902, it was unnecessary to allege whether the entry was made at night or during the day, but it was for the jury to determine the degree of the offense. State v. Copenhaver, 35 M 342, 89 P 61; State v. Mish, 36 M 168, 92 P 459; State v. Summers, 107 M 34, 79 P 2d 560; State ex rel. Williams v. Henry, 119 M 271, 174 P 2d 220; State ex rel. Wilson v. District Court, 159 M 439, 498 P 2d 1217.

When, under former sections 94-901 and 94-902, the information specifically charged burglary in the nighttime but the prosecution failed to prove night as the time of entry, acquittal was required. State v. Copenhaver, 35 M 342, 89 P 61; State v. Fitzpatrick, 125 M 448, 239 P 2d 529, distinguished in 135 M 139, 144, 337 P 2d 924, 927.

Instruction as to second degree burglary under former section 94-902 was not required where all the evidence indicated entry during the night and there was not a scintilla of evidence indicating entry during the daytime. State v. Dixson, 80 M 181, 260 P 138.

Tools as Evidence

Tools found near the site of an attempted burglary were not admissible as evidence unless properly connected with the crime or the defendants, and it was error to permit a police officer to testify as to how the tools might be used in effecting entry. State v. Filacchione, 136 M 238, 347 P 2d 1000.

Unlawful Entry

Burglary under former section 94-901 required an entry that was a trespass, and the fact that intent to commit an unlawful act accompanied an entry that was otherwise lawful did not make it unlawful so as to support a conviction for burglary. State v. Mish, 36 M 168, 92 P 459; State v. Starkweather, 89 M 381, 297 P 497.

Value of Property

Since entry to commit petit larceny was within the scope of former section 94-901, it was unnecessary in a burglary prosecution to allege or prove value of the property it was intended to steal. State v. Mish, 36 M 168, 92 P 459.

Where property taken was described in testimony, jury could infer that it had some value, thus that its taking would be larceny and that unlawful entry with that intent was burglary under former section 94-901. State v. Dixson, 80 M 181, 260 P 138.

Variance between Pleadings and Proof

Entry and intent were the gravamen of the offense under former section 94-901, and it was immaterial that the information did not state the location of the building with exact particularity, that the property stolen actually belonged to a different person than named in the information, or that the proof related to a date eight days later than that specified in the information. State v. Rogers, 31 M 1, 77 P 293.

94-6-205. Possession of burglary tools. (1) A person commits the offense of possession of burglary tools when he knowingly possesses any key, tool, instrument, device, or any explosive, suitable for breaking into an occupied structure or vehicle or any depository designed for the safekeeping of property, or any part thereof with the purpose to commit an offense therewith.

(2) A person convicted of possession of burglary tools shall be fined

not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-6-205 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 19-2.

Commission Comment

This section does not represent a substantial change from the old Montana law, R. C. M. 1947, section 94-908, which prohibited possession of burglary tools. The main purpose for the change is, first, to reconstruct the language of the provision to conform with that of the other burglary statutes in this chapter, and second, to eliminate the concept of altering a tool or instrument for the purpose of committing a felony or misdemeanor, since possession of an altered instrument or tool with the intent to use it to commit a crime, cannot logically be distinguished from possession of an unaltered burglarious tool. The new provision does not alter the penalty for the crime.

Part 3

Theft and Related Offenses

94-6-301. Repealed.

Repeal

Section 94-6-301 (Sec. 1, Ch. 513, L. 1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

94-6-302. Theft. (1) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when he purposely or knowingly obtains by threat or deception control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(3) A person commits the offense of theft when he purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(4) A person convicted of the offense of theft of property not exceeding $150 in value shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of the offense of theft of property exceeding $150 in value or theft

of any commonly domesticated hoofed animal shall be imprisoned in the state prison for any term not to exceed 10 years.

(5) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

History: En. 94-6-302 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 22, Ch. 359, L. 1977.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 16-1.

Commission Comment

The first sentence of the section requires that the act must be done "knowingly" or "purposely." As is true in all except absolute liability offenses the act and the mental state must coincide. Therefore, the offense of theft is committed when any one of the acts coincides with any one of the mental states. After extended and exhaustive study and consideration by the commission, matching various combinations of the subsections to cover every type of conduct proscribed by the old law, and extending such matching to conduct covered by statutes in other states, it is believed that this section will cover any conceivable form of theft.

Subsection (1) is the most comprehensive and should include most if not all forms of theft.

Subdivision (1) (a) covers the traditional mental state required in theft. This mental state is the one which will be present in the great majority of cases. However, special situations may exist where it is difficult to prove a specific purpose to permanently deprive, but the offender's handling or disposition of the property is such that it directly results in a permanent deprivation to the owner, or would have so resulted but for the fortuitous intervention of circumstances of recovery. Subdivision (1) (c) is not intended to convert all "joy-riding" escapades into theft unless the abandonment of the vehicle is under such circumstances that the owner probably would be deprived permanently of the use or benefit of his car.

While the method by which unauthorized control is obtained or exerted is immaterial in subsection (1), and probably, in conjunction with one of the subdivisions (a), (b), or (c), would cover all forms of theft the commission felt that such an approach might be too concise, and might create problems of application, in view of the large body of statutory material and the large number of offenses it is intended to replace. Therefore, subsections (2) and (3) were added, to cover the specific offenses of theft by threat or deceit and receipt of stolen property, although the commission intends that all forms of theft could be charged and proved under subsection (1).

Amendments

The 1977 amendment added subsection (5); and made minor changes in phraseology, punctuation and style.

Constitutionality

Because in Montana theft of livestock is a particularly serious problem, due to the large geographical area and the small population, the distinction in this section between theft of livestock and other theft has a rational basis and does not offend the equal protection clauses of the federal and state constitutions. State v. Feeley, — M —, 552 P 2d 66.

Criminal Intent

Proof that property was stolen property was not sufficient proof to support a conviction of theft or possession of stolen property since proof is also required of the specific intent of the defendant. State v. Jimison, — M —, 540 P 2d 315.

Where, after being asked to examine a stray horse for brands by the rancher into whose pasture it had wandered, defendant, after finding no markings, removed the horse and proceeded to sell it after making a number of representations of ownership, there was sufficient evidence to support a finding of the criminal intent necessary for commission of the crime. State v. Feeley, — M —, 552 P 2d 66.

Lesser Included Offenses

Where defendant was charged with stealing an automobile under this section, unauthorized use of a motor vehicle under section 94-6-305 is a lesser included offense. State v. Shults, — M —, 544 P 2d 817.

DECISIONS UNDER FORMER LAW

Constitutionality

Former section 94-2721, which described the offense of receiving stolen property, was not unconstitutional in delegating to prosecuting attorney discretion to charge either misdemeanor or felony since the defendant had to be charged with a felony and it was within the sound discretion of the court, after conviction, to determine punishment. Petition of Gibson, 153 M 454, 457 P 2d 767.

Former section 94-2721 dealing with re-

ceipt of stolen property was not unconstitutional as a denial of equal protection on theory it gave state the discretion to charge accused with either a felony or a misdemeanor under the same set of facts since prosecutor did not in fact have such discretion. State v. Tritz, 164 M 344, 522 P 2d 603, certiorari denied, 420 US 909, 42 L Ed 2d 838, 95 S Ct 828.

Agency

Defendant who was sole owner of corporate collection agency which contracted to collect debts owed to corporate clients was an agent of the other corporations and was properly charged under subdivision 2 of former section 94-2701, when he did not pay over agreed portions of debts collected. State v. Holdren, 143 M 103, 387 P 2d 446.

Attempts

Attempt to obtain money by false representations was complete when the representation was made and money solicited even though the representation was not believed and defendant did not actually receive any money. State v. Phillips, 36 M 112, 92 P 299.

Bailment

An indictment charging the defendant with larceny as bailee under former section 94-2701 had to contain an averment of the bailment, but the particulars of the bailment need not be averred. State v. Brown, 38 M 309, 312, 99 P 954.

Where money was paid to defendant with understanding that he was to use the money for a particular purpose and to repay it by a certain date, defendant was a debtor rather than a bailee and his use of the money for other purposes and his failure to repay did not constitute larceny under former section 94-2701. State v. Karri, 51 M 157, 149 P 956.

Where purchaser of automobile gave check to a dealer in amount of purchase price from an out-of-state seller with understanding that the money would be forwarded to the seller, the dealer receiving the money was a bailee rather than a debtor and his failure to forward the money was larceny by bailee under former section 94-2701. State v. Ahl, 140 M 305, 371 P 2d 7.

Continuous Series of Thefts

Where the evidence showed that defendant had a single purpose in the theft of numerous items over a period of time from the department store where she worked, and that the thefts must have occurred almost daily over a continuous period, the value of the items stolen could be aggregated to support a charge of grand larceny. In re Jones, 46 M 122, 126 P 929.

Information charging city water registrar with embezzlement of water receipts over a period of time in numerous separate transactions did not charge more than one offense and was not duplicitous; state could charge one act of embezzlement when defendant failed to account at the end of his term even though a city ordinance required him to account daily. State v. Kurth, 105 M 260, 72 P 2d 687.

Corporate Stock

Corporate officer who, without authority and with intent to deprive the corporation of its interest, issued a stock certificate in his own name, was guilty of larceny of the corporate shares under former section 94-2701. State v. Letterman, 88 M 244, 292 P 717.

Stock broker who received payment in full from a customer for a cash purchase but failed to order out stock in customer's name, using the stock instead to bolster its margin account with its correspondent, was guilty of larceny by bailee, at least where broker's account with correspondent did not include enough stock to meet demands of all its cash customers who were entitled to have the stock ordered out. State v. Lake, 99 M 128, 43 P 2d 627.

Credit Extended

Act of bank officer in debiting dishonored draft to account of a customer rather than to his own account, thus concealing an overdraft in his own account, though a violation of the banking laws, was not larceny in violation of former section 94-2715 since no money was taken and the liability of the bank to its customer was not actually changed. State v. Rarey, 72 M 270, 233 P 615.

Deception

Sending of telegram requesting money and signing of name of recipient's brother constituted a representation that the sender was the recipient's brother and was sufficient to support conviction for attempt to obtain money under false pretenses even though the sender used his own name, which was the same as the brother's. State v. Phillips, 36 M 112, 92 P 299.

In prosecution under former section 94-1806 for bunco or confidence game, it was not necessary to prove the falsity of every one of the pretenses making up an elaborate scheme to gain the victim's confidence. State v. Moran, 56 M 94, 182 P 110.

Evidence of representations of fact made to others than the complaining witness should not have been admitted, and reversal of conviction was required where these were the only false representations of fact proved. State v. Bratton, 56 M 563, 186 P 327.

Corporate officer could not be convicted for receiving money under false pretenses on the basis of payment of money to the corporation on the strength of misrepresentation of a sales agent of the corporation in the absence of evidence of a conspiracy or that the officer authorized or ratified the agent's misrepresentations. State v. Woolsey, 80 M 141, 259 P 826.

Conviction for obtaining property under false pretenses under former section 94-1805 did not require that the misrepresentations be such as would have deceived a person of ordinary caution and prudence; it was enough if they actually deceived the victim. State v. Foot, 100 M 33, 48 P 2d 1113.

Under former section 94-1805, information did not have to allege the very words of the pretenses or whether they were spoken or written. State v. Foot, 100 M 33, 48 P 2d 1113.

Defendant who induced the complaining witness to give him a valuable ring by saying that he had an oil well in Louisiana from which he received eight hundred dollars a month income and that he would cut her in for two hundred dollars of that income, should have been prosecuted under former section 94-1805 for obtaining money or property by false pretenses, rather than under former section 94-1806 for confidence game, where jury could assume that defendant's statements were false since the complaining witness received neither the first two hundred dollars nor any other payment. State v. Allen, 128 M 306, 275 P 2d 200.

Degrees of Larceny

It was not necessary under former section 94-2701 to allege the degree of larceny, but that was for the jury to determine. State v. Wiley, 53 M 383, 164 P 84.

Use of term "feloniously" in justice court complaint charging defendant with offense of obtaining money by false pretenses was not reversible error where complaint specifically stated that offense charged was misdemeanor. Petition of Brown, 150 M 483, 436 P 2d 693.

Description of Property

Information describing the property stolen as "five Ford wire wheels and tires" was sufficiently descriptive. State v. Dimond, 82 M 110, 265 P 5.

Disposition of Stolen Property

Evidence that stolen horse had been found out of state was admissible as a link in the chain of evidence relating to a scheme in which defendant participated to ship horses under false bills of sale. State v. Akers, 106 M 43, 74 P 2d 1138.

Entrapment

There was not such entrapment as to invalidate a conviction where defendant approached sheep owner's employee with scheme to carry away sheep and employee co-operated with his employer's consent. State v. Snider, 111 M 310, 111 P 2d 1047.

Fiduciary

A guardian who had given ample security to account for all funds coming into his hands and who was personally able to raise the amount thereof on demand, who temporarily employed guardianship funds to repay a loan under a misapprehension that he had a right to do so, thus technically appropriating them to his own use, could not nevertheless be adjudged guilty of larceny under former section 94-2715, especially where, at the settlement of the estate, he fully accounted for all moneys paid over to him as guardian. Smith v. Smith, 45 M 535, 125 P 987.

Bank which had received payment on government bond subscription and had purchased bond in its own name held the legal title to the bond as trustee for the subscriber, rather than as bailee, until the bond should be registered in the subscriber's name, and improper use of the bond as collateral on a loan was not larceny within the definition of former section 94-2701. State v. Wallin, 60 M 332, 199 P 285.

Secretary-treasurer of a corporation who, under a contract to sell treasury stock on a commission to be paid only when cash for the stock had been received, made fictitious sales, forged notes given in payment, manipulated the books so as to show him entitled to commissions and drew checks against the corporation's account for such commissions although not earned, committed larceny or embezzlement within the meaning of former section 94-2701, and his acts were covered by surety company's bond insuring against larceny or embezzlement. Montana Auto Finance Corp. v. Federal Surety Co., 85 M 149, 278 P 116.

Importation of Stolen Property

Under former section 94-2714, permitting prosecution for bringing stolen property into the state, the form of the accusation was intended to be the same as if the theft had occurred wholly within the state and the place of the theft was a matter of evidence. State v. Willette, 46 M 326, 127 P 1013, overruled on other grounds in State v. Greeno, 135 M 580, 592, 342 P 2d 1052.

Indians

State district court was without jurisdiction to convict an Indian of larceny which occurred on Indian territory since under section 1153, Title 18, U. S. Code, such an offense is within the exclusive jurisdiction of the United States. State v. Pepion, 125 M 13, 230 P 2d 961.

Intent

It was reversible error to omit from a jury instruction under former section 94-2701 the word "feloniously" or other language requiring a finding that the defendant had evil intent. State v. Rechnitz, 20 M 488, 52 P 264; State v. Allen, 34 M 403, 87 P 177; State v. Peterson, 36 M 109, 92 P 302.

Use of the word "feloniously" in an information sufficiently charged evil intent and it was not necessary to include an independent allegation as to intent. State v. Allen, 34 M 403, 87 P 177.

Instruction to jury requiring a finding that defendant had an intent to steal did not sufficiently state the requirement of a felonious or criminal intent. State v. Peterson, 36 M 109, 92 P 302.

Sheep herder did not, by receiving stolen sheep into his care without protest, incur criminal liability for receiving stolen property or become an accomplice to the theft, where he had no criminal intent and he quit his job and reported the incident to the sheriff at the first opportunity, so it was not necessary to corroborate his testimony. State v. McComas, 85 M 428, 278 P 993.

Delay in paying over state funds, with result that money was taken from defendant in an armed robbery, would not support conviction under subdivision 2 of former section 94-2701 without a showing of intent to deprive the state of its money permanently. State v. McGuire, 107 M 341, 88 P 2d 35.

Conviction for larceny under former section 94-2701 required proof of specific intent; it was error to give an instruction that "when an unlawful act is shown to have been deliberately committed for the purpose of injuring another, it is presumed to have been committed with a malicious and guilty intent. The law also presumes that a person intends the ordinary consequences of any voluntary act committed by him." State v. Garney, 122 M 491, 207 P 2d 506, distinguished in 135 M 139, 147, 337 P 2d 924, 929.

In prosecution for receiving stolen cow hides, evidence as to knowledge from brands on the hides was rebutted by evidence that when defendant purchased the hides they were so frozen that they could not be examined for brands, so that there was insufficient evidence to support conviction. State v. Gilbert, 126 M 171, 246 P 2d 814, overruled on other grounds in 156 M 456, 461, 481 P 2d 689.

In prosecution of county surveyor under former section 94-1805 for obtaining extra fees to which he was not entitled by presenting to the county a claim under another name, testimony that a state examining officer advised defendant to handle the matter in this manner was admissible to show good faith and absence of the requisite criminal intent. State v. Hale, 126 M 326, 249 P 2d 495.

Requisite intent to deprive owner of property permanently was not shown where proceeds of sale of complainants' property were received by defendant's corporation and credited to running account with complainants even though defendant delayed in settling and eventually became insolvent, resulting in loss to complainants. State v. Smith, 135 M 18, 334 P 2d 1099.

Lesser Included Offenses

In prosecution for obtaining money under false pretenses under former section 94-1805, defendant was not entitled to instructions on lesser and included offenses in former section 90-620 on sale of packaged commodities or in former section 94-1904 on full weight in sale of certain commodities, since both of those sections required a sale and section 94-1805 did not. State v. Lagerquist, 152 M 21, 445 P 2d 910.

Livestock

Subdivision 3 of former section 94-2704, declaring the theft of a heifer grand larceny regardless of value, referred to live animals only, but where defendants were caught carrying away carcasses of heifers which had been previously killed, dressed and hidden, circumstantial evidence could be used to show that defendants had previously killed the heifers. State v. Keeland, 39 M 506, 104 P 513, distinguished in 138 M 362, 357 P 2d 19.

Since, under former section 94-2704, theft of a calf was grand larceny regardless of value, it was not necessary for the jury to make a finding as to value in such a case. State v. Ingersoll, 88 M 126, 292 P 250.

Defendant who dressed a stolen cow and assisted the killers in disposing of it could be convicted of grand larceny under subdivision 3 of former section 94-2704, regardless of value, even though defendant did not know of the theft until the cow was already dead. State v. Guay, 138 M 362, 357 P 2d 19.

Subdivision 3 of former section 94-2704 made theft of each head of livestock a separate offense, and there was no prejudice in dividing information into five counts, each alleging theft of different cattle where there were differences in the manner of proving the thefts and differences in ownership. State v. Johnson, 149 M 173, 424 P 2d 728.

Obtaining Control

Evidence that defendant made false representations and exchanged bank draft

in amount of $800 for victim's car when defendant had only $300 in bank was sufficient to sustain conviction for obtaining property by false pretenses under former section 94-1805, where defendant obtained possession even though victim never transferred title to defendant. State v. Love, 151 M 190, 440 P 2d 275.

Under former section 94-1805, money received in form of check payable to defendant's wife was money received by defendant in light of evidence that family was living together, that money was used for household support of family and that defendant's wife acted in secretarial capacity in defendant's business operations; fact that defendant did not receive check made out to him personally did mean that element of crime of obtaining money by false pretenses had not been established. State v. Lagerquist, 152 M 21, 445 P 2d 910.

Other Offenses

In prosecution of county officer under former section 94-1805 for obtaining money under false pretenses in collecting illegal fees by presenting a claim under the name of another party for work which was within his duties as county surveyor, it was prejudicial error for the court to admit evidence of another claim submitted by the county surveyor which offense was not charged in the information. State v. Hale, 126 M 326, 249 P 2d 495.

Overlapping Statutes

Act which constituted violation of weights and measures statute and another statute relating to sale of specific commodities, both of which were misdemeanors, still could be punished as a felony when it constituted obtaining money under false pretenses under former section 94-1805; the state had the discretion to prosecute under any of the statutes. State v. Lagerquist, 152 M 21, 445 P 2d 910.

Fact that defendant charged with obtaining money by false pretenses under former section 94-1805 might instead have been charged with a misdemeanor under former section 94-2702, the bad-check statute, did not prevent his conviction under section 94-1805; a person may have been guilty of violating more than one section by the same act. State v. Evans, 153 M 303, 456 P 2d 842.

Conviction under federal law for making false statements in connection with federal research grant funds did not bar prosecution for embezzlement of state funds under state law, since defendant had received grants from both state and federal sources, and the university had kept separate accounts for each grant. State ex rel. Zimmerman v. District Court, — M —, 541 P 2d 1215.

Ownership of Property

Where information for receiving stolen property in violation of former section 94-2721 alleged ownership of the property jointly by three persons but the evidence showed ownership of particular items by the three named persons individually, there was a fatal variance between allegations and proof. State v. Moxley, 41 M 402, 110 P 83, distinguished in 146 M 188, 202, 405 P 2d 642.

Particular ownership of property is not of the essence of the crime of larceny and allegations of ownership are descriptive only, so that even though the information alleged larceny of partnership property, it was not necessary to make technical proof of a partnership. State v. Grimsley, 96 M 327, 30 P 2d 85.

Allegations of ownership are descriptive only and, in the case of livestock, may be proved other than by recorded brands; unrecorded brands served as descriptive of the animal. State v. Akers, 106 M 43, 74 P 2d 1128.

Instruction that if the jury should find that a cow allegedly stolen was the property of the prosecuting witness, and "if there is no evidence of ownership in any other person" they could conclude that the ownership remained in him, was not open to objection that it assumed that there was no other evidence as to ownership, the court, by the quoted words, having expressly recognized the possibility of evidence that ownership was in another who sold to defendant. State v. Rossell, 113 M 457, 462, 127 P 2d 379.

It was not essential that an information for obtaining property under false pretenses under former section 94-1805 contain an allegation of ownership; lawful possession was all that was necessary and the section did not require that money or property belong to the person defrauded. State v. Hanks, 116 M 399, 153 P 2d 220.

In prosecution under former section 94-2721 on information alleging receipt of a stolen freezer the property of a county, proof of ownership by the county was required and where the purchase was unlawful, the county never owned the freezer so there was a failure of proof. State v. Bourdeau, 126 M 266, 246 P 2d 1037.

Information against agent of a distributor for larceny of money belonging both to the distributor and a manufacturer was not required to set out with particularity the amount belonging to each. State v. Fairburn, 135 M 449, 340 P 2d 157.

In prosecution on information alleging taking from a named owner, there was no fatal variance in proof that the property was taken from the possession of a lessee of the named owner. State v. Rindal, 146 M 64, 404 P 2d 327.

Information alleging receipt of stolen property whose ownership was unknown was sufficient where the property was described with sufficient particularity to apprise the defendant of the crime charged and to protect him from double jeopardy. State v. Peters, 146 M 188, 405 P 2d 642.

Receiving Stolen Property

In a prosecution for larceny under former section 94-2701, where jury could have found on the evidence that defendant, though he received stolen property, was not a party to the original theft, defendant was entitled to an instruction distinguishing between the offenses and directing acquittal on the larceny charge if defendant was not a party to the original theft. State v. Rechnitz, 20 M 488, 52 P 264.

Where two persons conspired, one to steal property and the other to receive the property, the thief was an accomplice to the offense of receiving stolen property and his testimony had to be corroborated for conviction of his coconspirator. State v. Keithley, 83 M 177, 271 P 449.

State courts had jurisdiction of charge of receiving stolen property even though the property belonged to the federal government so that receiving it was a violation of section 101, Title 18, U.S. Code and was also triable by the federal courts. Ex parte Groom, 87 M 377, 287 P 638.

One who after the crime of larceny was completed, being present, aided and abetted others in receiving the stolen property, with knowledge that it was stolen and either for his own gain or with intent to prevent the owner from again possessing the property, was a principal in the distinct crime of receiving stolen property and was properly prosecuted as such. State v. Huffman, 89 M 194, 296 P 789.

In a prosecution for receiving stolen property under former section 94-2721, a distinct statutory offense, knowledge on the part of the defendant that property was stolen when he received it was essential for conviction. State v. Keays, 97 M 404, 34 P 2d 855.

An accessory before the fact of theft could still be guilty of receiving the property and it was optional with the state to prosecute the offender for either. State v. Webber, 112 M 284, 116 P 2d 679.

In the absence of a conspiracy, the thief is not generally an accomplice to the crime of receiving stolen property, so his testimony does not require corroboration. State v. Mercer, 114 M 142, 133 P 2d 358.

Where defendant's first knowledge as to particular stolen property was received after the property had already been stolen, he was not made an accomplice to the theft by his act of buying the property, and the fact that defendant may have purchased other stolen merchandise from the same thief previously did not constitute an offer to buy such merchandise in the future so as to make him an accomplice, especially where the thief had sold stolen merchandise to others in the past, so the thief's testimony in a prosecution for receiving stolen property did not require corroboration. State v. Mercer, 114 M 142, 133 P 2d 358.

Under former section 94-2721, state was not required to prove theft by someone other than defendant to establish defendant as receiver of stolen property. State v. Watkins, 156 M 456, 481 P 2d 689, overruling State v. Gilbert, 126 M 171, 246 P 2d 814.

State as Victim of Crime

By virtue of former section 94-105, which included bodies politic among those entities which one could criminally intend to defraud, the crimes of grand larceny and obtaining money by false pretenses, as defined by former sections 94-2701 and 94-1805, respectively, could be committed against the state, since the gravamen of each offense was to defraud the true owner of his, or its, property. State v. Cline, — M —, 555 P 2d 724.

Value of Property

Where three different persons all paid money to defendant at the same time for similar purposes, and defendant appropriated the money at the same time without carrying out the purposes, defendant could be informed against for a single act of larceny and the amounts could be combined to charge him with grand larceny. State v. Mjelde, 29 M 490, 75 P 87.

In prosecution under former section 94-2721 for receiving stolen property, value of the property made no difference in the penalty and an allegation of value in the information was surplusage, so that it was necessary on trial only to prove some value, not the amount alleged. State v. Moxley, 41 M 402, 110 P 83.

Value of numerous items stolen over a period of time by employee of a department store could be aggregated to support a charge of grand larceny where the evidence showed that defendant had a single purpose in the thefts and that they must have occurred almost daily over a continuous period. In re Jones, 46 M 122, 126 P 929.

Evidence that property stolen had some substantial value supported conviction for petit larceny. State v. Dimond, 82 M 110, 265 P 5.

Variance of Proof

Where the information charged theft

of corporate stock by misappropriation by a bailee or agent, but the evidence, including endorsement of the certificate by the owner and subscription to stock of a new corporation, showed that the crime, if any, was obtaining property by false pretenses, there was a fatal variance between the charge and the proof. State v. Lund, 93 M 169, 18 P 2d 603, distinguished in 146 M 64, 71, 404 P 2d 327, 331.

Where, in prosecution of a city water registrar for embezzling funds received by him for the city, the state filed a bill of particulars listing 214 items of receipts not accounted for, the state could still introduce evidence of other amounts received during the period as a part of the proof that the total amount reported was short of the total amount received. State v. Kurth, 105 M 260, 72 P 2d 687.

On prosecution of information charging larceny by taking of property, evidence that defendant secreted the property was admissible to show criminal intent in the taking even though secreting was a separate offense under subdivision 1 of former section 94-2701. State v. Rindal, 146 M 64, 404 P 2d 327.

94-6-303. Theft of lost or mislaid property. (1) A person who obtains control over lost or mislaid property commits the offense of theft when he:

(a) knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner; and

(b) fails to take reasonable measures to restore the property to the owner; and

(c) has the purpose of depriving the owner permanently of the use or benefit of the property.

(2) A person convicted of theft of lost or mislaid property shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a period not to exceed six (6) months.

History: En. 94-6-303 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Illinois Criminal Code, Chapter 38, section 16-2.

Commission Comment

Subsection (a) provides for the case in which the owner is known or there is a "clue" to his identity. The "clue" provision is designed to eliminate the distinction between lost property and property which has merely been mislaid based on the assertion that in all "mislaid" property cases there is a clue to ownership. Subsection (b) requires only that reasonable measures to restore the property be taken. Subsection (c) specifies the traditional mental state in theft, i.e., to deprive permanently. The three subsections must coincide before the offense is committed.

DECISIONS UNDER FORMER LAW

Attempt to Restore

Where ranch hand changed brand on range livestock and rancher, when he learned of it, attempted to find true owner and make amends but was arrested before he could do so, rancher was not guilty of larceny. State v. McClain, 76 M 351, 246 P 956.

94-6-304. Theft of labor or services or use of property. (1) A person commits the offense of theft when he obtains the temporary use of property, labor or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor or services.

(2) A person convicted of theft of labor or services or use of property shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-6-304 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 16-3.

Commission Comment

This section is a slight variation of the traditional requirement of theft found in section ~~94-6-302 which~~ requires permanent deprivation. In this section a temporary taking will suffice to complete the offense.

DECISIONS UNDER FORMER LAW

Restoration of Property

Bank's temporary use of bond to which it held legal title as trustee for a subscriber as collateral to secure a loan to the bank was not, under former section 94-2717, larceny without an intent to deprive the owner permanently of his property and where the bond was in fact restored before demand for it or before information filed. State v. Wallin, 60 M 332, 199 P 285.

94-6-304.1. Obtaining communication services with intent to defraud. In a prosecution under section 94-6-304 for theft of telephone, telegraph, or cable television services, the element of deception is established by proof that the defendant obtained such services by any of the following means:

(1) by use of a code, prearranged scheme, or other similar stratagem or device whereby said person, in effect, sends or receives information; or

(2) by installing, rearranging, or tampering with any facilities or equipment, whether physically, inductively, acoustically, electronically; or

(3) by any other trick, stratagem, impersonation, false pretense, false representation, false statement, contrivance, device, or means; or

(4) by making, assembling, or possessing any instrument, apparatus, equipment or device, or the plans or instructions for the making or assembling of any instrument, apparatus, equipment or device which is designed, adapted or otherwise intended to be used to avoid the lawful charge, in whole or in part, for any telecommunications service by concealing the existence or place of origin or destination of any telecommunications.

History: En. 94-6-304.1 by Sec. 1, Ch. 156, L. 1974; amd. Sec. 1, Ch. 175, L. 1977.

Title of Act

An act relating to obtaining communication services with intent to defraud.

Amendments

The 1977 amendment deleted subdivision 5, which prohibited aiding in the avoidance of lawful telecommunication charges; and made minor changes in punctuation and style. For analogous current provisions, see 94-6-304.2.

94-6-304.2. Aiding the avoidance of telecommunications charges. (1) A person commits the offense of aiding the avoidance of telecommunications charges when he:

(a) publishes the number or code of an existing, canceled, revoked, expired, or nonexistent credit card or the numbering or coding which is employed in the issuance of credit cards with the purpose that it will be used to avoid the payment of lawful telecommunications charges; or

(b) publishes, advertises, sells, gives, or otherwise transfers to another plans or instructions for the making or assembling of any apparatus, instrument, equipment, or device described in 94-6-304.1(4) with the purpose that such will be used or with the knowledge or reason to believe that such will be used to avoid the payment of lawful telecommunication charges.

(2) A person convicted of the offense of aiding the avoidance of tele-

communications charges shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) For the purposes of this section, the term "publish" means to communicate information to any one or more persons, either orally; in person; by telephone, radio, or television; or in a writing of any kind, including but not limited to a letter, memorandum, circular, handbill, newspaper or magazine article, or book.

History: En. 94-6-304.2 by Sec. 2, Ch. 175, L. 1977.

Title of Act

An act to define the offense of aiding the avoidance of telecommunications charges; amending section 94-6-304.1, R.C.M. 1947.

94-6-305. Unauthorized use of motor vehicles. (1) A person commits the offense of unauthorized use of motor vehicles if he knowingly operates the automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle of another without his consent.

(2) A person convicted of unauthorized use of motor vehicles shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. It is an affirmative defense that the offender reasonably believed that the owner would have consented to the operation had he known of it.

History: En. 94-6-305 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 223-9.

Commission Comment

~~Common-law larceny did not~~ cover the use of an auto for purposes of a joyride, or where the bailee of a vehicle or animal used the bailed chattel for his own purposes, because larcenous intent was usually found to be absent. This section is intended to deal with that problem.

Lesser Included Offense

Where an automobile is taken, the offense described in this section is a lesser included offense within the crime of theft, section 94-6-302. State v. Shults, — M —, 544 P 2d 817.

DECISIONS UNDER FORMER LAW

Amendment of Information

Where first information charged violation of former section 94-3305, unauthorized use of vehicle, and second information, based on same taking, charged grand larceny in violation of former section 94-2701, the second information was in effect an amendment of the first information and might have been objected to because filed after arraignment on the first information; however, defendant waived his objection by pleading to the second information and moving to dismiss the first. Gransberry v. State, 149 M 158, 423 P 2d 853.

94-6-306. Offender's interest in the property. (1) It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.

(2) It is no defense that theft was from the offender's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

History: En. 94-6-306 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 16-4.

Commission Comment

Subsection (1) is substantially the same as Model Penal Code, Tent. Draft No. 2, ¶ 206-11(1), (See comment, p. 100). The provision removes any doubt regarding the commission of theft by a co-owner, such as a partner, joint tenant or tenant in common, or any other type of co-owner who exercises unauthorized control with the purpose to permanently deprive a co-owner of his interest in the property.

Subsection (2) recognizes that unless the husband and wife have separated and are living in separate abodes when the supposed theft occurs the criminal law should not intrude into what usually is a civil fight over property, the true ownership of which is dubious at best. The divorce court should be better informed regarding the relationship between the parties and should determine the proper distribution of the property. If, however, the parties have separated and are living in separate abodes and theft occurs, there seems to be no good reason why such conduct should not be punished in the Criminal Code.

DECISIONS UNDER FORMER LAW

Claim of Interest

Evidence of statements made by defendant indicating his intention to retain money due his principal as a means of protecting his own supposed claim against principal was inadmissible as hearsay and self-serving. State v. Fairburn, 135 M 449, 340 P 2d 157.

Partnership Property

Where, under an agreement to form a partnership, one party gave money to the other for the purposes of the partnership, the one receiving money was merely a bailee until such time as the partnership had actually been formed, and misappropriation of the money by the bailee fell within the definition of larceny in former section 94-2701 despite the fact that a partner could not embezzle partnership property. State v. Brown, 38 M 309, 99 P 954.

Restitution

Restoration of property was not available under former section 94-2717 as a defense to the crime of uttering fraudulent checks where no restitution on any of the counts had been made until after the informations had been filed against the defendant. State v. Skinner, — M —, 515 P 2d 81.

94-6-307. Deceptive practices. (1) A person commits the offense of deceptive practices when he purposely or knowingly:

(a) causes another, by deception or threat, to execute a document disposing of property or a document by which a pecuniary obligation is incurred;

(b) makes or directs another to make a false or deceptive statement addressed to the public or any person for the purpose of promoting or procuring the sale of property or services;

(c) makes or directs another to make a false or deceptive statement to any person respecting his financial condition for the purpose of procuring a loan or credit or accepts a false or deceptive statement from any person who is attempting to procure a loan or credit regarding that person's financial condition; or

(d) obtains or attempts to obtain property, labor, or services by any of the following means:

(i) using a credit card which was issued to another, without the other's consent;

(ii) using a credit card that has been revoked or canceled;

(iii) using a credit card that has been falsely made, counterfeited, or altered in any material respect;

(iv) using the pretended number or description of a fictitious credit card;

(v) using a credit card which has expired provided the credit card clearly indicates the expiration date.

(2) A person convicted of the offense of deceptive practices shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both. If the deceptive practices are part of a common scheme or the value of any property, labor, or services obtained or attempted to be obtained exceeds $150, the offender shall be imprisoned in the state prison for a term not to exceed 10 years.

History: En. 94-6-307 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 23, Ch. 359, L. 1977.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 17-1.

Commission Comment

This section supplements section 94-6-302(2)(b). Most outright swindles with no pretext of legitimacy will fall within section 94-6-302(2) and be prosecuted thereunder because of the greater penalty. Section 94-6-307 is designed to cover a greater variety of deceptive practices than were formerly proscribed by Montana law (See Title 94, chapter 18, which contains such offenses as: obtaining property or services by false pretenses; confidence games; sale without consent of holder; deception in the sale of land; etc.; and chapter 21, fraudulent conveyances.) See also R. C. M. 1947, section 94-1803 (False statement respecting financial condition) and section 94-35-256 (Workmen—false representation to procure punishable.)

The four (4) subsections of this section are intended to cover deceptive practices which might not fall under the prohibition of section 94-6-302, Theft.

Amendments

The 1977 amendment deleted "or knowingly accepts" after "make" in subsection (1)(c); added "or accepts a false or deceptive statement from any person who is attempting to procure a loan or credit regarding that person's financial condition" to subsection (1)(c); and made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

False Financial Statement

Defendant who obtained a bank loan by misrepresenting his ownership of ranch land, livestock and feed, was guilty of obtaining property under false pretenses under former section 94-1805, and it did not matter that the bank credited defendant's account rather than paying him money directly. State v. Mason, 62 M 180, 204 P 358.

Defendant who induced the complaining witness to give him a ring by saying that he had an oil well in Louisiana from which he received $800 a month income and that he would cut her in for $200 of that income should have been prosecuted under former section 94-1805 for "obtaining money or property by false pretenses," rather than for confidence game under former section 94-1806, where jury could assume that defendant's statements were false since the complaining witness received neither the first $200 nor any other payment. State v. Allen, 128 M 306, 275 P 2d 200.

Promissory Note

It was doubtful whether inducing another to execute a promissory note was defrauding of property within the meaning of former section 94-1805, which covered obtaining property under false pretenses. State v. Bratton, 56 M 563, 186 P 327.

94-6-308. Deceptive business practices. (1) A person commits the offense of deceptive business practices if in the course of engaging in a business, occupation, or profession he purposely or knowingly:

(a) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(b) sells, offers, or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(c) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnished the weight or measure; or

(d) sells, offers or exposes for sale adulterated commodities; or

(e) sells, offers or exposes for sale mislabeled commodities; or

(f) makes a deceptive statement regarding the quantity or price of goods in any advertisement addressed to the public.

(2) "Adulterated" means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage.

(3) "Mislabeled" means:

(a) varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage; or

(b) represented as being another person's produce, though otherwise labeled accurately as to quality and quantity.

(4) A person convicted of the offense of deceptive business practices shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-6-308 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as the proposed Michigan Code, section 4105.

Commission Comment

This section replaces a large number of statutes in the old code which provided for the content of goods, marks which they are to bear and the use of false weights and measures. The purpose of this section is to provide a single, simple definition for false weights and measures, short weight sales and purchases, adulteration, mislabeling of commodities, and false advertising.

DECISIONS UNDER FORMER LAW

False Weights

An act which constituted a misdemeanor under former section 90-602, the weights and measures statute, and at the same time a felony under former section 94-1805, the false pretenses statute, could be prosecuted under either in the state's discretion, and when it was prosecuted as a felony, defendant was not entitled to an instruction on the other offense as a lesser and included offense since former section 90-602 required a sale but section 94-1805 did not. State v. Lagerquist, 152 M 21, 445 P 2d 910.

94-6-308.1. Chain distributor schemes. (1) As used in this section:

(a) "person" means a natural person, corporation, partnership, trust, or other entity; and in the case of an entity it shall include any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors, and other persons in act of control of the activities of each entity;

(b) "chain distributor scheme" means a sales device whereby a person, under a condition that he make an investment, is granted a license or right to recruit for consideration one or more additional persons who are also granted such license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted such license or right upon such condition.

(2) It is unlawful for any person to promote, sell, or encourage participation in any chain distributor scheme.

(3) Any person violating the provisions of this section shall, upon

conviction, be imprisoned in the state prison for a period not to exceed 1 year, or fined not to exceed $1,000, or both.

(4) Any person convicted of a second offense under this section shall be imprisoned in the state prison for a period not to exceed 5 years or fined not to exceed $5,000, or both.

History: En. Secs. 1 to 3, Ch. 465, L. 1973; R. C. M. 1947, Supp., Secs. 94-1832 to 94-1834; amd. Sec. 24, Ch. 359, L. 1977.

Compiler's Note

This section was not part of the Criminal Code of 1973 but is derived from a separate 1973 act. The compiler has placed the section here in the interest of orderly arrangement and has inserted subsection and subdivision designations in the same style as in the Criminal Code.

Title of Act

An act prohibiting the use of chain distributor schemes; and providing a penalty.

Amendments

The 1977 amendment deleted a provision in subsection (3) that a person violating this section be deemed guilty of a felony; and made minor changes in phraseology, punctuation and style.

94-6-309. Issuing a bad check. (1) A person commits the offense of issuing a bad check when, with the purpose of obtaining control over property or to secure property, labor or services of another, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository.

(2) If the offender has an account with th depository, failure to make good the check or other order within five (5) days after written notice of nonpayment has been received by the issuer is prima facie evidence that he knew that it would not be paid by the depository.

(3) A person convicted of issuing a bad check shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender has engaged in issuing bad checks which are part of a common scheme, or if the value of any property, labor or services obtained, or attempted to be obtained exceeds one hundred fifty dollars ($150), he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-6-309 by Sec. 1, Ch. 513, L. 1973.

Source: Derived from Illinois Criminal Code, Chapter 38, section 17-1(d).

Commission Comment

Bad check laws, in addition to eliminating the doubt as to liability on false promises, accomplish two other things which seem worth preserving: (a) they eliminate the requirement of proof of obtaining property by means of false pretense; and (b) they create a presumption of knowledge that the check would not be paid under certain circumstances. The presumption of knowledge is probably the most important practical reason for maintaining special bad check provisions. In the fictitious account case it is possible but highly improbable that the transaction was innocent; the drawer may absent-mindedly have put the name of the wrong bank on a blank check, or he may have intended to open an account before the check was presented. In the case of checks on real but inadequate accounts, the chance of innocent miscalculation by the drawer is much greater but is negatived by a refusal to make the check good.

DECISIONS UNDER FORMER LAW

False Pretenses

Fact that defendant might have been charged with a misdemeanor under the fraudulent check statute did not prevent his conviction of felony under former section 94-1805, the false pretense section; a person may be guilty of violating two statutes by the same act. State v. Evans, 153 M 303, 456 P 2d 842.

Fictitious Account

The offense was complete when defendant passed a check, knowing that no one by the name signed as maker had an account with the bank, and it was no defense that defendant had no notice of nonpayment or that he later made restitution. State v. Johnston, 140 M 111, 367 P 2d 891.

Five-day Notice Provision

In prosecution under former section 94-2702, trial court did not err in refusing to instruct jury there could be no conviction in absence of any showing that the five-day notice specified in the statute had been given; five-day notice provision was created by legislature in order to obviate necessity of proving defendant's intent to defraud and knowledge of insufficient funds and provided only an alternative method of establishing a prima facie case and was therefore only a rule of evidence and not essential to the establishment of the crime. State v. Skinner, — M —, 515 P 2d 81.

Other Offenses

In prosecution for uttering and delivering a fraudulent check under former section 94-2702, evidence was properly received as to other checks drawn on prior occasions on banks in which defendant had no account as such testimony tended to show defendant's intent to defraud. State v. Tully, 148 M 166, 418 P 2d 549.

Postdated Check

Defendant who gave a postdated check, stating honestly that he did not then have sufficient funds but that the bank would honor the check by the time of its date, did not misrepresent present facts but merely made a promise as to the future; this did not constitute a violation of former section 94-2702, the fraudulent check law, even though the check was dishonored when presented. State v. Patterson, 75 M 315, 243 P 355.

Restitution

The crime of uttering fraudulent checks under former section 94-2702 was one of the crimes of larceny under former section 94-2717 to which restoration of property was a defense; however, the defense was not available where no restitution on any of the counts had been made until after the informations had been filed against defendant. State v. Skinner, — M —, 515 P 2d 81.

94-6-310. Forgery. (1) A person commits the offense of forgery when, with purpose to defraud, he knowingly:

(a) without authority makes or alters any document or other object apparently capable of being used to defraud another in such manner that it purports to have been made by another or at another time, or with different provisions, or of different composition; or

(b) issues or delivers such document or other object knowing it to have been thus made or altered; or

(c) possesses with the purpose of issuing or delivering any such document or other object knowing it to have been thus made or altered; or

(d) possesses with knowledge of its character any plate, die, or other device, apparatus, equipment or article specifically designed for use in counterfeiting or otherwise forging written instruments.

(2) A purpose to defraud means the purpose of causing another to assume, create, transfer, alter or terminate any right, obligation or power with reference to any person or property.

(3) A document or other object capable of being used to defraud another includes, but is not limited to, one by which any right, obligation, or power with reference to any person or property may be created, transferred, altered or terminated.

(4) A person convicted of the offense of forgery shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months or both. If the forgery is part

of a common scheme or if the value of the property, labor or services obtained or attempted to be obtained, exceeds one hundred fifty dollars ($150) the offender shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

History: En. 94-6-310 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 17-3.

Commission Comment

There is doubt that a specific forgery law is necessary because the provisions dealing with false pretense and fraud should be adequate to cover forgery. Forgery is retained as a distinct offense partly because the concept is so embedded in popular understanding that it would be unlikely that any legislature would completely abandon it, and partially in recognition of the special effectiveness of forgery as a means of undermining public confidence in important symbols of commerce, perpetrating large scale frauds.

DECISIONS UNDER FORMER LAW

Accomplices

Making a false endorsement and passing the instrument with knowledge of the falsity of the endorsement are separate offenses, and the person who makes the endorsement is not necessarily an accomplice to the offense of passing it, so that his testimony did not require corroboration as would that of an accomplice. State v. Phillips, 127 M 381, 264 P 2d 1009.

Alteration of Document

Information alleging alteration of a document in violation of former section 94-2001 was required to set forth the particulars of the alteration since not every alteration but only material alterations are in violation. State v. Mitten, 36 M 376, 92 P 969.

Where information alleged forgery by making of a document but not by alteration, it was prejudicial error to give an instruction on alteration. State v. Mitten, 36 M 376, 92 P 969.

Severance of a promissory note from a purchase order, thus making the note negotiable instead of nonnegotiable, constituted such material alteration of the instrument as to constitute forgery within the meaning of former section 94-2001. State v. Mitton, 37 M 366, 96 P 926, explained in 52 M 359, 365, 157 P 951, 953.

Information charging that defendant knowingly passed a forged instrument need not specify the means by which the forgery was done, and evidence that defendant knew the instrument had been altered supported the allegation. State v. Mitton, 37 M 366, 96 P 926.

Apparatus for Counterfeiting

Information charging possession of "apparatus, paper and other things" for use in counterfeiting was sufficient under former section 94-2011, and it was not necessary that the apparatus be described with greater particularity. State v. Shannon, 95 M 280, 26 P 2d 360, overruled on other grounds in 125 M 566, 589, 242 P 2d 477, 488.

Authority to Sign Document

Bank officers who were authorized to issue travelers' checks, on condition that they collect and remit the amount thereof to the drawee bank, did not commit forgery in issuing such checks without collecting or remitting the amount. State v. Alexander, 73 M 329, 236 P 542.

Where executor of estate signed blank checks on the estate's account and authorized attorney to use them by filling in names of creditors and distributees of the estate, attorney's unauthorized filling in of his own name or that of his creditor constituted forgery within the meaning of former section 94-2011. State v. Daems, 97 M 486, 37 P 2d 322.

Document Forged or Counterfeited

There was no violation of former section 94-2001 where the instrument forged did not purport to impose any liability on the purported maker but merely directed the addressee to charge an advance to the defendant's account. State v. Evans, 15 M 539, 39 P 850.

A warrant for payment out of a particular city fund, apparently valid on its face, was protected by former section 94-2001, and alteration thereof was forgery despite the fact that the warrant may have been unlawfully issued because in excess of the debt limitations for the city. State v. Brett, 16 M 360, 40 P 873.

Where an instrument appeared on its face to be the obligation of a bank, it was not necessary to allege or prove by extrinsic evidence that such a bank existed in order to convict for forgery of an endorsement in violation of former section 94-2001. State v. Patch, 21 M 534, 55 P 108.

Juror's fee certificate which did not bear the district court seal required by statute was void on its face and counterfeiting thereof was not forgery. In re Farrell, 36 M 254, 92 P 785.

It is not necessary that the instrument be negotiable for its false making or endorsement to constitute forgery. Ex parte Solway, 82 M 89, 265 P 21; State v. Phillips, 127 M 381, 264 P 2d 1009.

Checks on the account of an estate were apparently valid when signed by one of the executors and unauthorized completion of the checks constituted forgery despite the fact that they were not signed by the other executor as required by law. State v. Daems, 97 M 486, 37 P 2d 322.

Under former section 94-2001, it was not necessary that the forged instrument create civil liability before it could be held to be forgery. State v. Phillips, 127 M 381, 264 P 2d 1009.

State auditor's warrant was an order within the meaning of former section 94-2001, and the affixing of a false endorsement thereto was forgery under the section. State v. Phillips, 127 M 381, 264 P 2d 1009.

Endorsement of Instrument

The offense of forgery was complete when defendant, with intent to defraud, wrote a check to himself and forged the name of another as maker, and it was immaterial that the check was later passed without being endorsed. Ex parte Solway, 82 M 89, 265 P 21.

Indians

State court had no jurisdiction of prosecution of an enrolled and allotted Indian for forgery and attempted passing of a check within the exterior boundaries of an Indian reservation, even on patented land. State ex rel. Bokas v. District Court, 128 M 37, 270 P 2d 396.

State court had jurisdiction of prosecution of Indian for passing a forged check outside the reservation even though the check originated within the reservation and belonged to another Indian. Petition of Fox, 141 M 189, 376 P 2d 726.

Intent

In prosecution for knowingly passing altered instrument, evidence of other similar acts by defendant about the same time was admissible as bearing on intent. State v. Mitton, 37 M 366, 96 P 926; State v. Daems, 97 M 486, 37 P 2d 322; State v. Phillips, 127 M 381, 264 P 2d 1009.

Where defendant cashed a check found in his pocket without any recollection of having seen the purported maker and the check was apparently made to him as payee under a different name than that previously used for him by the same purported maker, he had the requisite criminal intent despite intoxication and, the maker's signature having been forged, he was guilty of forgery under former section 94-2001. State v. Cooper, 146 M 336, 406 P 2d 691.

In the absence of evidence that he knew the checks were forged or that the person giving him the checks was a convicted forger, defendant who passed forged checks should have been acquitted. State v. Phillips, 147 M 334, 412 P 2d 205.

Person Defrauded

Forgery of a payee's signature and delivery to the obligor showed intent to defraud the payee as well as the obligor. State v. Patch, 21 M 534, 55 P 108.

Information failing to name the person it was intended to defraud would be held bad on demurrer, but the omission was not subject to attack in collateral proceedings on habeas corpus where there was an allegation of general intent to defraud. Ex parte Solway, 82 M 89, 265 P 21.

Allegation of intent to defraud either the bank or the purported maker would have supported conviction of forgery by the false signing of another's name as maker of a check. Ex parte Solway, 82 M 89, 265 P 21.

Where information charging forgery of checks on the account of an estate alleged intent to defraud the executors, the bank and the payee, proof that the executors were defrauded was sufficient and the naming of the other two could be regarded as surplusage. State v. Daems, 97 M 486, 37 P 2d 322.

Pleadings

It was proper for an information to contain two counts relating to the same instrument, one alleging that defendant made the forgery and the other that defendant passed the instrument knowing it to have been forged. State v. Mitton, 37 M 366, 96 P 926.

94-6-311. Obscuring the identity of a machine. (1) A person commits the offense of obscuring the identity of a machine if he:

(a) removes, defaces, covers, alters, destroys or otherwise obscures the manufacturer's serial number or any other distinguishing identification

number or mark upon any machine, vehicle, electrical device, or firearm, with the purpose to conceal, misrepresent or transfer any such machine, vehicle, electrical device, or firearm; or

(b) possesses with the purpose to conceal, misrepresent or transfer any machine, vehicle, device, or firearm knowing that the serial number or other identification number or mark has been removed or otherwise obscured. The fact of possession or transfer of any such machine, vehicle, electrical device, or firearm creates a presumption that the person knew the serial number or other identification number or mark had been removed or otherwise obscured.

(2) A person convicted of obscuring the identity of a machine shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-6-311 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 167, L. 1977.

Source: Substantially the same as proposed New York Criminal Code, section 170-65.

Commission Comment

This section is directed at a specialized class of criminals who deal in machinery and motor vehicles. The citizen is given the opportunity to avoid criminal liability by reporting the fact of the obscured identity to the proper agency.

Vehicles and certain kinds of machinery are particularly vulnerable to organized rings who steal, attempt to render unidentifiable and resell them. Under the old law only farm machinery was protected from such alteration. (See R. C. M. 1947, section 94-35-262.)

Possession of a vehicle or machine with obscured identity is also a violation, but there must be a purpose to misrepresent and knowledge that the identification number or mark has been obscured or altered. The burden of proving purpose and knowledge rests with the state.

Amendments

The 1977 amendment inserted "firearm" throughout the section; added the last sentence of subsection (1)(b); and made minor changes in style.

94-6-312. Illegal branding or altering or obscuring a brand. (1) A person commits the offense of illegal branding or altering or obscuring a brand if he marks or brands any commonly domesticated hoofed animal or removes, covers, alters or defaces any existing mark or brand on any commonly domesticated hoofed animal with the purpose to obtain or exert unauthorized control over said animal or with the purpose to conceal, misrepresent, transfer or prevent identification of said animal.

(2) A person convicted of the offense of illegal branding or altering or obscuring a brand shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-6-312 by Sec. 1, Ch. 513, L. 1973.

Source: Derived from Revised Codes of Montana 1947, sections 94-3504, 94-3514.

Commission Comment

This section is merely a recodification of old Montana law. Although the offense of forgery would seem to make the same acts punishable, the commission deemed it necessary to have this specific statute included in the code in light of the special problems that Montana law enforcement authorities face in the area of cattle rustling.

DECISIONS UNDER FORMER LAW

Unauthorized Brand

An unauthorized brand or mark did not have to touch, alter or deface a former brand on an animal to be in violation of former section 94-3504. State v. Johnson, 155 M 351, 472 P 2d 287.

94-6-313. Defrauding creditors. (1) A person commits the offense of defrauding secured creditors if he destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in section 87-1-201 (37) [87A-1-201 (37)] of the Uniform Commercial Code.

(3) A person convicted of the offense of defrauding secured creditors shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

(4) A person who destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose of depriving the owner of the property, or of the proceeds and value therefrom, may be prosecuted under section 94-6-302.

History: En. 94-6-313 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 367, L. 1975.

Source: Substantially the same as Model Penal Code, section 224.10.

Commission Comment

The states commonly provide criminal penalties for debtors or conditional vendees who dispose of property subject to a security interest to the prejudice of the secured creditor. This is necessary because laws dealing with theft are framed in terms of larceny or embezzlement of goods "of another." Although there is a need for penal legislation in this area, it is possible to go too far in providing penalties for acts such as removing encumbered property from the county or selling the property without the consent of the secured creditor. Such behavior may be evidence of fraud, but it is also quite consistent with innocence, as where the owner-debtor drives his mortgaged car to an out-of-state resort for a weekend without notifying the finance company, or where he trades the car in on a new car without finance company consent, but makes adequate arrangements to discharge the old debt.

The offense is classified as a misdemeanor regardless of the amount involved. This differs from the section on theft, section 94-6-302 under which stealing amounts over one hundred fifty dollars ($150) is felonious. The difference seems justified because offenders against this section are less obviously dangerous than outright thieves who take property to which they have no claim. Moreover, sellers can better guard against this kind of criminal behavior in extending credit.

It is no longer a criminal offense to remove mortgaged property from the county as under former Montana law but the section retains the prohibition against removing secured property from the state.

Amendments

The 1975 amendment added subsection (4).

DECISIONS UNDER FORMER LAW

Intent

To constitute the crime of removing mortgaged chattels from the county under former section 94-1811, it was necessary that the removal be made with the intent of depriving the mortgagee of his claim thereto or interest therein. Averill Machinery Co. v. Taylor, 70 M 70, 223 P 918.

94-6-314. Effect of criminal possession of stolen property. Possession of stolen property shall not constitute proof of the commission of the offense of theft; such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all other evidence pointing to his guilt.

History: En. 94-6-314 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section represents a substantial change in the prevailing theory concerning possession of stolen property.

Possession of stolen property is not per se a punishable offense. Possession of stolen property is one of the circumstances which may be considered in establishing that the defendant is guilty of theft.

The provision that the possessor of the stolen property has the burden of removing the evidentiary effect of the possession of the stolen goods may deprive the defendant of the presumption of innocence as well as his right to remain silent. However, in State v. Gray, 152 M 145, 447 P 2d 475, 478 (1968), the court held that these fundamental constitutional rights were not violated by such a provision.

DECISIONS UNDER FORMER LAW

Explanation of Possession

It was proper to instruct jury that one found in possession of stolen property must explain such possession in order to remove the effect of that fact as a circumstance, to be considered with other evidence, pointing to his guilt. State v. Gray, 152 M 145, 447 P 2d 475, explaining State v. Greeno, 135 M 580, 342 P 2d 1052.

Livestock

Instruction in language of former section 94-2704.1 that possession of recently stolen livestock is prima facie evidence of guilt of larceny was proper. State v. Gloyne, 156 M 94, 476 P 2d 511.

State did not have to overcome presumption of larceny contained in former section 94-2704.1 to convict one in possession of stolen livestock of being a receiver of stolen property under former section 94-2721. State v. Watkins, 156 M 456, 481 P 2d 689.

CHAPTER 7

OFFENSES AGAINST PUBLIC ADMINISTRATION

Part 1—Bribery and Corrupt Influence

Section 94-7-102. Bribery in official and political matters.
94-7-103. Threats and other improper influence in official and political matters.
94-7-104. Compensation for past official behavior.
94-7-105. Gifts to public servants by persons subject to their jurisdiction.

Part 2—Perjury and Other Falsification in Official Matters

94-7-202. Perjury.
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94-7-301. Resisting arrest.
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Part 5—Treason, Flags and Related Offenses

94-7-502. Desecration of flags.
94-7-503. Criminal syndicalism.
94-7-504. Bringing armed men into the state.

Part 1

Bribery and Corrupt Influence

94-7-101. Repealed.

Repeal

Section 94-7-101 (Sec. 1, Ch. 513, L. 1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

94-7-102. Bribery in official and political matters. (1) A person commits the offense of bribery if he purposely or knowingly offers, confers, or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(b) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or

(c) any benefit as consideration for a violation of a known duty as a public servant or party official.

It is no defense to prosecution under this section that a person whom the offender sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(2) A person convicted of the offense of bribery shall be imprisoned in the state prison for any term not to exceed ten (10) years, and shall forever be disqualified from holding any public office in this state.

History: En. 94-7-102 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Model Penal Code, section 240.1.

Commission Comment

Subsection (a) prohibits the giving or receiving of any pecuniary benefit to influence official or political discretion. Offers of nonpecuniary gain, e.g., political support, honorific appointments, are penalized under subsection (b) but limited to judicial and administrative proceedings. "Administrative proceedings" is defined in section 94-2-101(3) and includes some actions that might be called "executive" or "administrative," where the official action applies a general rule to an individual, e.g., in granting or revoking a license, awarding veteran's disability compensation or social security payments. Gifts to officials are covered by section 94-7-105.

DECISIONS UNDER FORMER LAW

Disbarment

Bribery of members of the legislature was a felony under former section 94-2905 and would furnish ample ground for disbarment even though the acts were not in the attorney's official capacity, but the supreme court would not, as a matter of policy, act on disbarment until after criminal prosecution. In re Wellcome, 23 M 140, 58 P 45.

Intent

Allegation that sheriff received a bribe did not charge a violation of former section 94-3904 without an allegation of agreement that his official action would be influenced; sheriff may have intended entrapment or some other lawful purpose. State ex rel. Beazley v. District Court, 75 M 116, 241 P 1075.

"Judicial Officer"

Defendant, who offered a bribe to a deputy county attorney, was properly convicted under former section making it an offense to offer bribes to a "judicial officer." State v. Hensley, — M —, 554 P 2d 745.

Jurors

Former section 94-801, covering bribery of judicial officials, applied to members of the jury panel who might be selected to try a case, not just to those who had

been selected and sworn. State ex rel. Webb v. District Court, 37 M 191, 95 P 593.

On prosecution for attempt to influence grand juror, evidence of transactions after juror had been discharged by operation of law was inadmissible even though defendant did not know that juror had been discharged. State v. Porter, 125 M 503, 242 P 2d 984.

94-7-103. Threats and other improper influence in official and political matters. (1) A person commits an offense under this section if he purposely or knowingly:

(a) threatens unlawful harm to any person with the purpose to influence his decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(b) threatens harm to any public servant with the purpose to influence his decision, opinion, recommendation, vote, or other exercise of discretion in a judicial or administrative proceeding;

(c) threatens harm to any public servant or party official with the purpose to influence him to violate his duty;

(d) privately addresses to any public servant who has or will have official discretion in a judicial or administrative proceeding any representation, entreaty, argument, or other communication designed to influence the outcome on the basis of considerations other than those authorized by law; or

(e) as a juror or officer in charge of a jury receives or permits to be received any communication relating to any matter pending before such jury, except according to the regular course of proceedings.

(2) It is no defense to prosecution under subsections (1)(a) through (1)(d) that a person whom the offender sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted under this section shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both, unless the offender threatened to commit an offense or made a threat with the purpose to influence a judicial or administrative proceeding, in which case the offender shall be imprisoned in the state prison for any term not to exceed 10 years.

History: En. 94-7-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 25, Ch. 359, L. 1977.

Source: Substantially the same as Model Penal Code, section 240.2.

Commission Comment

Penal legislation against the use of intimidation to influence the behavior of public officials is much rarer than legislation against bribery, although there are many statutes relating to jurors, legislators, and law enforcement officers.

Amendments

The 1977 amendment made the former second sentence of subsection (1)(d) present subsection (2); redesignated former subsection (2) as subsection (3); and made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

Jurors

On prosecution for attempt to influence grand juror, evidence of transactions after juror had been discharged by operation of law was inadmissible even though defendant did not know that juror had been discharged. State v. Porter, 125 M 503, 242 P 2d 984.

Regular Course of Proceedings

Conversations with a grand juror at his home were clearly outside the regular course of proceedings of the grand jury so were not within the communications permitted by the exception to former section 94-804. State v. Porter, 125 M 503, 242 P 2d 984.

94-7-104. Compensation for past official behavior. (1) A person commits an offense under this section if he knowingly solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having as a public servant given a decision, opinion, recommendation, or vote favorable to another, for having otherwise exercised a discretion in another's favor, or for having violated his duty. A person commits an offense under this section if he knowingly offers, confers, or agrees to confer compensation which is prohibited by this section.

(2) A person convicted under this section shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-7-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 26, Ch. 359, L. 1977.

Source: Identical to Model Penal Code, section 240.3.

Commission Comment

There is little legislative precedent for this section, but it obviates the difficulty occasionally encountered in a bribery prosecution when the defendant contends that he did not solicit or receive anything until after the official transaction had been completed. This behavior should be discouraged because it undermines the integrity of government. Compensation for past action implies a promise of similar compensation for future favor.

Amendments

The 1977 amendment deleted "acceptance of" before "which is prohibited" in the last sentence of subsection (1); and made minor changes in phraseology, punctuation and style.

94-7-105. Gifts to public servants by persons subject to their jurisdiction. (1) No public servant in any department or agency exercising regulatory function, or conducting inspections or investigations, or carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority or participating in the enforcement of its decision, shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or tribunal with which he is associated.

(4) No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency thereof.

(5) Exceptions. This section shall not apply to:

(a) fees prescribed by law to be received by a public servant, or any

other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(6) No person shall knowingly confer, or offer, or agree to confer, any benefit prohibited by the foregoing subsections.

(7) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-7-105 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 240.5.

Commission Comment

This section covers gifts by businessmen to government inspectors or by carriers and utilities to regulatory authorities. In some cases a noncriminal sanction against a public servant would be preferred, but there is difficulty in arriving at satisfactory generalizations for all classes of persons and conduct covered by this section. This section is broader than the old law.

Part 2

Perjury and Other Falsification in Official Matters

94-7-201. Repealed.

Repeal

Section 94-7-201 (Sec. 1, Ch. 513, L. 1973), relating to definitions, was repealed by Sec. 77, Ch. 359, Laws 1977.

94-7-202. Perjury. (1) A person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material.

(2) A person convicted of perjury shall be punished by imprisonment in the state prison for any term not to exceed ten (10) years.

(3) Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(4) It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the offender presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(5) No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(6) Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the

statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(7) No person shall be convicted of an offense under this section where proof of falsity rests solely upon the testimony of a single person other than the defendant.

History: En. 94-7-202 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 241.1.

Commission Comment

The proposed definition of "materiality" in subsection (3) does not differ substantially from that given by prior law. The question of materiality in a perjury trial is not governed by the rules of evidence applicable in the proceeding. It would be against public policy to immunize false swearing merely because the testimony might have been excluded on objection which was not made. The result would be that an unqualified expert witness could not be punished for consciously falsifying an opinion which he did in fact give to the jury. It should be noted that this section applies to grand jury proceedings, legislative investigations, and administrative hearings, as well as to court trials, each with its own peculiar rules of evidence. Technical irregularities in the administration of the oath are of no concern to the defendant as provided in subsection (4). This is not a change from prior law. Subsection (5) making a retraction a defense is new. It is included in many state code revisions since it attempts to preserve incentive to correct falsehoods, without impairing the compulsion to tell the truth in the first place. The danger that witnesses might be encouraged to take a chance on perjury is limited by the requirement that recantation must take place before the falsity becomes manifest. The distinctive feature of subsection (6) is that accusation and proof in the alternative is authorized, without relieving the prosecution of the burden of proving mens rea. The defendant would not be able to escape conviction because the state cannot prove which of the contradictory statements was false and known to be so. The rule that proof of falsity be by at least two witnesses with corroborating circumstances was adopted at common law because of the problem created by an oath against an oath. The policy question to be decided is whether the protection of witnesses counter-balances the occasional inability to convict an apparent perjurer. The majority of jurisdictions still require at least one witness and corroborating circumstances.

DECISIONS UNDER FORMER LAW

Knowledge of Falsity

Attorney's statement that a note had been delivered to a corporation was not perjury justifying disbarment where the evidence showed that the attorney had endorsed the note and given it to his partner, who was an agent for the corporation, with instructions to deliver it to the corporation, so that the attorney had reason to believe his statement true. In re McCue, 80 M 537, 261 P 341.

Even though one can be guilty of perjury in making an unqualified statement when he does not have knowledge as to its truth, yet it is not perjury to make a statement in good faith and in the belief of its truth even though the statement later proves false. State v. Jackson, 88 M 420, 293 P 309.

Material Statement

Statement by witness at murder trial that he arrived at a certain town at a certain time the day after the homicide, which statement related indirectly to a trip during which the homicide weapon was allegedly disposed of, was not a material statement, so was not perjury, even though it contradicted the testimony and might have reflected on the credibility of another witness. State v. Hall, 88 M 297, 292 P 734.

Pleadings

An information charging perjury in swearing that a certain event happened at 11 o'clock, without stating whether it was in the morning or at night, was sufficient, where no person of ordinary intelligence could, from a reading of other portions of the pleading, have arrived at any other conclusion than that it meant 11 o'clock in the forenoon. State v. Jackson, 88 M 420, 293 P 309.

94-7-203. False swearing. (1) A person commits the offense of false swearing if he knowingly makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made when he does not believe the statement to be true, and:

(a) the falsification occurs in an official proceeding; or

(b) the falsification is purposely made to mislead a public servant in performing his official function; or

(c) the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(2) Subsections (4) to (7) of section 94-7-202 apply to this section.

(3) A person convicted of false swearing shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-7-203 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 241.2.

Commission Comment

This section makes it a misdemeanor to swear falsely in cases not amounting to perjury under section 94-7-202. Thus, if the false statement is made in an official proceeding, but is not material, it falls within subdivision (a) of subsection (1). If it is material, but is not made in an official proceeding involving a hearing, subdivision (b) applies. Subdivision (c) applies where an affidavit is sworn to before a notary public, but is restricted to affidavits required by law. The possibility of abuse where there is criminal liability for falsification in private affidavits has occurred where such law exists. For example, small loan companies have been known to obtain oaths from debtors and threaten criminal charges to collect on their loans.

DECISIONS UNDER FORMER LAW

Venue of Prosecution

Where defendant swore to a false statement before a notary public in Lake County in a document to be filed with the state board of equalization in Lewis and Clark County, the offense was complete when the document was placed in the mails addressed to the board or was handed to some other person with instructions to deliver it to the board, and the district court of Lewis and Clark County did not have jurisdiction in the absence of evidence that defendant personally delivered the document to the board's office. State v. Rother, 130 M 357, 303 P 2d 393, distinguished in — M —, 548 P 2d 949.

94-7-204. Unsworn falsification to authorities. (1) A person commits an offense under this section if, with purpose to mislead a public servant in performing his official function, he

(a) makes any written false statement which he does not believe to be true; or

(b) purposely creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary mark or other object which he knows to be false.

(2) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-7-204 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 241.3.

Commission Comment

This section was suggested by 18 U.S.C. Sec. 1001, which authorizes imprisonment up to five (5) years for knowing mis-statement of material fact in "any matter within the jurisdiction of any department or agency of the United States." There is no parallel in the Montana law. There is a requirement of writing and purpose to mislead in this section, as well as the extension of liability to misleading omissions, in subdivision (1)(b), and to things other than writings, e.g., false samples, etc., in subdivision (1)(d). If there is a pecuniary benefit from misleading omissions, the code provisions on theft by deception would apply.

94-7-205. False alarms to agencies of public safety. (1) A person commits an offense under this section if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, which deals with emergencies involving danger to life or property.

(2) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-7-205 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Model Penal Code, section 241.4.

Commission Comment

This section covers all dangerous emergency alarms, e.g., floods, hurricanes, landslides, civil defense. The police force would qualify as an emergency organization. The provision is justifiable on the ground of waste of government resources and the likelihood that the actor will cause personnel or equipment to be unavailable to deal with real emergencies.

94-7-206. False reports to law enforcement authorities. (1) A person commits an offense under this section if he knowingly:

(a) gives false information to any law enforcement officer with the purpose to implicate another; or

(b) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or

(c) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident.

(2) A person convicted under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-7-206 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 241.5.

Commission Comment

Few state statutes now deal with this offense. The recent Wisconsin Code, section 346.30(a) requires that the officer act in reliance upon such false information, but such behavior is likely to have antisocial consequences regardless of any action in reliance.

94-7-207. Tampering with witnesses and informants. (1) A person commits the offense of tampering with witnesses and informants if, believing that an official proceeding or investigation is pending or about to be instituted, he purposely or knowing attempts to induce or otherwise cause a witness or informant to:

(a) testify or inform falsely;

(b) withhold any testimony, information, document, or thing;

(c) elude legal process summoning him to testify or supply evidence; or

(d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person convicted of tampering with witnesses or informants shall be imprisoned in the state prison for any term not to exceed 10 years.

History: En. 94-7-207 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 27, Ch. 359, L. 1977.

Source: Substantially the same as Model Penal Code, section 241.6.

Commission Comment

This section covers "informants" and "witnesses." Under prior law most such offenses were misdemeanors. This section gives the judge discretion to impose a sentence of up to ten (10) years if the circumstances justify it.

Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

Secreting Witness

The action of a party to a civil action in secreting and forcibly keeping in hiding a material witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted a misdemeanor under former section 94-1705 and was an offense so odious and so utterly at war with every intelligent notion of the due administration of justice as to require a new trial after a verdict for the party who tampered. Buntin v. Chicago, M. & St. P. Ry. Co., 54 M 495, 172 P 330.

Accused's attempt to hide state's witness against him in a criminal prosecution and to intimidate her could have been grounds for prosecution under former section 94-1705. State v. Crockett, 148 M 402, 421 P 2d 722.

94-7-208. Tampering with or fabricating physical evidence. (1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he

(a) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(b) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead any person who is or may be engaged in such proceeding or investigation.

(2) A person convicted of tampering with or fabricating physical evidence shall be imprisoned in the state prison for a term not to exceed ten (10) years.

History: En. 94-7-208 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Model Penal Code, section 241.7.

Commission Comment

This section is broader than prior law since it covers investigations as well as trials and other formal proceedings.

94-7-209. Tampering with public records or information. (1) A person commits the offense of tampering with public records or information if he:

(a) knowingly makes a false entry in, or false alteration of, any record, document, legislative bill or enactment, or thing belonging to, or received or issued, or kept by the government for information or record, or required by law to be kept by others for information of the government; or

(b) makes, presents or uses any record, document or thing knowing it to be false, and with purpose that it be taken as a genuine part of information or records referred to in paragraph (a); or

(c) purposely destroys, conceals, removes or otherwise impairs the verity or availability of any such record, document or thing.

(2) A person convicted of the offense of tampering with public records or information shall be imprisoned in the state prison for any term not to exceed ten (10) years.

History: En. 94-7-209 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 241.8.

Commission Comment

It is common to penalize falsification, destruction or concealment of public records. The only innovation in this section is the explicit provision of subdivision (1) (b) as to fabrication of false records. This section would not cover records of private persons; however, records maintained at the behest of government, such as legislative bills or enactments would fall within this section.

DECISIONS UNDER FORMER LAW

Concealment

The willful act of an officer of the senate in failing to send a legislative bill to the clerk to receive it next in the normal course of procedure constituted "secreting" within the meaning of former section 94-2722. State v. Bloor, 20 M 574, 52 P 611.

Indexing

Former section 94-2722 had no reference to and did not prevent indexing of public records. State ex rel. Coad v. District Court, 23 M 171, 57 P 1095.

Intent

"Willfully" as used in former section 94-2722 required only that an act be done by design or set purpose, not that it be with intent to injure or defraud any particular person. State v. Bloor, 20 M 574, 52 P 611.

94-7-210. Impersonating a public servant. (1) A person commits the offense of impersonating a public servant if he falsely pretends to hold a position in the public service with purpose to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense to his prejudice.

(2) A person convicted of impersonating a public servant shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-7-210 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Model Penal Code, section 241.9.

Commission Comment

Legislation prohibiting impersonation of some or all public officials is found in most penal codes. The object is to prevent imposition on people by the pretense of authority, and partly to ensure proper respect for genuine authority by suppressing discreditable imitations. These objectives are regarded as especially important in relation to law enforcement officers.

Part 3

Obstructing Governmental Operations

94-7-301. Resisting arrest. (1) A person commits the offense of resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest by:

(a) using or threatening to use physical force or violence against the peace officer or another; or

(b) using any other means which creates a risk of causing physical injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the arrest was unlawful, provided the peace officer was acting under color of his official authority.

(3) A person convicted of the offense of resisting arrest shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

History: En. 94-7-301 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as the proposed Michigan Code, section 4625.

94-7-302. Obstructing a peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant if he knowingly obstructs, impairs or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-7-302 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section is designed to deal generally with the knowing obstruction of governmental activities. It protects both peace officers and public servants in the administration of their respective duties. Generally, the section seeks to retain the coverage of the old law to encompass protection of all governmental functions. It imposes a uniform mens rea requirement for all illegal obstruction, i.e., knowingly.

The section requires a person to "knowingly" obstruct, impair or hinder government administration. The old law required a "willful" obstruction. Subsection (2) of this section makes a distinction between the obstruction of illegal activity by a peace officer and a public servant. The commission has followed the basic premise that a person should not take the law into his own hands when faced with illegal police activity.

DECISIONS UNDER FORMER LAW

Investigation by Peace Officer

Where store delayed approval of check tendered by plaintiff for merchandise while police were called for investigation of suspected forgery, but plaintiff meanwhile demanded return of the check, it was his property and he had a right to possession of it, and his subsequent detention after attempting to snatch the check from the hand of a police officer gave rise to a cause of action against the store. Harrer v. Montgomery Ward & Co., 124 M 295, 221 P 2d 428.

94-7-303. Obstructing justice. (1) For the purpose of this section "an offender" means a person who has been or is liable to be arrested, charged, convicted or punished for a public offense.

(2) A person commits the offense of obstructing justice if, knowing a person is an offender, he purposely:

(a) harbors or conceals an offender; or

(b) warns an offender of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring an offender into compliance with the law; or

(c) provides an offender with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or

(d) prevents or obstructs, by means of force, deception or intimidation anyone from performing an act that might aid in the discovery or apprehension of an offender; or

(e) suppresses by act of concealment, alteration or destruction any physical evidence that might aid in the discovery or apprehension of an offender; or

(f) aids an offender who is subject to official detention to escape from such official detention.

(3) A person convicted of obstructing justice shall be:

(a) imprisoned in the state prison for a term not to exceed ten (10) years if the offender has been or is liable to be charged with a felony; or

(b) fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both, if the offender has been or is liable to be charged with a misdemeanor.

History: En. 94-7-303 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

The section is based on the theory that a person who aids another to elude apprehension or trial is obstructing justice and interfering with the processes of government. It is his willingness to interfere and the harm threatened by such interference that constitutes the offense rather than any fiction that equates a "harborer" with the murderer or traitor whom he harbors.

This section makes it an offense to aid misdemeanants as well as felons. This result follows from the purpose to deter an obstruction of justice. Also the aider may not know what crime the offender has committed.

Knowledge or reason to believe that the putative offender is guilty of or charged with a crime is simply evidence of the purpose to aid the putative offender to elude justice. A purpose to aid the offender to avoid arrest is not proved merely by showing that defendant gave succor to one who was in fact a fugitive. When a fugitive seeks help from friends and relatives there may be other motivations in addition to the objective of impeding law enforcement. Such other motivations are not taken into consideration by way of exception of certain classes of near kin, but could possibly be a ground for mitigating sentence after conviction. This section specifies the prohibited forms of aid in addition to the traditional offense of harboring or concealing the fugitive. Subdivision (2)(b) contains an exception to take care of cases like fellow-motorists warning speeder to slow down, or a lawyer advising a client to discontinue illegal activities.

DECISIONS UNDER FORMER LAW

Corroboration of Accessory

Witness who became an accessory after the fact under former section 94-205 by receiving part of the stolen property and by failure to report the theft did not thereby become an accomplice so as to require corroboration of his testimony. State v. Slothower, 56 M 230, 182 P 270.

Harboring Misdemeanant

Former section 94-205, defining as accessories after the fact persons harboring criminals, applied only to felonies, and where the charge filed against the principal was only a misdemeanor, defendant who harbored him was properly discharged on demurrer even though under the facts the principal might have been charged with a felony. State v. Williams, 106 M 516, 79 P 2d 314.

94-7-304. Failure to aid a peace officer. (1) Where it is reasonable for a peace officer to enlist the co-operation of a person in

(a) effectuating or securing an arrest of another (pursuant to R. C. M. 95-609), or

(b) preventing the commission by another of an offense, a peace officer may order such person to co-operate. A person commits the offense of failure to aid a peace officer if he knowingly refuses to obey such an order.

(2) A person convicted of the offense of failure to aid a peace officer shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-7-304 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

The section is limited to "peace officer" (see definition of peace officer in R. C. M. 1947, section 95-210). Rather than require every eighteen-year-old male to assist, a more flexible standard of reasonableness is substituted.

DECISIONS UNDER FORMER LAW

Compensation of Posse Comitatus

Former section 94-35-177, requiring adult males to join a posse comitatus when required by the sheriff, did not require or authorize the county to reimburse members of the posse for their services or for expenses incurred. Sears v. Gallatin County, 20 M 462, 52 P 204.

94-7-305. Compounding a felony. (1) A person commits the offense of compounding a felony if he knowingly accepts or agrees to accept any pecuniary benefit in consideration for:

(a) refraining from seeking prosecution of a felony; or

(b) refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony.

(2) A person convicted of compounding a felony shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-7-305 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

The significant difference between this section and prior law is that there is no grading of the offense.

94-7-306. Escape. (1) "Official detention" means imprisonment which resulted from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society; but "official detention" does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(2) A person subject to official detention commits the offense of escape if he knowingly or purposely removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited time.

(3) A person convicted of the offense of escape shall be:

(a) imprisoned in the state prison for a term not to exceed twenty (20) years if he escapes from a state prison, county jail or city jail by the use or threat of force, physical violence, weapon or simulated weapon; or

(b) imprisoned in the state prison for a term not to exceed ten (10) years if he:

(i) escapes from a state prison, county jail or city jail; or

(ii) escapes from another official detention by the use or threat of force, physical violence, weapon or simulated weapon; or

(c) fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both if he commits escape under circumstances other than (a) and (b) of this subsection.

History: En. 94-7-306 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

The section classifies escapes according to the risk they create. Punishment is more severe for the offense when committed by the use of or threat of force, physical violence, weapon or simulated weapon. The grading of the offense by relying on the prisoner's use of force is actually a return to common law, since early common law clearly distinguished between escapes with and without use of force. The grading scheme implicit in the old code by which punishment is provided in reference to the type of confinement, is not entirely abandoned by section 94-7-306. For example, use of force in escaping from a noninstitutional detention calls for a lesser punishment than escape from a prison, county or city jail. Further, an escape without use of force from a noninstitutional detention as provided in subdivision (3)(c) removes the offense from the felony category altogether.

Another grading method for escapes is based on the seriousness of the crime causing the detention. The section includes the grading indirectly in that the seriousness of the crime causing the detention is indicated by the institution in which the detention is made. For example, persons held in the state prison will usually be felons while those in city or county jails will be misdemeanants.

DECISIONS UNDER FORMER LAW

Consecutive Sentences

Former section 94-4203, providing that sentence for escape should be consecutive to term for which then in confinement, did not result in automatic discharge of the first sentence when a prisoner was paroled on the escape sentence. State ex rel. Herman v. Powell, 139 M 583, 367 P 2d 553; Petition of Duran, 152 M 111, 448 P 2d 137.

Conspiracy to Rescue

In a prosecution for second degree assault on a police officer, evidence of a conspiracy to rescue a prisoner being taken to jail by the officer was admissible to establish liability of members of the conspiracy not proved to have committed the assault personally. State v. Dennison, 94 M 159, 21 P 2d 63.

Lawful Detention

Neither former section 94-4207, relating to assisting a prisoner to escape, nor former section 94-4208, relating to giving a prisoner anything useful in making an escape, required proof that the imprisonment was lawful. State v. Zuidema, 157 M 367, 485 P 2d 952.

94-7-307. Transferring illegal articles or unauthorized communication. (1) (a) A person commits the offense of transferring illegal articles if he knowingly or purposely transfers any illegal article or thing to a person subject to official detention or is transferred any illegal article or thing by a person subject to official detention.

(b) A person convicted of transferring illegal articles shall be:

(i) imprisoned in the state prison for a term not to exceed 20 years, if he conveys a weapon to a person subject to official detention; or

(ii) fined not to exceed $100 or imprisoned in the county jail for any term not to exceed 10 days, or both, if he conveys any other illegal article or thing to a person subject to official detention.

(c) Subsection (1)(b)(ii) does not apply unless the offender knew or was given sufficient notice so that he reasonably should have known that the article or thing he conveyed was an illegal article.

(2) (a) A person commits the offense of unauthorized communication if he knowingly or purposely communicates with a person subject to official detention without the consent of the person in charge of such official detention.

(b) A person convicted of the offense of unauthorized communication shall be fined not to exceed $100 or imprisoned in the county jail for any term not to exceed 10 days, or both.

History: En. 94-7-307 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 28, Ch. 359, L. 1977.

Source: Derived from Revised Codes of Montana 1947, sections 94-35-241, 94-35-264 and 94-4208.

Commission Comment

The section does not require proof of an intent to assist an inmate to escape, but requires only that the actor intended to convey the item involved. It is sufficient that he know the nature of the item as an illegal article, i.e., something that he is prohibited from conveying to the inmate by statute, regulation or institutional rule. The offense is graded on the basis of the nature of the article or thing introduced, i.e., if the thing be a deadly weapon, the offense is a felony; and the section applies to all official detention rather than just the state prison.

Amendments

The 1977 amendment inserted "illegal" before "article or thing" twice in subsection (1)(a); and made minor changes in style, phraseology and punctuation.

DECISIONS UNDER FORMER LAW

Lawful Detention

Former section 94-4208, relating to giving a prisoner anything useful in making an escape, did not require proof that the imprisonment was lawful. State v. Zuidema, 157 M 367, 485 P 2d 952.

94-7-308. Bail-jumping. (1) A person commits the offense of bail-jumping if, having been set at liberty by court order, with or without security, upon condition that he will subsequently appear at a specified time and place, he purposely fails without lawful excuse to appear at that time and place.

(2) This section shall not interfere with the exercise by any court of its power to punish for contempt.

(3) This section shall not apply to a person set at liberty by court order upon condition that he will appear in connection with a charge of having committed a misdemeanor, except it shall apply where the judge has released the defendant on his own recognizance.

(4) A person convicted of bail-jumping in connection with a felony shall be imprisoned in the state prison for a term not to exceed ten (10) years. In all other cases he shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-7-308 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

Statutes designating the offense of "bail-jumping" are of comparatively recent origin. The first such statute was passed in New York in 1928, and it was over a generation later that the federal provision was enacted in 1954. Montana had no statute making it a separate punishable crime for failure to comply within a condition of a bail bond or recognizance, although such a provision had been anticipated. In the proposed Montana Code of Criminal Procedure of 1966, under section 95-1106, the following comment can be found: "In addition it is recommended that Montana make it a separate punishable crime not to appear, regardless of the method by which the accused was released. It is believed this will be a greater deterrent than any anticipated financial loss." The section is graded on the basis of the seriousness of the crime charged so bail-jumping in connection with a felony is a potential felony and all other cases of bail-jumping are misdemeanors.

94-7-309. Criminal contempt. (1) A person commits the offense of criminal contempt when he knowingly engages in any of the following conduct:

(a) disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or

(b) breach of the peace, noise, or other disturbance, directly tending to interrupt a court's proceeding; or

(c) purposely disobeying or refusing any lawful process or other mandate of a court; or

(d) unlawfully refusing to be sworn as a witness in any court proceeding or, after being sworn, refusing to answer any legal and proper interrogatory; or

(e) purposely publishing a false or grossly inaccurate report of a court's proceeding; or

(f) purposely failing to obey any mandate, process or notice relative to juries issued pursuant to Title 93, chapters 12, 13, 14, 15, 16, 17 and 18, R. C. M. 1947.

(2) A person convicted of the offense of criminal contempt shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-7-309 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as New York Penal Law, section 215-50; also derived from Revised Codes of Montana 1947, section 94-3540.

Commission Comment

See "The Increasing Use of the Power of Contempt," John L. Hilts, 32 Mont. L. Rev. 183.

DECISIONS UNDER FORMER LAW

Attorney's Behavior

Counsel for a witness being examined in court had the right to be heard in his client's behalf, but he did not have the right to abuse his privilege to insult the court or judge, or to interrupt the orderly procedure which should characterize every judicial investigation. Arbitrary rulings or oppressive conduct on the part of the court would not warrant retaliation by an attorney or resort to undignified or insolent behavior. The law affords him ample redress. In re Mettler, 50 M 299, 146 P 747.

Change of Judge

Proceedings for contempt under former section 94-3540 were criminal in nature, even when the basis for the charge was disobedience of an injunction issued in a civil case, and the statute providing for change of judge in civil cases did not apply. State ex rel. Boston & Montana Consol. Copper & Silver Min. Co. v. Judges, 30 M 193, 76 P 10.

Civil Remedy

On prosecution for criminal contempt under former section 94-3540 for disobedience of a decree, the court had no power to order payment of costs to plaintiffs in the previous action; rather, the court exhausted its power when it imposed a fine of $500, and any reimbursement of costs must come out of the fine. State ex rel. Flynn v. District Court, 24 M 33, 60 P 493.

Criticism of Courts

Comment on and criticism of a court's decision, once the matter is no longer pending before the court, was not prohibited by subdivision 7 of former section 94-3540 and is protected by the free speech and free press section of the Constitution. State ex rel. Metcalf v. District Court, 52 M 46, 155 P 278.

False Publication

Territorial supreme court had inherent power to protect its processes by punishing for contempt a party who, by publishing unfounded reports of undue influence by his adversaries, attempted to influence the court to hold for him to avoid further charges of corruption. Territory v. Murray, 7 M 251, 15 P 145.

Published statement that supreme court, in case still before it, was dealing out injustice and was a party to a "dirty deal" was a false and grossly inaccurate report within the meaning of subdivision 7 of former section 94-3540 and was punishable under the contempt powers of the court. State ex rel. Haskell v. Faulds, 17 M 140, 42 P 285.

Pending Cases

A case on which the supreme court had handed down a decision but which was still pending on rehearing was still pending for the purposes of contempt, and a false and grossly inaccurate report thereof was punishable as contempt. In re Nelson, 103 M 43, 60 P 2d 365.

Part 4

Official Misconduct

94-7-401. Official misconduct. (1) A public servant commits the offense of official misconduct when, in his official capacity, he commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction; or

(b) knowingly performs an act in his official capacity which he knows is forbidden by law; or

(c) with the purpose to obtain advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of section 82-3402.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

(3) The district court shall have exclusive jurisdiction in prosecutions under this section, and any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from his office without pay pending final judgment.

Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all back pay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect such impeachment or removal.

History: En. 94-7-401 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 474, L. 1975.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 33-3.

Commission Comment

The intent of this section is to provide criminal sanctions when a public servant intentionally acts in a manner he knows to be contrary to regulation or statute. The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service.

The section provides punishment for failure to comply with specific mandatory duties set forth outside of the Criminal Code. It also provides punishment for failure to comply with mandatory duties which are set forth in provisions of the Criminal Code.

Amendments

The 1975 amendment added subdivision (1)(e); and substituted "may be suspended" for "shall be suspended" in subsection (4).

DECISIONS UNDER FORMER LAW

Appeal from District Court

An order sustaining demurrer to two counts of an accusation under former section 94-5516 was not appealable without a judgment entered thereon, and where trial judge sustained demurrer, then disqualified himself and called in another judge, the successor judge should have entered judgment on the two counts in order to make a final determination which would be appealable. State ex rel. King v. District Court, 95 M 400, 26 P 2d 966.

County Attorney Accused

When an accusation is filed against a county attorney, the district court may appoint another attorney, including a county attorney from a nonadjoining county, to prosecute the accusation, but the prosecuting attorney is not entitled to compensation from the county for his services. State ex rel. McGrade v. District Court, 52 M 371, 157 P 1157.

Dealing in Warrants

Police captain could be removed from office for purchase and redemption of a city warrant in violation of section 59-504, and it was no defense that the purchase was made on behalf of a fellow officer. State ex rel. O'Brien v. Mayor of Butte, 54 M 533, 172 P 134.

Disqualification of Judge

Proceeding under former section 94-5516 for removal of an officer from office was criminal rather than civil in nature, so section 93-901, relating to disqualification of the judge by affidavit, did not apply. State ex rel. Houston v. District Court, 61 M 558, 202 P 756.

Fees Charged

The term "fees" used in former section 94-5516 was broad enough to include both the per diem and reimbursable expenses of a county commissioner. State ex rel. Payne v. District Court, 53 M 350, 165 P 294; State v. Story, 53 M 537, 165 P 748.

Former section 94-5516, in so far as it related to unlawful fees, was restricted to fees "for services rendered . . . in his office," so that accusation that county commissioner received fees for attending a convention did not come within the section where it was shown that another commissioner was authorized to attend and thus that defendant's attendance was not "in his office." State ex rel. King v. Smith, 98 M 171, 38 P 2d 274.

Good Faith

Former section 94-5516, before the 1917 amendment, did not require a showing that the exaction of unauthorized fees was knowingly made, and it was no defense that the officer charged the fees in good faith and in reliance on the attorney general's advice. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103.

County commissioner charged with receiving illegal fees for supervising road work was virtually deprived of good faith defense allowed by former section 94-5516, after the 1917 amendment, by admission of evidence of attorney general's opinions holding such fees unlawful and of conversations with the county attorney, together with instructions that the attorney general and county attorney were the commissioner's legal advisers and that ignor-

ance of the law was no excuse. State v. Russell, 84 M 61, 274 P 148.

The 1917 amendment of former section 94-5516 allowing the good faith defense to officers accused of receiving illegal fees established the public policy of the state, and the governor should have heard evidence on such defense before removing officers removable by him only for cause. State ex rel. Holt v. District Court, 103 M 438, 63 P 2d 1026.

Evidence that county surveyor acted with knowledge of members of county airport board and on advice of state examining officer in filing claim under another name for services for which he could not have been paid in his own name tended to establish the good faith defense allowed by the 1917 amendment to former section 94-5516. State v. Hale, 126 M 326, 249 P 2d 495.

Misfeasance and Malfeasance

Accusations charging school board members with selecting a school site and erecting a building without submitting the matter to the electors, with employing an uncertified teacher, and with issuing warrants not authorized by the county superintendent, charged affirmative acts rather than nonfeasance, and could be brought only under former section 94-5502, which required accusation by grand jury and trial by jury, rather than under former section 94-5516. State ex rel. Hessler v. District Court, 64 M 296, 209 P 1052.

Accusation that sheriff actively participated in offenses involving bribery charged malfeasance in office and, where not properly brought under former section 94-5502, was subject to dismissal even though joined with other counts properly brought under former section 94-5516. State ex rel. Beazley v. District Court, 75 M 116, 241 P 1075.

In prosecution of sheriff under former section 94-5516 for nonfeasance in not arresting and instituting proceedings against one who offered a bribe, where the evidence showed that the sheriff actively solicited and received bribes but the accusation had not been brought by the grand jury as required by former section 94-5502, the court lost jurisdiction and should have dismissed the charge. State on Accusation of McNaught v. Beazley, 77 M 430, 250 P 1114.

Neglect of Mandatory Duty

Sheriff could be convicted and removed from office under former section 94-5516 for failure to take any steps to dispel a riot and for failure to attempt to serve bench warrants issued by district court. State v. Driscoll, 49 M 558, 144 P 153.

Police captain could be removed from office for failure for three years to file bond required. State ex rel. O'Brien v. Mayor of Butte, 54 M 533, 172 P 134.

Accusation that sheriff failed to arrest and institute proceedings against one who offered him a bribe charged nonfeasance, rather than misfeasance or malfeasance, and could be brought under former section 94-5516. State ex rel. Beazley v. District Court, 75 M 116, 241 P 1075.

Former section 94-5516, after the 1917 amendment, required that neglect of duty be willful before it would constitute ground for removal from office, and an accusation that failed to allege willfulness should be dismissed. State ex rel. Arnot v. District Court, 155 M 344, 472 P 2d 302.

Pleadings

Accusation listing fees received by a county commissioner which were unlawful on their face was sufficient. State ex rel. Payne v. District Court, 53 M 350, 165 P 294, distinguished in 155 M 344, 348, 472 P 2d 302, 304.

Accusation against county commissioner for collecting illegal fees that quoted a number of items of per diem, mileage and expenses without specifying which portions of which items were excessive or unlawful did not sufficiently apprise defendant of the charges against him and was therefore properly dismissed on special demurrer. State ex rel. King v. Smith, 98 M 171, 38 P 2d 274.

Prosecution by Attorney General

When the attorney general petitions for the removal of a county officer, he is acting in behalf of the public and even though the prosecution is unsuccessful, the county rather than the attorney general personally is liable for witness fees. Griggs v. Glass, 58 M 476, 193 P 564.

Survival of Action

Action did not abate on death of officer pending appeal from judgment ousting him from office under former section 94-5516, since the question of his entitlement to the per diem and fees in question, as well as other emoluments accrued since the judgment of ouster, still remained. State v. Russell, 84 M 61, 274 P 148.

Time for Trial

Accused officer was entitled to dismissal of accusation under former section 94-5516 when it had not been brought to trial within the forty days allowed by that section, even where accused had demanded jury trial under the 1917 amendment. State ex rel. Galbreath v. District Court, 108 M 425, 91 P 2d 424.

Trial by Judge

Former section 94-5516, providing for removal from office in certain instances, was quasi-criminal in nature, so that the officer was entitled to have his case adjudicated by the trial judge, and supreme court would not issue mandamus requiring his removal on the trial judge's findings. State ex rel. Rowe v. District Court, 44 M 318, 119 P 1103.

Since former section 94-5516 provided for no penalty other than removal from office, there was no right to trial by jury except as provided in that section, even though the proceeding was criminal in nature, and a prosecution for neglect of mandatory duty was properly triable by the judge alone. State ex rel. Bullock v. District Court, 62 M 600, 205 P 955.

Value Received

Under clause in former section 94-5516 permitting officer charged with collecting illegal fees to show the value received by the public body from his services, it was error to exclude evidence of the amounts county would have had to pay by contract to have done the road work for which the officer, a county commissioner, was accused of having received unauthorized fees. State v. Russell, 84 M 61, 274 P 148.

Part 5

Treason, Flags and Related Offenses

94-7-501. [None.]

Compiler's Notes

Chapter 513, Laws of 1973, contained no section 94-7-501.

94-7-502. Desecration of flags. (1) In this section "flag" means anything which is or purports to be the official flag of the United States, the United States shield, the United States coat of arms, the Montana state flag, or a copy, picture, or representation of any of them.

(2) A person commits the offense of desecration of flags if he purposely or knowingly:

(a) publicly mutilates, defiles, or casts contempt upon the flag; or

(b) places on or attaches to the flag any work, mark, design, or advertisement not properly a part of such flag or exposes to public view a flag so altered; or

(c) manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or

(d) uses the flag for commercial advertising purposes.

(3) A person convicted of the offense of desecration of flags shall be imprisoned in the state prison for any term not to exceed ten (10) years.

(4) This section does not apply to flags depicted on written or printed documents or periodicals or on stationery, ornaments, pictures, or jewelry, provided there are not unauthorized words or designs on such flags and provided the flag is not connected with any advertisement.

History: En. 94-7-502 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Minnesota Criminal Code, section 609.40.

Commission Comment

The section is not intended to prevent giving away flags to customers of a business enterprise as a patriotic gesture or placing the names of donors on flags by the Red Cross. United States Code, Title 36, Sections 170 and 171 and subsequent sections prescribe the formalities of using and displaying the flag on various occasions.

94-7-503. Criminal syndicalism. (1) "Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

(2) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;

(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or

(c) for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine.

(3) A person convicted of the offense of criminal syndicalism shall be imprisoned in the state prison for a term not to exceed 10 years.

(4) Whoever, being the owner or in possession or control of any premises, knowingly permits any assemblage of persons to use such premises for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-7-503 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 29, Ch. 359, L. 1977.

Source: Substantially the same as Minnesota Statutes Annotated, section 609.405.

Commission Comment

The intent of the provision is to provide a more concise statute to deal with those social elements which advocate violence, subversion and destruction by (1) eliminating the cumbersome and convoluted language found in the old sedition statute (R. C. M. 1947, section 94-4401) and (2) modernizing the statute for application to present social needs.

There can be little doubt that the former sedition statute is obsolete. The statute was derived from the Espionage Act of 1917, as amended. (40 Stat. 553) The amended language provided a more detailed delineation of acts causing the offense and broadened immensely the scope of activity that could be included therein. The amendment was passed exclusively as a wartime measure. In upholding the constitutionality of the section, Justice Holmes said in Schenck v. United States, 249 US 47, 52, 63 L Ed 470, 39 S Ct 247 (1919) "When a nation is at war, many things that might be said in time of peace are such a hinderance to its effect that those utterances will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right." The Congress of the United States, in keeping with the intent of the section as a wartime measure, repealed it in 1921 (41 Stat. 1395, 1360) and replaced it with the original act. This, in turn, was repealed in 1948 (62 Stat. 862). The former Montana statute was directly derived from the 1918 amendment to the Espionage Act of 1917. In spite of the federal government's use of the language as a wartime provision, the statute remained intact in Montana for nearly half a century. There is an additional reason for repealing the former sedition statute. In Commonwealth of Pennsylvania v. Nelson, 350 US 497, 100 L Ed 640, 76 S Ct 477 (1955) Chief Justice Warren, writing for the majority stated, "The Congress determined in 1940 that it was necessary for it to re-enter the field of antisubversive legislation which it had abandoned in 1921. In that year it enacted the Smith Act which proscribed advocacy of the overthrow of any government — federal, state or local—by force and violence and organization of and knowing membership in a group which so advocates." Referring further to the Internal Security Act of 1950 (50 U.S.C. § 781 et seq.), Warren went on to say, "We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of Sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the states to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to sup-

plement the federal law." The opinion also stated that "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program."

Amendments

The 1977 amendment substituted "whose purpose is" in subsection (2)(c) for "who purposely thereby"; and made minor changes in phraseology, punctuation and style.

94-7-504. Bringing armed men into the state. (1) A person commits the offense of bringing armed men into the state when he knowingly brings, or aids in bringing, into this state an armed person or armed body of men for the purpose of engaging in criminal or socially disruptive activities or to usurp the powers of law enforcement authorities.

(2) A person convicted of the offense of bringing armed men into the state shall be imprisoned in the state prison for a term not to exceed ten (10) years.

History: En. 94-7-504 by Sec. 1, Ch. 513, L. 1973.

Source: Derived from Revised Codes of Montana 1947, sections 94-3524 and 94-3920.

Commission Comment

This is intended to deal with those individuals who would bring criminal and politically adverse elements into Montana to carry on criminal or socially disruptive activities, or to take over duties of law enforcement authorities.

CHAPTER 8

OFFENSES AGAINST PUBLIC ORDER

Part 1—Offensive, Indecent and Inhumane Conduct

Part 2—Weapons

Part 3—Lotteries

Part 4—Gambling

Part One

Offensive, Indecent and Inhumane Conduct

94-8-101. Disorderly conduct. (1) A person commits the offense of disorderly conduct if he knowingly disturbs the peace by:

(a) quarreling, challenging to fight or fighting; or

(b) making loud or unusual noises; or

(c) using threatening, profane or abusive language; or

(d) discharging firearms; or

(e) rendering vehicular or pedestrian traffic impassable; or

(f) rendering the free ingress or egress to public or private places impassable; or

(g) disturbing or disrupting any lawful assembly or public meeting; or

(h) transmitting a false report or warning of a fire, impending explosion or other catastrophe in such a place that its occurrence would endanger human life; or

(i) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) A person convicted of the offense of disorderly conduct shall be fined not to exceed one hundred dollars ($100) or be imprisoned in the county jail for a term not to exceed ten (10) days, or both.

History: En. 94-8-101 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

There appeared to have been no distinct crime known as disorderly conduct at common law. Some of the acts now included by statute in this category fell under the general heading of breaches of the peace such as fighting or causing a disturbance which would tend to provoke fighting among those present.

In many jurisdictions statutes have developed which go beyond merely preventing breaches of the peace. Included generally are acts which offend others or annoy them or create resentment without necessarily leading to a breach of peace. The crime of disorderly conduct appears to be directed at curtailing that kind of behavior which disrupts and disturbs the peace and quiet of the community by various kinds of annoyances. These acts standing alone may not be criminal under other categories such as theft, or assault and battery, or libel, etc. The difficulty is in defining the conduct which falls within these objectives, for a given act under some circumstances is not objectionable, while under others it is. Thus sounding a horn at a carnival is not objectionable. But sounding it at midnight in a residential section might be. The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb "others." It is not sufficient that a single person or a very few persons have grounds for complaint.

DECISIONS UNDER FORMER LAW

Disturbing the Peace

Evidence that defendant was slapping his pistol against his leg in an agitated manner, that he unholstered the weapon and pointed it at another and threatened to shoot him and that he spat at that person's departing automobile was sufficient to support conviction of disturbing the peace. State v. Turley, — M —, 521 P 2d 690.

94-8-102. Failure of disorderly persons to disperse. (1) Where two (2) or more persons are engaged in disorderly conduct, a peace officer, judge or mayor may order the participants to disperse. A person who pur-

posely refuses or knowingly fails to obey such an order commits the offense of failure to disperse.

(2) A person convicted of the offense of failure to disperse shall be fined not to exceed one hundred dollars ($100) or be imprisoned in the county jail for a term not to exceed ten (10) days, or both.

History: En. 94-8-102 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

State statutes commonly penalize refusal to disperse when ordered to do so by those in authority and present at the scene of an unlawful assembly. The elements of the offense are that at least two persons be involved and that the group members must purposely refuse or fail to disperse when they are ordered to do so by an official of the law or one given authority by law.

DECISIONS UNDER FORMER LAW

Civil Liability

Former sections 94-5304 and 94-5305, requiring the sheriff to command rioters to disperse and to arrest those who do not disperse, did not impose civil liability on the sheriff for damages sustained because of his neglect of this duty. Annala v. McLeod, 122 M 498, 206 P 2d 811.

94-8-103. Riot. (1) A person commits the offense of riot if he purposely and knowingly disturbs the peace by engaging in an act of violence or threat to commit an act of violence as part of an assemblage of five (5) or more persons, which act or threat presents a clear and present danger of, or results in, damage to property or injury to persons.

(2) A person convicted of the offense of riot shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-8-103 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

The common-law misdemeanor, "unlawful assembly," was a gathering of three or more persons with the common purpose of commiting an unlawful act. When an act was done toward carrying out this purpose, the offense was "rout." The actual beginning of the perpetration of the unlawful act became "riot." All states penalize some form of unlawful assembly or riot. The section follows the common law with the exception of the number of people involved and the inclusion of the language "purposely and knowingly," which is the standard mens rea requirement in the code.

94-8-104. Incitement to riot. (1) A person commits the offense of incitement to riot if he purposely and knowingly commits an act or engages in conduct that urges other persons to riot. Such act or conduct shall not include the mere oral or written advocacy of ideas, or expression of belief, which advocacy or expressions does not urge the commission of an act of immediate violence.

(2) A person convicted of the offense of incitement to riot shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-8-104 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section introduces a new concept to the Montana Criminal Code. The intent of the section is to specifically define an offense which might otherwise be covered in another part of the code.

It is conceivable that an act constituting incitement to riot would be covered

under the inchoate offense of solicitation. However, with the increase in the general social upheaval in many jurisdictions, a single statute specifically prohibiting incitement to riot might provide more effective law enforcement. Preventing a riot before substantial injury to property and persons has occurred is the only practical method of dealing with such social unrest, for after the substantive offenses are committed, and a riot is in progress, normal law enforcement procedures are generally unworkable and the tactics used by enforcement officials to restore order often extend beyond that which may be considered a reasonable use of force under the circumstances.

94-8-105. Repealed.

Repeal

Section 94-8-105 (Sec. 1, Ch. 513, L. 1973), relating to public intoxication, was repealed by Sec. 4, Ch. 403, Laws 1975.

94-8-106. Cruelty to animals. (1) A person commits the offense of cruelty to animals if without justification he knowingly or negligently subjects an animal to mistreatment or neglect by:

(a) overworking, beating, tormenting, injuring or killing any animal; carrying any animal in a cruel manner; or

(b) failing to provide an animal in his custody with proper food, drink, or shelter; or

(c) abandoning any helpless animal or abandoning any animal on any highway, railroad or in any other place where it may suffer injury, hunger or exposure or become a public charge; or

(d) promoting, sponsoring, conducting or participating in a horse race of more than two (2) miles; or promoting, sponsoring, or conducting or participating in any fight between any animals.

(2) A person convicted of the offense of cruelty to animals shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. 94-8-106 by Sec. 1, Ch. 513, L. 1973.

Source: Derived from the proposed Michigan Code, section 5565; also derived from Model Penal Code, section 250.11.

Commission Comment

Subdivision (1)(c) covers instances in which a person knowingly and negligently releases or abandons a wild or semi-wild animal in a populated area where it will not be able to fend for itself.

94-8-107. Public nuisance. (1) "Public nuisance" means:

(a) a condition which endangers safety or health, is offensive to the senses, or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons;

(b) any premises where persons gather for the purpose of engaging in unlawful conduct; or

(c) a condition which renders dangerous for passage any public highway or right-of-way or waters used by the public.

(2) A person commits the offense of maintaining a public nuisance if he knowingly creates, conducts, or maintains a public nuisance.

(3) Any act which affects an entire community or neighborhood or any considerable number of persons (as specified in subsection (1)(a)) is no

less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

(4) A person convicted of maintaining a public nuisance shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both. Each day of such conduct constitutes a separate offense.

(5) Action to abate a public nuisance.

(a) Every public nuisance may be abated and the persons maintaining such nuisance and the possessor of the premises who permits the same to be maintained may be enjoined from such conduct by an action in equity in the name of the state of Montana by the county attorney or any resident of the state.

(b) Upon the filing of the complaint in such action the judge may issue a temporary injunction.

(c) In such action evidence of the general reputation of the premises is admissible for the purpose of proving the existence of the nuisance.

(d) If the existence of the nuisance is established, an order of abatement shall be entered as part of the judgment in the case. The judge issuing the order may, in his discretion:

(i) confiscate all fixtures used on the premises to maintain the nuisance and either sell them and transmit the proceeds to the county general fund, destroy them, or return them to their rightful ownership;

(ii) close the premises for any period not to exceed 1 year, during which period the premises shall remain in the custody of the court;

(iii) allow the premises to be opened upon posting bond sufficient in amount to assure compliance with the order of abatement. The bond shall be forfeited if the nuisance is continued or resumed. The procedure for forfeiture or discharge of the bond shall be as provided in 95-1116; or

(iv) any combination of the above.

History: En. 94-8-107 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 30, Ch. 359, L. 1977.

Source: New.

Commission Comment

The phrase "any considerable number of persons" as used in the provision will undoubtedly be subject to court interpretation. The phrase has not been interpreted by any Montana case to date. The New York Court of Appeals held that "The expression 'any considerable number of persons' is used solely for the purpose of differentiating a public nuisance, which is subject to indictment, from a private nuisance. But a considerable number of persons does not necessarily mean a very great or any particular number of persons." People v. Kings County Iron Foundry, 209 NY 530, 102 NE 598, 599 (1913).

The offense of "nuisance," in some ways, resembles disorderly conduct in its requirement that the proscribed conduct annoy, alarm or inconvenience the public or "a considerable number of persons" however disorderly conduct relates to existing acts or acts of brief duration while nuisance usually involves the creation or maintenance of a continuing condition. In practical application, most criminal nuisance cases fall into two categories: (1) the maintenance of manufacturing plants, entertainment resorts and the like, which by virtue of excessive noise, noxious gases, etc., annoy or offend groups or areas of the community; and (2) the conduct of resorts where people gather for illegal or immoral purposes. Subdivision (1)(a) deals with the first category. One difficulty of this offense is the fine balancing of the relative rights of plant operators or business people on the one hand and the residents of the vicinity on the other. The problem is accentuated by the fact that "public nuisance," as defined and construed, requires little if any criminal intent, being virtually a crime of absolute liability.

Amendments

The 1977 amendment substituted "public nuisance" in subsection (5)(a) for "prem-

ise upon which a public nuisance is being maintained"; inserted "of the premises" in subsection (5)(a); and made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

Burden of Proof

An action in equity to abate a nuisance initiated under former section 94-1003 was a civil action and the burden resting on the state was proof by a preponderance of the evidence only. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Where the evidence overwhelmingly established gambling activities on the premises and there was virtually no contradictory evidence, supreme court would reverse judgment dismissing action to abate nuisance and would direct entry of judgment of abatement, including a perpetual injunction against use of premises for gambling. State ex rel. Nagle v. Naughton, 103 M 306, 63 P 2d 123.

Closing of Premises

Closing of an entire three-story building was justified on evidence that previous lesser attempts to abate unlawful activities had failed and that the operation of all parts of the building were connected with the unlawful activities. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Where stipulated facts established that gambling operations had been conducted on premises in violation of perpetual injunction ordered by supreme court thirteen years before, but sheriff's return reported that he found no gambling equipment there, order would be entered closing premises for a year and restraining defendants from removing any gambling equipment. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

Complaint

Complaint initiating an action in equity under former section 94-1003 was sufficient if verified as required by that section, and it was not necessary that it comply with the requirements of section 93-4205 that the allegations be made positively, rather than on belief, as required for temporary injunction in other types of cases. State ex rel. Bergland v. Bradley, 124 M 434, 225 P 2d 1024.

Destruction of Property

Order directing sheriff to sell equipment confiscated was erroneous where such equipment was gambling equipment of the type described in section 94-8-404, since under section 94-8-411 such equipment is to be destroyed. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

Good Faith

Defendants could not plead good faith compliance with unconstitutional statute purporting to authorize certain types of lotteries when they had not paid the tax or license fees required by those same statutes; in any event, good faith was relevant only in applying for release of the premises for lawful use. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

Order of Abatement

Order abating nuisance was not required, as a prerequisite or concurrent with closing of the premises, to order confiscation of the fixtures. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Trial court should have included in the order abating a nuisance and confiscating equipment a description of the fixtures and equipment confiscated, and where there was evidence as to the equipment used in illegal activities, it was immaterial that the complaint did not describe it. State ex rel. Bottomly v. Johnson, 116 M 483, 154 P 2d 262.

An order closing the premises and ordering confiscation of personal property was a final judgment and could not be entered while a motion to strike portions of the complaint was still pending. State ex rel. Harrison v. Baker, 135 M 180, 340 P 2d 142.

Parties Defendant

Owner of building could not complain that a particular lessee of part had not been made a party to abatement action initiated under former section 94-1003. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Parties Plaintiff

The fact that the nominal complainant in an abatement action under former section 94-1003 was an attorney and had been paid by an undisclosed person to file the action and testify as a witness was not ground for questioning his motives or the credibility of his testimony. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P 2d 168.

Permitting Nuisance

Finding that the owner of a place knew of and permitted unlawful conduct therein was justified by evidence of its general reputation for gambling and unlawful sale of liquor, that owner knew of several arrests for unlawful activities and on one occasion assumed responsibility for per-

sons arrested, that owner leased to persons previously involved in illegal activities, and that on learning of violations, owner failed to terminate leases immediately but merely failed to renew when the leases expired several months later. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Reputation Evidence

Testimony as to the general reputation of a place was admissible in an abatement action initiated under former section 94-1003 and tended directly to prove knowledge on the part of the owner. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Temporary Injunction

Under former section 94-1004, the district court was required, on a prima facie showing of unlawful gambling on the premises, to issue a temporary injunction which should be effective at least until the hearing on the order to show cause, and an order quashing the temporary injunction before that time was appealable. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P 2d 307.

Unlawful Conduct

Gambling, prostitution and unlawful sale of liquor were proper grounds for an abatement action initiated under former section 94-1003. State ex rel. Lamey v. Young, 72 M 408, 234 P 248.

Former section 94-1002, defining nuisances, was designed to include lotteries, as defined by section 94-8-301, as well as other forms of gambling. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P 2d 168.

94-8-108. Creating a hazard. (1) A person commits the offense of creating a hazard if he knowingly:

(a) discards in any place where it might attract children a container having a compartment of more than 1½ cubic feet capacity and a door or lid that locks or fastens automatically when closed and cannot easily be opened from the inside and fails to remove the door, lid, or locking or fastening device;

(b) being the owner or otherwise having possession of property upon which there is a well, cistern, cesspool, mine shaft, or other hole of a depth of 4 feet or more and a top width of 12 inches or more, fails to cover or fence it with a suitable protective construction;

(c) tampers with an aircraft without the consent of the owner;

(d) being the owner or otherwise having possession of property upon which there is a steam engine or steam boiler, continues to use a steam engine or steam boiler which is in an unsafe condition;

(e) being a person in the act of game hunting, acts in a negligent manner or knowingly fails to give all reasonable assistance to any person whom he has injured; or

(f) deposits any hard substance upon or between any railroad tracks which will tend to derail railroad cars or other vehicles.

(2) A person convicted of the offense of creating a hazard shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-8-108 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 31, Ch. 359, L. 1977.

Source: Substantially the same as proposed Michigan Code, section 7505.

Commission Comment

The section is designed primarily to protect children, unsuspecting or handicapped adults and injured hunting victims. In addition it deals with several unrelated and somewhat unique problems in imposing criminal liability on aircraft meddlers, railroad derailers and possessors of steam engines or steam boilers. The mens rea requirement for each offense is "knowingly" and the penalty is a misdemeanor only.

Amendments

The 1977 amendment made minor changes in phraseology, punctuation and style.

DECISIONS UNDER FORMER LAW

Civil Liability

Failure to put a cover over or a fence around an open shaft as required by former section 94-35-125 was negligence per se and made the landowner liable for injuries sustained in a fall even by a trespasser. Conway v. Monidah Trust, 47 M 269, 132 P 26.

Trench

Former section 94-35-125 did not apply to a temporary trench opened for the laying of sewer pipe, even though more than ten feet deep. McLaughlin v. Bardsen, 50 M 177, 145 P 954.

94-8-109. Failure to yield party line. (1) Any person who fails to relinquish a telephone party line or public pay telephone after he has been requested to do so to permit another to place an emergency call to a fire department or police department, or for medical aid or ambulance service, shall be imprisoned for a term not to exceed ten (10) days or fined not to exceed twenty-five dollars ($25), or both.

(2) It is a defense to prosecution under subsection (1) that the accused did not know or did not have reason to know of the emergency in question, or that the accused was himself using the telephone party line or public pay telephone for such an emergency call.

(3) Any person who requests another to relinquish a telephone party line or public pay telephone on the pretext that he must place an emergency call knowing such pretext to be false, shall be imprisoned for a term not to exceed ten (10) days or fined not to exceed twenty-five dollars ($25), or both.

(4) Every telephone company doing business in this state shall print a copy of subsections (1), (2) and (3) of this section in each telephone directory published by it after the effective date of this section.

History: En. 94-8-109 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Revised Codes of Montana 1947, sections 94-35-221.1, 94-35-221.2, 94-35-221.3 and 94-35-221.4.

Commission Comment

This section is a recodification of old laws dealing with party lines.

94-8-110. Obscenity. (1) A person commits the offense of obscenity when, with knowledge of the obscene nature thereof, he purposely or knowingly:

(a) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene to anyone under the age of eighteen (18); or

(b) Presents or directs an obscene play, dance or other performance or participates in that portion thereof which makes it obscene to anyone under the age of eighteen (18); or

(c) Publishes, exhibits or otherwise makes available anything obscene to anyone under the age of eighteen (18); or

(d) Performs an obscene act or otherwise presents an obscene exhibition of his body to anyone under the age of eighteen (18); or

(e) Creates, buys, procures or possesses obscene matter or material with the purpose to disseminate it to anyone under the age of eighteen (18); or

(f) Advertises or otherwise promotes the sale of obscene material or materials represented or held out by him to be obscene.

(2) A thing is obscene if:

(a) it is a representation or description of perverted ultimate sexual acts, actual or simulated, or

(b) it is a patently offensive representation or description of normal ultimate sexual acts, actual or simulated, or

(c) it is a patently offensive representation or description of masturbation, excretory functions or lewd exhibition of the genitals, and

(d) taken as a whole the material:

(i) applying contemporary Montana standards, appeals to the prurient interest in sex,

(ii) portrays conduct described in (a), (b), or (c) above in a patently offensive way, and

(iii) lacks serious literary, artistic, political or scientific value.

(3) In any prosecution for an offense under this section evidence shall be admissible to show:

(a) The predominant appeal of the material, and what effect if any, it would probably have on the behavior of people;

(b) The artistic, literary, scientific, educational or other merits of the material;

(c) The degree of public acceptance of the material in this state;

(d) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; or

(e) Purpose of the author, creator, publisher or disseminator.

(4) A person convicted of obscenity shall be fined at least five hundred dollars ($500) but not more than one thousand dollars ($1,000), or imprisoned in the county jail for a term not to exceed six (6) months, or both.

(5) No city or municipal ordinance may be adopted which is more restrictive as to obscenity than the provisions of this section and section 94-8-110.1.

History: En. 94-8-110 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 407, L. 1975.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 11-20.

Commission Comment

This section closely follows section 11-20 of the Illinois Criminal Code, which is essentially the same as the American Law Institute Model Penal Code Draft. Slight changes in wording were undertaken in recognition that today's society often condones literature, movies and other art which may incidentally provide erotic stimulation. The significant difference between this section and the prior provisions is that a violation cannot occur unless the obscene art is specifically directed to a person under the age of majority with the exception of subdivision (1)(f) which is aimed at "pandering", using its common definition.

Amendments

The 1975 amendment rewrote subsection (2) which read: "A thing is obscene if: (a) the dominant theme of the material taken as a whole appeals to a prurient interest, that is, a shameful or morbid interest in violence, nudity, sex or excretion; and (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without re-

deeming social value"; substituted "at least five hundred dollars ($500) but not more than one thousand dollars ($1,000)" in subsection (4) for "not to exceed five hundred dollars ($500)"; added subsection (5); and made a minor change in phraseology.

Constitutionality

United States Supreme Court decisions holding that applicable standards for determination of obscenity are those of the "community" in which the regulation is imposed do not render this section unconstitutional in so far as it invalidates local ordinances in conflict with it. U.S. Mfg. & District Corp. v. City of Great Falls, — M —, 546 P 2d 522.

94-8-110.1. Public display of offensive material. (1) A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, marquee or similar place, any pictorial, three-dimensional or other visual representation of a person or a portion thereof of the human body that predominantly appeals to prurient interest in sex, and is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors; and does not

(a) separate that material by an opaque structure from other materials displayed, and

(b) establish, by official identification, that each person viewing the displayed material is at least eighteen (18) years of age.

(2) A theater may not display previews or projections advertising or promoting motion pictures if such previews or projections contain a display of offensive sexual or offensive violent material and if minors are permitted to attend the showing of the motion picture then being featured.

(3) For purposes of this section, "offensive violent material" means material which is so violent as to be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

(4) A drive-in movie screen may not display any material prohibited by subsection (1) in such manner that the display is easily visible from any public street, sidewalk, thoroughfare or transportation facility.

(5) A person convicted of the public display of offensive sexual material or convicted of otherwise violating this section shall be fined at least five hundred dollars ($500) but not more than one thousand dollars ($1,000), or imprisoned in the county jail for a term not to exceed six (6) months, or both.

History: En. Secs. 1 to 3, Ch. 463, L. 1973; R. C. M. 1947, Supp., Secs. 94-3624 to 94-3626; amd. Sec. 2, Ch. 407, L. 1975; amd. Sec. 1, Ch. 391, L. 1977.

Compiler's Notes

This section was not a part of the Criminal Code of 1973, but is derived from a separate 1973 act. The compiler has placed the section here in the interest of logical arrangement and, in so doing, has inserted subsection designations in the style used in the Criminal Code of 1973.

Title of Act

An act prohibiting the public display of offensive sexual material, with definition of terms; and providing for a penalty.

Amendments

The 1975 amendment deleted "drive-in movie screen" after "billboard" in subsection (1); deleted "in such manner that the display is easily visible from or in any public street, sidewalk, or thoroughfare or transportation facility" after "marquee or similar place" in subsection (1); added

"and does not" and subdivisions (a) and (b) to subsection (1); inserted subsection (3); designated former subsection (3) as (4); and increased the fine in subsection (4) from "not to exceed five hundred dollars ($500)" to "at least five hundred dollars ($500) but not more than one thousand dollars ($1,000)."

The 1977 amendment inserted "or offensive violent" before "material" in subsection (2); inserted subsection (3); redesignated former subsections (3) and (4) as subsections (4) and (5); substituted "subsection (1)" in subsection (4) for "this section"; and inserted "or convicted of otherwise violating this section" in subsection (5).

Separability Clause

Section 4 of Ch. 463, Laws 1973 read "It is the intent of the legislature that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid application."

Effective Date

Section 3 of Ch. 407, Laws 1975 provided the act should be in effect from and after its passage and approval. Approved April 14, 1975.

94-8-110.2. Sale and advertisement of contraceptive drugs and devices. (1) It is unlawful for any person, firm, corporation, partnership, or association to sell, offer for sale, or give away, by means of vending machines, personal or collective distribution, solicitation, or peddling or in any other manner whatsoever, contraceptive drugs or devices, prophylactic rubber goods, or other articles for the prevention of venereal diseases. This subsection does not apply to regularly licensed practitioners of medicine or osteopathy, other licensed persons practicing other healing arts, registered pharmacists, or wholesale drug jobbers or manufacturers who sell to retail stores only.

(2) It is unlawful to:

(a) exhibit or display prophylactics or contraceptives in any show window, upon the streets, or in any public place, other than in the place of business of a licensed pharmacist;

(b) advertise such in any magazine, newspaper, or other form of publication originating in or published within the state of Montana;

(c) publish or distribute from house to house or upon the streets any circular, booklet, or other form of advertising of prophylactics or contraceptives; or

(d) advertise such by other visual means, auditory method, or radio broadcast or by the use of outside signs on stores, billboards, window displays, or other advertising visible to persons upon the streets or public highways.

(3) Nothing in this section prevents the advertising of prophylactics or contraceptives in the trade press, those magazines whose principal circulation is to the medical and pharmaceutical professions, or those magazines and other publications having interstate circulation or originating outside of the state of Montana where the advertising does not violate any United States law or federal postal regulation.

(4) Nothing in this section prevents the furnishing within the store or place of business of a licensed pharmacist to persons qualified to purchase, and then only upon their inquiry, such printed or other information as is requisite to proper use in relation to any merchandise coming within the provisions of this section.

(5) Nothing in this section prevents the dissemination of medically acceptable contraceptive information by printed or other methods concerning the availability and use of any merchandise coming within the provisions of this section.

(6) Any officer of the law may cause the arrest of a person violating any provision of this section, seize stocks illegally held, and seize any mechanical device or vending machine containing any merchandise coming within the provisions of this section, holding the owner of the machine and the occupier and owner of the premises where seizure is made to be in violation of this section.

(7) Any person, any member of a firm or partnership, or the officers of a corporation or association who knowingly violate any of the provisions of this section are guilty of a misdemeanor and shall, upon conviction, be punished by a fine not to exceed $500 or by imprisonment not to exceed 6 months in the county jail, or both.

(8) Justice of the peace courts and the district courts of the state have concurrent jurisdiction in all prosecutions and causes arising under this section.

History: En. Secs. 1 to 4, Ch. 430, L. 1973; R. C. M. 1947, Supp., Secs. 94-3620 to 94-3623; amd. Sec. 32, Ch. 359, L. 1977.

Compiler's Notes

This section was not part of the Criminal Code of 1973, but is based on a separate 1973 act. The compiler has placed it here in the interest of logical arrangement and, in so doing, has inserted subsection numbers in the style used in the Criminal Code of 1973.

Title of Act

An act to be codified in chapter 15, Title 66, R. C. M. 1947, relating to the sale and advertisement of contraceptive drugs and devices; providing penalties; and repealing sections 94-3616, 94-3617, 94-3618 and 94-3619, R. C. M. 1947.

Amendments

The 1977 amendment made minor changes in style, phraseology and punctuation.

Repealing Clause

Section 5 of Ch. 430, Laws 1973 read "Sections 94-3616, 94-3617, 94-3618 and 94-3619, R. C. M. 1947, are repealed."

94-8-110.3. Certain motion picture theater employees not liable for prosecution. (1) As used in this section, "employee" means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed but does not include a manager of the motion picture theater.

(2) No employee is liable to prosecution under sections 94-8-110 and 94-8-110.1, R. C. M. 1947, or under any city or county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employee is acting within the scope of his regular employment at a showing open to the public.

History: En. 94-8-110.3 by Sec. 1, Ch. 76, L. 1974.

Title of Act

An act relating to motion picture theater employees and obscene motion pictures.

94-8-111. Criminal defamation. (1) Defamatory matter is anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation.

(2) Whoever with knowledge of its defamatory character, orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed commits the offense of criminal defamation and may be sentenced to imprisonment for not more than six (6) months in the county jail or a fine of not more than five hundred dollars ($500), or both.

(3) Violation of subsection (2) is justified if:

(a) the defamatory matter is true and is communicated with good motives and for justifiable ends; or

(b) the communication is absolutely privileged; or

(c) the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern; or

(d) the communication consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings; or

(e) the communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with the purpose to further such interest or duty.

(4) No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two (2) other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty.

History: En. 94-8-111 by Sec. 1, Ch. 513, L. 1973.

Source: Identical to Minnesota Statutes Annotated, section 609.765.

Commission Comment

The law of criminal libel has been based upon two divergent, and often confused, policy considerations. The first is that personal reputations should be protected from injury by punishing the communication of scandalous matter. The second is that breaches of the peace which might be caused by the publication of such matter can be avoided by punishing the publication. This section has the main function of preserving personal reputations by assimilating the nearly one dozen statutes now involved in present provisions, and by clearing up the traditionally confusing language associated with the statutes.

DECISIONS UNDER FORMER LAW

Public Officer

Statements leading to necessary inference that township constable had acted unlawfully in attachment, had formed a collusive partnership with a bill collector, and had been guilty of graft in the administration of the affairs of his office was libelous within the meaning of former section 94-2801. State v. Winterrowd, 77 M 74, 249 P 664.

94-8-112. Bribery in contests. (1) A person commits the offense of bribery in contests if he purposely or knowingly offers, confers, or agrees to confer upon another, or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's failure to use his best efforts in connection with any professional or amateur athletic contest, sporting event or exhibition; or

(b) any benefit as consideration for a violation of a known duty as a person participating in, officiating or connected with any professional or amateur athletic contest, sporting event or exhibition.

(2) A person convicted of the offense of bribery in contests shall be fined not to exceed five thousand dollars ($5,000) or be imprisoned in the state prison for a term not to exceed ten (10) years, or both.

History: En. 94-8-112 by Sec. 1, Ch. 513, L. 1973.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 29-1.

Commission Comment

The bribery of a participant in a sporting event constitutes an activity sufficiently deceitful to warrant criminal sanctions. The purpose of this section is twofold. First, by preventing the offer and acceptance of bribes it attempts to protect the moral character of participants and officials from influence and corruption. Second, through the use of criminal sanctions, the economic and psychological ill effects of "fixed" contests are sought to be avoided. The general phrase "failure to use his best efforts in connection with (a contest)" is intended to cover any conduct whereby a participant tries to lose the contest, lower the margin of victory, establish a point spread, etc., or, in the case of an official or other person, conduct whereby he deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest. The section has no counterpart in the old Montana Criminal Code.

94-8-113. Mistreating prisoners. (1) A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, he purposely or knowingly:

(a) assaults or otherwise injures a prisoner; or

(b) intimidates, threatens, endangers or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him, or for any other purpose; or

(c) violates any civil right of a prisoner.

(2) A person convicted of the offense of mistreating prisoners shall be removed from office or employment and imprisoned in the state prison for a term not to exceed ten (10) years.

History: En. 94-8-113 by Sec. 1, Ch. 513, L. 1973.

Source: New.

Commission Comment

This section replaces R. C. M. 1947, sections 94-3917, "Inhumanity to prisoners," and 94-3918, "Confessions obtained by duress or inhuman practices." The purpose of the section is to provide more concise terminology for offenses against prisoners. Thus, the terms assault, intimidation, threat, endanger and withhold are clearer and more meaningful than "inhumanity" or "inhuman practices."

The maximum punishment provided in the provision is ten (10) years and removal from office. The severe punishment is based on two premises: (1) the relatively helpless circumstance of a prisoner subjected to such treatment, and (2) the policy that a sentence to imprisonment should be rehabilitative in nature. Clearly, little rehabilitation or reorientation to social norms can be accomplished when those responsible for the custody and care of prisoners mistreat them.

94-8-114. Privacy in communications. (1) A person commits the offense of violating privacy in communications if he knowingly or purposely:

(a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with any person by telephone and uses any obscene, lewd, or profane language, suggests any lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of any person

(the use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend);

(b) uses a telephone to attempt to extort money or any other thing of value from any person or to disturb by repeated telephone calls the peace, quiet, or right of privacy of any person at the place where the telephone call or calls are received;

(c) records or causes to be recorded any conversation by use of a hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Subsection (c) does not apply to duly elected or appointed public officials or employees when the transcription or recording is done in the performance of official duty, to persons speaking at public meetings, or to persons given warning of the recording;

(d) by means of any machine, instrument, or contrivance or in any other manner:

(i) reads or attempts to read any message or learn the contents thereof while it is being sent over a telegraph line;

(ii) learns or attempts to learn the contents of any message while it is in a telegraph office or is being received thereat or sent therefrom; or

(iii) uses, attempts to use, or communicates to others any information so obtained;

(e) discloses the contents of a telegraphic message or any part thereof addressed to another person without the permission of such person, unless directed to do so by the lawful order of a court; or

(f) opens or reads or causes to be read any sealed letter not addressed to himself without being authorized to do so by either the writer of the letter or the person to whom it is addressed or, without the like authority, publishes any of the contents of the letter knowing the same to have been unlawfully opened.

(2) A person convicted of the offense of violating privacy in communications shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-8-114 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 33, Ch. 359, L. 1977.

Source: Derived from Revised Codes of Montana 1947, sections 94-3203, 94-3320, 94-3321, 94-3323, 94-35-220, 94-35-221.5, 94-35-274 and 94-35-275.

Commission Comment

This statute is merely a recodification of the old Montana law. A comprehensive electronic surveillance proposal was defeated by the 1971 state legislature.

Amendments

The 1977 amendment substituted subsection (1)(a) for "Communicates with any person by telephone with the intent to terrify, intimidate, threaten, harass, annoy or offend, or use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person"; deleted a second sentence from subsection (1)(b) which now appears in parentheses in subsection (1)(a); inserted "any conversation" in the first sentence of subsection (1)(c); and made minor changes in style, phraseology and punctuation.

Part Two

Weapons

94-8-201. (11317.1) **Definitions.** In 94-8-202 through 94-8-208 the following definitions apply:

(1) "Machine gun" means a weapon of any description by whatever name known, loaded or unloaded, from which more than six shots or bullets may be rapidly, automatically, or semiautomatically discharged from a magazine by a single function of the firing device.

(2) "Crime of violence" means any of the following crimes or an attempt to commit any of the same: any forcible felony, robbery, burglary, and criminal trespass.

(3) "Person" includes a firm, partnership, association, or corporation.

History: En. Sec. 1, Ch. 43, L. 1935; Sec. 94-3101, R. C. M. 1947; redes. 94-8-201 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 34, Ch. 359, L. 1977.

Amendments

The 1977 amendment inserted the introductory phrase and numerical subdivision designations; substituted "any forcible felony" in subdivision (2) for "murder, manslaughter, kidnaping, rape, mayhem, assault to do great bodily harm"; substituted "and criminal trespass" in subdivision (2) for "housebreaking, breaking and entering, and larceny"; and made minor changes in style, phraseology and punctuation.

94-8-202. (11317.2) **Possession or use of machine gun—when unlawful.** Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than twenty years.

History: En. Sec. 2, Ch. 43, L. 1935; Sec. 94-3102, R. C. M. 1947; redes. 94-8-202 by Sec. 29, Ch. 513, L. 1973.

94-8-203. (11317.3) **Punishment for possession or use of machine gun for offensive purpose.** Possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than ten years.

History: En. Sec. 3, Ch. 43, L. 1935; Sec. 94-3103, R. C. M. 1947; redes. 94-8-203 by Sec. 29, Ch. 513, L. 1973.

94-8-204. (11317.4) **Presumption of offensive or aggressive purpose.** Possession or use of a machine gun shall be presumed to be for offensive or aggressive purpose:

(1) when the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found;

(2) when the machine gun is in the possession of or used by a person who has been convicted of a crime of violence in any court of record, state or federal, in the United States of America or its territories or insular possessions;

(3) when the machine gun is of the kind described in 94-8-208 and has not been registered as required in that section; or

(4) when empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of being used in the machine gun are found in the immediate vicinity thereof.

History: En. Sec. 4, Ch. 43, L. 1935; Sec. 94-3104, R. C. M. 1947; amd. and redes. 94-8-204 by Sec. 26, Ch. 513, L. 1973; amd. Sec. 35, Ch. 359, L. 1977.

Compiler's Notes

The previous text of this section may be found under sec. 94-3104 in bound Volume Eight.

Amendments

The 1973 amendment renumbered this section; and substituted the reference to section 94-8-208 in subdivision (c) for a reference to section 94-3108.

The 1977 amendment redesignated subdivisions (a) through (d) as (1) through (4); deleted "an unnaturalized foreign-born person, or" before "a person" in subdivision (2); and made minor changes in phraseology and punctuation.

94-8-205. (11317.5) **Presence of gun as evidence of possession or use.** The presence of a machine gun in any room, boat, or vehicle shall be evidence of the possession or use of the machine gun by each person occupying the room, boat, or vehicle where the weapon is found.

History: En. Sec. 5, Ch. 43, L. 1935; Sec. 94-3105, R. C. M. 1947; redes. 94-8-205 by Sec. 29, Ch. 513, L. 1973.

94-8-206. (11317.6) **Exceptions.** Nothing contained in this act shall prohibit or interfere with:

1. The manufacture for, and sale of, machine guns to the military forces or the peace officers of the United States or of any political subdivision thereof, or the transportation required for that purpose;

2. The possession of a machine gun for scientific purpose, or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake;

3. The possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber, for a purpose manifestly not aggressive or offensive.

History: En. Sec. 6, Ch. 43, L. 1935; Sec. 94-3106, R. C. M. 1947; redes. 94-8-206 by Sec. 29, Ch. 513, L. 1973.

94-8-207. (11317.7) **Manufacturer to keep register of machine guns—contents—inspection—penalty for failure to keep.** Every manufacturer shall keep a register of all machine guns manufactured or handled by him. This register shall show the model and serial number, date of manufacture, sale, loan, gift, delivery or receipt, of every machine gun, the name, address, and occupation of the person to whom the machine gun was sold, loaned, given or delivered, or from whom it was received; and the purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given or delivered, or from whom received. Upon demand every manufacturer shall permit any marshal, sheriff or police officer to inspect his entire stock of machine guns, parts, and supplies therefor, and shall

produce the register, herein required, for inspection. A violation of any provision of this section shall be punishable by a fine of not less than one hundred dollars ($100.00).

History: En. Sec. 7, Ch. 43, L. 1935; Sec. 94-3107, R. C. M. 1947; redes. 94-8-207 by Sec. 29, Ch. 513, L. 1973.

94-8-208. (11317.8) **Registration of machine guns now in state and hereafter acquired—presumption from failure to register.** Every machine gun now in this state adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber shall be registered in the office of the secretary of state, on the effective date of this act, and annually thereafter. If acquired hereafter it shall be registered within twenty-four hours after its acquisition. Blanks for registration shall be prepared by the secretary of state, and furnished upon application. To comply with this section the application as filed must show the model and serial number of the gun, the name, address and occupation of the person in possession, and from whom and the purpose for which, the gun was acquired. The registration data shall not be subject to inspection by the public. Any person failing to register any gun as required by this section, shall be presumed to possess the same for offensive or aggressive purpose.

History: En. Sec. 8, Ch. 43, L. 1935; Sec. 94-3108, R. C. M. 1947; redes. 94-8-208 by Sec. 29, Ch. 513, L. 1973.

Cross-References

Registration functions transferred to department of law enforcement, sec. 82A-1203.

94-8-209. (11317.10) **Uniformity of interpretation.** This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 11, Ch. 43, L. 1935; Sec. 94-3110, R. C. M. 1947; redes. 94-8-209 by Sec. 29, Ch. 513, L. 1973.

94-8-209.1. Destructive device and explosive defined. (1) "Destructive device", as used in this chapter, includes but is not limited to the following weapons:

(a) a projectile containing an explosive or incendiary material or any other similar chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns;

(b) a bomb, grenade, explosive missile, or similar device or a launching device therefor;

(c) a weapon of a caliber greater than .60 caliber which fires fixed ammunition or any ammunition therefor, other than a shotgun or shotgun ammunition;

(d) a rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch, or a launching device therefor and a rocket, rocket-propelled projectile, or similar device containing an explosive or incendiary material or any other similar chemical substance other than the propellant for the device, except devices designed primarily for emergency or distress signaling purposes;

(e) a breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and which has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(2) "Explosive", as used in this chapter, means any explosive defined in 69-1901.

History: En. Sec. 1, Ch. 304, L. 1971; Sec. 69-1931, R. C. M. 1947; amd. and redes. 94-8-209.1 by Sec. 72, Ch. 359, L. 1977.

Title of Act

An act relating to possession of explosives and destructive devices with intent to injure persons or property; setting penalties therefor.

Amendments

The 1977 amendment inserted "similar" before "chemical substance" in subdivisions (1)(a) and (1)(d); and made minor changes in phraseology and punctuation.

94-8-209.2. Possession of a destructive device. (1) A person who, with the purpose to commit a felony, has in his possession any destructive device on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of the offense of possession of a destructive device.

(2) A person convicted of the offense of possession of a destructive device shall be imprisoned in the state prison for a period of not more than 10 years.

History: En. Sec. 2, Ch. 304, L. 1971; Sec. 69-1932, R. C. M. 1947; amd. and redes. 94-8-209.2 by Sec. 73, Ch. 359, L. 1977.

Amendments

The 1977 amendment deleted "or any explosive" after "destructive device" in subsection (1); substituted "the offense of possession of a destructive device" at the end of subsection (1) for "a felony"; designated the penalty clause as subsection (2); inserted "A person convicted of the offense of possession of a destructive device" at the beginning of subsection (2); substituted "imprisoned" in subsection (2) for "punishable by imprisonment"; and made minor changes in phraseology and style.

94-8-209.3. Possession of explosives. (1) A person commits the offense of possession of explosives if he possesses, manufactures, transports, buys, or sells an explosive compound, flammable material, or timing, detonating, or similar device for use with an explosive compound or incendiary device and:

(a) has the purpose to use such explosive, material, or device to commit an offense; or

(b) knows that another has the purpose to use such explosive, material, or device to commit an offense.

(2) A person convicted of the offense of possession of explosives shall be imprisoned in the state prison for any term not to exceed 20 years.

History: En. 94-6-105 by Sec. 1, Ch. 513, L. 1973; amd. and redes. 94-8-209.3 by Sec. 74, Ch. 359, L. 1977.

Source: Substantially the same as Illinois Criminal Code, Chapter 38, section 20-2.

Commission Comment

This section is intended to consolidate R. C. M. 1947, section 94-3304, "Destruction of buildings by explosive—punishment," and the various applicable provisions included in Title 69, chapter 19, Explosives, Regulation of Manufacture,

Storage and Sale. The act is prohibited only when it is done with the intent to commit an offense or with knowledge that another intends to use the explosives to commit an offense.

Amendments

The 1977 amendment inserted "buys, or sells" in subsection (1); inserted "flammable material" in subsection (1); inserted "similar" before "device" in subsection (1); inserted "material" in subdivisions (1)(a) and (1)(b); and made minor changes in phraseology, punctuation and style.

94-8-209.4. Possession of a silencer. (1) A person commits the offense of possession of a silencer if he possesses, manufactures, transports, buys, or sells a silencer and has the purpose to use it to commit an offense or knows that another person has such a purpose.

(2) A person convicted of the offense of possession of a silencer is punishable by imprisonment in the state prison for a term of not less than 5 years or more than 30 years or a fine of not less than $1,000 or more than $20,000 or by both such fine and imprisonment.

History: En. 94-8-209.4 by Sec. 75, Ch. 359, L. 1977.

94-8-209.5. Possession prima facie evidence of unlawful purpose. Possession of a silencer or of a bomb or similar device charged or filled with one or more explosives is prima facie evidence of a purpose to use the same to commit an offense.

History: En. 94-8-209.5 by Sec. 76, Ch. 359, L. 1977.

Repealing Clause

Section 77 of Ch. 359, Laws 1977 read "Sections 69-1916, 94-5-601, 94-5-611, 94-5-612, 94-6-101, 94-6-301, 94-7-101, 94-7-201, 94-8-223, 94-8-224, and 94-8-225, R. C. M. 1947, are repealed."

94-8-210. (11302) **Carrying concealed weapons.** (1) Every person who carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife having a blade 4 inches long or longer, razor, not including a safety razor, or other deadly weapon shall be punished by a fine not exceeding $500 or imprisonment in the county jail for a period not exceeding 6 months, or both.

(2) A person who has previously been convicted of an offense, committed on a different occasion than the offense under this section, in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed and who carries or bears concealed upon his person any of the weapons described in subsection (1) shall be punished by a fine not exceeding $1,000 or imprisoned in the state prison for a period not exceeding 5 years, or both.

History: Earlier acts were Sec. 1, p. 62, L. 1883; re-en. Sec. 66, 4th Div. Comp. Stat. 1887; amd. Sec. 758, Pen. C. 1895; re-en. Sec. 8582, Rev. C. 1907; amd. Sec. 1, Ch. 58, L. 1911.

This section en. Sec. 1, Ch. 74, L. 1919; re-en. Sec. 11302, R. C. M. 1921; Sec. 94-3525, R. C. M. 1947; redes. 94-8-210 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 36, Ch. 359, L. 1977; amd. Sec. 1, Ch. 411, L. 1977.

Compiler's Notes

This section was amended twice in 1977, once by Ch. 359 and once by Ch. 411. Since the amendments do not appear to conflict, the Code Commissioner has made a composite section embodying the changes made by both amendments.

Amendments

Chapter 359, Laws of 1977, substituted "prison" for "penitentiary" near the end

of the section; and made minor changes in phraseology, punctuation and style.

Chapter 411, Laws of 1977, designated the former section as subsection (1); deleted "within the limits of any city or town" after "Every person who" at the beginning of the section; deleted "or may be punished by imprisonment in the state prison for a period not exceeding five years" at the end of subsection (1); and added subsection (2).

Repealing Clause

Section 2 of Ch. 411, Laws 1977 read "Section 94-8-211, R. C. M. 1947, is repealed."

Permit

In assault prosecution based on use of a gun taken by defendant from his pocket, it was not error to instruct jury that it was crime to carry a concealed weapon without a permit, even in the absence of evidence that defendant did not have a permit; existence of a permit would have been an affirmative defense. State v. Lewis, 157 M 452, 486 P 2d 863.

94-8-211. (11303) **Repealed.**

Repeal

Section 94-8-211 (Sec. 2, Ch. 74, L. 1919; Sec. 29, Ch. 513, L. 1973), relating to carrying concealed weapons outside cities and towns, was repealed by Sec. 2, Ch. 411, Laws 1977. For current provision, see sec. 94-8-210.

94-8-212. (11304) **Exceptions.** Sections 94-8-210 and 94-8-211 do not apply to:

(1) any peace officer of the state of Montana;

(2) any officer of the United States government authorized to carry a concealed weapon;

(3) a person in actual service as a national guardsman;

(4) a person summoned to the aid of any of the persons named in subsections (1) through (3);

(5) a civil officer or his deputy engaged in the discharge of official business;

(6) a person authorized by a judge of a district court of this state to carry a weapon; or

(7) the carrying of arms on one's own premises or at one's home or place of business.

History: En. Sec. 3, Ch. 74, L. 1919; re-en. Sec. 11304, R. C. M. 1921; Sec. 94-3527, R. C. M. 1947; amd. Sec. 1, Ch. 63, L. 1969; amd. Sec. 1, Ch. 54, L. 1971; redes. 94-8-212 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 37, Ch. 359, L. 1977.

Amendments

The 1971 amendment added item 17, relating to national park service rangers.

The 1977 amendment substituted "Sections 94-8-210 and 94-8-211" at the beginning of the section for "The preceding sections"; deleted former subdivisions 1 through 8, 10, 16 and 17 which read "1. A sheriff or his deputy; 2. A marshal or his deputy; 3. A constable or his deputy; 4. A police officer or policeman; 5. A United States marshal or his deputy; 6. A person in the secret service of the United States; 7. A game warden or his deputy; 8. A U. S. forest reserve official or his deputy; 10. A revenue officer or his deputy; 16. United States immigration and naturalization service officer; 17. National park service rangers"; redesignated former subdivisions 15, 9, and 11 through 14 as present subdivisions (1) and (3) through (7), respectively; inserted present subdivision (2); substituted "any of the persons named in subsections (1) through (3)" in subdivision (4) for "either of the foregoing named persons"; and made minor changes in phraseology and punctuation.

94-8-213. Possession of weapon by prisoner. Every prisoner committed to the Montana state prison, who, while at such state prison, or while being conveyed to or from the Montana state prison, or while at a state prison

farm or ranch, or while being conveyed to or from any such place, or while under the custody of prison officials, officers or employees, possesses or carries upon his person or has under his custody or control without lawful authority, a dirk, dagger, pistol, revolver, slingshot, swordcane, billy, knuckles made of any metal or hard substance, knife, razor, not including a safety razor, or other deadly weapon, is guilty of a felony and shall be punishable by imprisonment in the state prison for a term not less than five (5) years nor more than fifteen (15) years. Such term of imprisonment to commence from the time he would have otherwise been released from said prison.

History: En. Sec. 1, Ch. 131, L. 1961; Sec. 94-3527.1, R. C. M. 1947; redes. 94-8-213 by Sec. 29, Ch. 513, L. 1973.

94-8-214. (11306) **Permits to carry concealed weapons—records—revocation.** (1) Any judge of a district court of this state may grant permission to carry or bear, concealed or otherwise, a pistol or revolver for a term not exceeding 1 year.

(2) All applications for such permission must be made by petition filed with the clerk of the district court. No charge may be made for the filing of the petition.

(3) The applicant shall, if personally unknown to the judge, furnish proof by a credible witness of his good moral character and peaceable disposition.

(4) No such permission shall be granted any person who is not a citizen of the United States and who has not been an actual bona fide resident of the state of Montana for 6 months immediately next preceding the date of such application.

(5) A record of permission granted shall be kept by the clerk of the court. The record shall state the date of the application, the date of the permission, the name of the person to whom permission is granted, the name of the judge granting the permission, and the name of the person, if any, by whom good moral character and peaceable disposition are proved. The record must be signed by the person who is granted such permission.

(6) The clerk shall thereupon issue under his hand and the seal of the court a certificate, in a convenient card form so that the same may be carried in the pocket, stating:

"Permission to ..... authorizing him to carry or bear, concealed or otherwise, a pistol or revolver for the period of ..... from the date hereof, has been granted by ....., a judge of the district court of the ..... judicial district of the state of Montana, in and for the county of .....

"Witness the hand of the clerk and the seal of said court this ..... day of ....., 19.....

.....
Clerk."

(7) The date of the certificate shall be the date of the granting of such

permission. The certificate shall bear upon its face the signature of the person receiving the same.

(8) Upon good cause shown the judge granting such permission may, in his discretion without notice to the person receiving such permission, revoke the same. The date of the revocation shall be noted by the clerk upon the record kept by him.

(9) All permissions to carry or bear concealed weapons granted before March 3, 1919, are hereby revoked.

History: En. Sec. 5, Ch. 74, L. 1919; re-en. Sec. 11306, R. C. M. 1921; Sec. 94-3529, R. C. M. 1947; redes. 94-8-214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 38, Ch. 359, L. 1977.

Amendments

The 1977 amendment inserted the subsection designations; substituted "granted before March 3, 1919" in subsection (9) for "heretofore granted"; and made minor changes in style, phraseology and punctuation.

94-8-215. (11307) **Definition of concealed weapons.** Concealed weapons shall mean any weapon mentioned in the foregoing sections, which shall be wholly or partially covered by the clothing or wearing apparel of the person so carrying or bearing the weapon.

History: En. Sec. 6, Ch. 74, L. 1919; re-en. Sec. 11307, R. C. M. 1921; Sec. 94-3530, R. C. M. 1947; redes. 94-8-215 by Sec. 29, Ch. 513, L. 1973.

94-8-216. (11308) **Definition of unincorporated town.** A town, if unincorporated, within the meaning of this act, shall consist of at least ten dwellings situated so that no one of said buildings is distant from another more than one hundred yards.

History: En. Sec. 7, Ch. 74, L. 1919; re-en. Sec. 11308, R. C. M. 1921; Sec. 94-3531, R. C. M. 1947; redes. 94-8-216 by Sec. 29, Ch. 513, L. 1973.

94-8-217. (11309) **Jurisdiction of courts.** The district courts shall have original jurisdiction in all criminal actions for violations of the provisions of this act.

History: En. Sec. 8, Ch. 74, L. 1919; re-en. Sec. 11309, R. C. M. 1921; Sec. 94-3532, R. C. M. 1947; redes. 94-8-217 by Sec. 29, Ch. 513, L. 1973.

94-8-218. (11530) **Firing firearms.** Every person who willfully shoots or fires off a gun, pistol, or any other firearm within the limits of any town or city or of any private inclosure which contains a dwelling house is punishable by a fine not exceeding $25.

History: En. Secs. 1, 2, p. 46, Ex. L. 1873; re-en. Sec. 185, 4th Div. Rev. Stat. 1879; re-en. Sec. 228, 4th Div. Comp. Stat. 1887; amd. Sec. 1161, Pen. C. 1895; re-en. Sec. 8834, Rev. C. 1907; re-en. Sec. 11530, R. C. M. 1921; Sec. 94-3578, R. C. M. 1947; redes. 94-8-218 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 39, Ch. 359, L. 1977.

Amendments

The 1977 amendment inserted "other" before "firearm"; and made minor changes in punctuation and style.

Cities and Towns

An illustration is found in this section of legislative use of "city or town" under circumstances which would render it absurd to hold that only incorporated cities and towns are meant. State ex rel. Powers v. Dale, 47 M 227, 131 P 670.

94-8-219. When Montana residents may purchase rifles or shotguns in contiguous states. Residents of Montana may purchase any rifle or rifles

and shotgun or shotguns in a state contiguous to Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further, that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which the purchase is made.

History: En. Sec. 1, Ch. 87, L. 1969; Sec. 94-3578.1, R. C. M. 1947; redes. 94-8-219 by Sec. 29, Ch. 513, L. 1973.

Compiler's Note

The federal Gun Control Act of 1968, referred to in this section, is the act of October 22, 1968, P. L. 90-618, compiled at 18 U.S.C. 921-928.

94-8-220. When residents of contiguous state may purchase rifles or shotguns in Montana. Residents of a state contiguous to Montana may purchase any rifle or rifles and shotgun or shotguns in Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968, and regulations thereunder, as administered by the United States secretary of the treasury, and provided further that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which such persons reside.

History: En. Sec. 2, Ch. 87, L. 1969; Sec. 94-3578.2, R. C. M. 1947; redes. 94-8-220 by Sec. 29, Ch. 513, L. 1973.

94-8-221. (11565) **Use of firearms by children under age fourteen prohibited.** It is unlawful for a parent, guardian, or other person having charge or custody of a minor child under the age of 14 years to permit the minor child to carry or use in public any firearms of any description loaded with powder and lead, except when the child is accompanied by a person having charge or custody of the child or under the supervision of a qualified firearms safety instructor who has been authorized by the parent or guardian.

History: En. Sec. 1, Ch. 111, L. 1907; Sec. 8879, Rev. C. 1907; re-en. Sec. 11565, R. C. M. 1921; Sec. 94-3579, R. C. M 1947; amd. Sec. 1, Ch. 139, L. 1963; redes. 94-8-221 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 40, Ch. 359, L. 1977.

Amendments

The 1977 amendment substituted "accompanied by a person having charge or custody of the child" for "in the company of such parent or guardian"; and made minor changes in phraseology and punctuation.

94-8-222. (11566) **Liability of parent or guardian.** Any parent, guardian, or other person, violating the provisions of this act shall be guilty of a misdemeanor, and the county attorney, on complaint of any person, must prosecute violations of this act.

History: En. Sec. 2, Ch. 111, L. 1907; Sec. 8880, Rev. C. 1907; re-en. Sec. 11566, R. C. M. 1921; Sec. 94-3580, R. C. M. 1947; redes. 94-8-222 by Sec. 29, Ch. 513, L. 1973.

94-8-223 to 94-8-225. (11281 to 11283) **Repealed.**

Repeal

Sections 94-8-223 to 94-8-225 (Secs. 1 to 3, Ch. 6, Ex. L. 1918; Sec. 29, Ch. 513, L. 1973), relating to silencers and explosives, were repealed by Sec. 77, Ch. 359, Laws 1977.

94-8-226. Switchblade knives—possession, selling, using, giving, or offering for sale—penalty—collectors. Every person who carries or bears upon his person or who carries or bears within or on any motor vehicle or other means of conveyance owned or operated by him or who owns, possesses, uses, stores, gives away, sells or offers for sale, a switchblade knife shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment in the county jail for a period not exceeding six (6) months or by both such fine and imprisonment; provided, that a bona fide collector, whose collection is registered with the sheriff of the county in which said collection is located, is hereby exempted from the provisions of this act. For the purpose of this section a switchblade knife is defined as any knife which has a blade one and one-half (1½) inches long or longer, which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

History: En. Sec. 1, Ch. 243, L. 1957; Sec. 94-35-273, R. C. M. 1947; redes. 94-8-226 by Sec. 29, Ch. 513, L. 1973.

Part Three

Lotteries

94-8-301. (11149) **Lottery defined.** A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it or for any share or interest in such property upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, gift enterprise, or by whatever name the same may be known.

History: En. Sec. 580, Pen. C. 1895; re-en. Sec. 8406, Rev. C. 1907; re-en. Sec. 11149, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1935; Sec. 94-3001, R. C. M. 1947; redes. 94-8-301 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 17, Ch. 508, L. 1977; Cal. Pen. C. Sec. 319.

Amendments

The 1977 amendment deleted "raffle or" before "gift" near the end of the section; and made minor changes in punctuation.

Bank Night

In an action by the state to enjoin the operation of "bank night" drawings as a lottery under this section, submitted on an agreed statement of facts wherein it was stipulated among other matters that "the money that is used for the purpose of purchasing the defense bond is received from the rental of the store and office properties of the defendant corporation in the theater buildings, and not from the sale of admission tickets to the theater," held, on the facts presented, that the scheme did not constitute a lottery, and second part of section 2, article XIX of the 1889 constitution was not self-executing. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 57, 70, 132 P 2d 689, overruling State ex rel. Dussault v. Fox Missoula Theatre Corp., 110 M 441, 101 P 2d 1065.

Bingo and Keno

The game of "keno" was held to be a lottery and prohibited by this law. Gambling is a generic term, embracing within its meaning all forms of play or game for stakes wherein one or the other participating stands to win or lose as a matter of chance. Play at lottery is gambling. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P 2d 168.

Cash Prize or Merchandise

To constitute a lottery, it is immaterial whether the prize be given in cash or in merchandise so long as it was awarded by chance and a consideration paid for that chance. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

Numbers Games

A numbers game, whether called Chinese lottery, "The Crown Game," "The Crown punchboard game" or any other name is a lottery. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

Punch Boards

Punch boards constitute a lottery. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

In an action for violation of this section it was no defense that the defendant had offered to pay for the operation of such punch boards in accordance with chapter 201, Laws 1951, which purported to license trade stimulators such as punch boards, since it was not competent for the legislature to authorize lotteries in view of section 2, article 19 of the 1889 constitution and the case of State ex rel. Harrison v. Deniff. State v. Tursich, 127 M 504, 267 P 2d 641, 642.

Requisites of Lottery

The legal requisites necessary to charge the offense of operating a lottery under this section are the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

Skill Ball

Where county attorney first set out his charge in the language of this section and then proceeded to set out in detail the game, while it was conceivable that in pursuing this method a prosecutor could plead himself out of court by detailing facts which when challenged by demurrer would show themselves to be without the ban of the statute, it was not true of this information because the essential elements were supplied by the particulars. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

Skill or Chance

To defeat a charge of conducting a lottery (styled "skill ball") it is not enough that some skill is involved in the game; the test to be applied in determining whether a game is one of skill or chance being, is not whether it contains an element of skill or an element of chance, but which of the two is the dominating element that determines the result of the game. State v. Hahn, 105 M 270, 72 P 2d 459, overruled on other grounds in State v. Bosch, 125 M 566, 242 P 2d 477.

Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marck, 124 M 178, 220 P 2d 1017; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

Valuable Consideration

The words "pay" a "valuable consideration" used in this section are not synonymous with furnishing a good consideration required as the basis for an enforceable contract according to the context, and their approved usage. "Consideration" is defined by section 13-501 as that which is paid to the promisor "as an inducement." What can be obtained free cannot be said to have been induced by a consideration; hence one purchasing an admission ticket in order to obtain a chance to win which he can have free of charge, does not pay consideration for the gratuity. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P 2d 689.

Where one is required to make an outlay of money in order to participate in a scheme whereby an award is made by chance, the participant pays valuable consideration for the chance to participate, notwithstanding the fact he may also receive merchandise at the same time that the outlay is made. State v. Cox, 136 M 507, 349 P 2d 104.

94-8-302. (11149.1) **Application.** This part shall not apply to the provisions of 62-715 through 62-726 or to the giving away of cash or merchandise attendance prizes or premiums by public drawings at agricultural fairs or rodeo associations in this state, and the county fair commissioners of agricultural fairs or rodeo associations in this state may give away at such fairs cash or merchandise attendance prizes or premiums by public drawings.

History: En. Sec. 2, Ch. 36, L. 1935; Sec. 94-3002, R. C. M. 1947; redes. 94-8-302 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 18, Ch. 508, L. 1977.

Amendments

The 1977 amendment substituted "This part shall not apply to the provisions of 62-715 through 62-726 or" at the beginning of the section for "This act shall not apply."

94-8-303. (11150) **Punishment for drawing lottery.** Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor.

History: En. Sec. 581, Pen. C. 1895; re-en. Sec. 8407, Rev. C. 1907; re-en. Sec. 11150, R. C. M. 1921; Sec. 94-3003, R. C. M. 1947; redes. 94-8-303 by Sec. 29, Ch. 513, L. 1973.

Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marek, 124 M 178, 220 P 2d 1017; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

94-8-304. (11151) **Punishment for selling lottery tickets.** Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person, any ticket, chance, share or interest or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery is guilty of a misdemeanor.

History: En. Sec. 582, Pen. C. 1895; re-en. Sec. 8408, Rev. C. 1907; re-en. Sec. 11151, R. C. M. 1921; Sec. 94-3004, R. C. M. 1947; redes. 94-8-304 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 321.

Nonexistent Lottery

In a proceeding to enjoin a theater corporation from operating "bank night" drawings as a nuisance under the lottery statute, section 94-3001 (renumbered 94-8-301) the sole question under the pleadings was whether a lottery was being conducted, not whether defendant was violating this section; hence where the evidence failed to prove the existence of a lottery, the claim advanced thereafter on appeal that there was also a violation of this section, became immaterial. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P 2d 689.

94-8-305. (11152) **Aiding lotteries.** Every person who aids or assists, either by printing, writing, advertising, publishing or otherwise, in setting up, managing or drawing any lottery or in selling or disposing of any ticket, chance, or share therein, is guilty of a misdemeanor.

History: En. Sec. 583, Pen. C. 1895; re-en. Sec. 8409, Rev. C. 1907; re-en. Sec. 11152, R. C. M. 1921; Sec. 94-3005, R. C. M. 1947; redes. 94-8-305 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 322.

94-8-306. (11153) **Lottery offices—advertising lottery offices.** Every person who opens, sets up or keeps, by himself, or by any other person, any office or any other place for the sale of, or for registering the number of any ticket in any lottery within or without this state, or who by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of, any such office is guilty of a misdemeanor.

History: En. Sec. 584, Pen. C. 1895; re-en. Sec. 8410, Rev. C. 1907; re-en. Sec. 11153, R. C. M. 1921; Sec. 94-3006, R. C. M. 1947; redes. 94-8-306 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 323.

94-8-307. (11154) **Insuring lottery tickets—publishing offers to insure.** Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum or deliver the same, or any other property if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn at

any particular time, or in any particular order, or who promises or agrees to pay any sum of money, or to deliver any goods, things in action or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency, dependent on the drawing of any ticket in any lottery, or who publishes any notice or proposal of any of the purposes aforesaid, is guilty of a misdemeanor.

History: En. Sec. 585, Pen. C. 1895; re-en. Sec. 8411, Rev. C. 1907; re-en. Sec. 11154, R. C. M. 1921; Sec. 94-3007, R. C. M. 1947; redes. 94-8-307 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 324.

94-8-308. (11155) **Property offered for disposal in lottery forfeited.** All moneys or property offered for sale or distribution in violation of any of the provisions of this chapter [part], are forfeited to the state, and may be recovered by information filed, or by an action brought by the attorney general, or by any county attorney in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or, if the suit is in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments are issued from the district courts in civil cases.

History: En. Sec. 586, Pen. C. 1895; re-en. Sec. 8412, Rev. C. 1907; re-en. Sec. 11155, R. C. M. 1921; Sec. 94-3008, R. C. M. 1947; redes. 94-8-308 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 325.

94-8-309. (11156) **Letting building for lottery purposes.** Every person who lets or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing, or drawing, any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

History: En. Sec. 587, Pen. C. 1895; re-en. Sec. 8413, Rev. C. 1907; re-en. Sec. 11156, R. C. M. 1921; Sec. 94-3009, R. C. M. 1947; redes. 94-8-309 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 326.

94-8-310. (11157) **Lotteries out of this state.** The provisions of this chapter [part] are applicable to lotteries drawn or to be drawn out of this state, whether authorized or not by the laws of the state or country where they are drawn or to be drawn, in the same manner as to lotteries drawn or to be drawn within this state.

History: En. Sec. 588, Pen. C. 1895; re-en. Sec. 8414, Rev. C. 1907; re-en. Sec. 11157, R. C. M. 1921; Sec. 94-3010, R. C. M. 1947; redes. 94-8-310 by Sec. 29, Ch. 513, L. 1973.

94-8-311. (11158) **Punishment.** Every person convicted of any of the offenses mentioned in this chapter [part], is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding two thousand dollars, or both.

History: En. Sec. 589, Pen. C. 1895; re-en. Sec. 8415, Rev. C. 1907; re-en. Sec. 11158, R. C. M. 1921; Sec. 94-3011, R. C. M. 1947; redes. 94-8-311 by Sec. 29, Ch. 513, L. 1973.

Slot Machines

The operation of a slot machine is a lottery and banned by the criminal laws of this state. State v. Marek, 124 M 178, 220 P 2d 1017; State v. Read, 124 M 184, 220 P 2d 1020; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

Part Four

Gambling

94-8-401. (11159) **Gambling prohibited—penalty.** Except as otherwise provided by law, a person who engages in gambling in any form with cards, dice, or other implements or devices of any kind wherein anything valuable may be wagered upon the outcome or who keeps any establishment, place, equipment, or apparatus for such gambling or any agents or employees for such purpose is guilty of a misdemeanor and is punishable by a fine of not less than $100 or more than $1,000 or imprisonment not less than 3 months or more than 1 year or by both such fine and imprisonment.

History: En. Sec. 600, Pen. C. 1895; amd. Sec. 1, p. 80, L. 1897; amd. Secs. 1, 2 and 3, pp. 166, 167, L. 1901; amd. Sec. 1, Ch. 115, L. 1907; re-en. Sec. 8416, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1917; re-en. Sec. 11159, R. C. M. 1921; amd. Sec. 1, Ch. 153, L. 1937; Sec. 94-2401, R. C. M. 1947; redes. 94-8-401 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 19, Ch. 508, L. 1977; Cal. Pen. C. Sec. 330.

Compiler's Note

The provisos to this section, as they appeared prior to the 1977 amendment, were held unconstitutional in State ex rel. Harrison v. Deniff and in State ex rel. Woodahl v. District Court. See annotations on "Constitutionality" below.

Amendments

The 1977 amendment completely rewrote this section. For prior version, see 94-2401 in the parent volume.

Constitutionality

This act and sections 84-5701 and 84-5702 (since repealed) authorizing and licensing so-called trade stimulators violated section 2, article XIX of the 1889 constitution, which prohibited the legislature from authorizing lotteries. State ex rel. Harrison v. Deniff, 126 M 109, 245 P 2d 140.

Voters' approval of gambling option submitted with 1972 Constitution did not repeal previous laws against gambling or validate the 1937 amendment of this section previously held unconstitutional. State ex rel. Woodahl v. District Court, 511 P 2d 318.

Amount of Stakes Immaterial

This section makes no distinction as to the amount of the stakes involved; hence it is immaterial that the stakes were merely treats or cigars. State v. Dumphy, 57 M 229, 187 P 897.

Disposal of Money Found in Slot Machines

Although provisions for the seizure and destruction of apparatus used for gaming do not authorize seizure of money contained in slot machines and not found by the officer seizing them until they were about to be destroyed by order of court, it does not follow, in an action for its conversion by the operator of the machines, that the taking was unlawful or that plaintiff was entitled to its return. Dorrell v. Clark, 90 M 585, 4 P 2d 712.

Federal Travel Act

Sale by out-of-state manufacturers of punch boards and pull tabs to distributors in Montana did not constitute facilitation of unlawful activity in violation of former Montana gambling laws within the meaning of the Federal Travel Act (18 U.S.C. § 1952). United States v. Gibson Specialty Co., 507 F 2d 446.

Football Parlay Card

Where football parlay card fixed the point spread and the odds and gave the house the benefits of ties, it was an integral part of the game necessary in order to play it, and thus a "device" within the meaning of this section. United States v. Thompson, 409 F Supp 1044.

Game of Skill as Gambling Device

An innocent game involving the element of skill alone becomes a gambling device when players bet on the outcome. State ex rel. Dussault v. Kilburn, 111 M 400, 109 P 2d 1113.

Pinball Machine

A "pinball" machine, equipped with a sloping plane studded with pins and containing holes into which a small ball, catapulted by means of a spring, must fall to enable the player to win and which pays off in trade checks, is a gambling device under the provisions of this section, and while the evidence shows that by long practice a certain amount of skill may be developed, with the patronizing public it is purely a game of chance, and the building in which it is used was a nuisance under former section 94-1002. State ex rel.

Dussault v. Kilburn, 111 M 400, 109 P 2d 1113.

Prosecution of Gambling Laws

Actions for violation of the gambling laws may be prosecuted under either this section and section 94-8-404 or under former section 94-1001 et seq., the abatement law, or under each and all of such sections. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988, 1000.

Slot Machines

A so-called mint vending machine which by the insertion of a nickel and pulling a lever will bring the operator a package of mint of the value of five cents, and which may or may not in addition bring to him trade checks good for five cents in trade (and which also may be operated by the insertion of a trade check, in which event trade checks but not mint may or may not be paid), is a gambling device; the machine appeals to the operator's propensities to gamble and lures him into continuing his play in the hope that he may gain an amount much greater than the amount risked. Marvin v. Sloan, 77 M 174, 250 P 443.

Information charging defendant with the operation of slot machines was not subject to demurrer as not charging an offense. State v. Israel, 124 M 152, 220 P 2d 1003.

There is nothing in this law that makes it lawful for any person or any religious, fraternal or charitable organization, or any private home to run, conduct or keep any slot machine within the state of Montana. State v. Israel, 124 M 152, 220 P 2d 1003.

The operation of all slot machines is prohibited to all persons without exception. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

Sufficiency of Charge

An information charging a violation of the antigambling law in the words of this section was sufficient, and it was not necessary to describe the game in detail, or set out the means by which it was carried on. State v. Ross, 38 M 319, 99 P 1056.

An information charging defendant with permitting a game of chance to be played upon his premises is not defective because of its failure to set forth the names of the persons permitted to play. State v. Radmilovich, 40 M 93, 105 P 91.

The particular name of a game of chance played with cards for money, checks, etc. need not be stated in the information. State v. Duncan, 40 M 531, 107 P 510.

The allegation that the defendant did carry on, conduct, and cause to be conducted the game described is sufficient to charge an offense without regard to the expression "as owner and proprietor thereof," which may be regarded as surplusage. State v. Tudor, 47 M 185, 131 P 632.

DECISIONS UNDER FORMER LAW

Construction

This section, designed to permit the playing of certain games for amusement and pastime and as business trade stimulators upon payment of a license, was not susceptible of a construction allowing use of trade checks for betting purposes in the games enumerated. State v. Aldahl, 106 M 390, 78 P 2d 935.

Construction of Amendment

The 1937 amendment to this section which added the licensing provisions did not affect section 94-8-404. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

Redeemable Tokens

The operator of a cigar store and beer parlor who permitted the game of blackjack to be played therein with trade checks ranging in price from five cents to five dollars, sold by him to the players and which were redeemable, at the option of the holder, either in merchandise or cash, was properly found guilty of violating this section. State v. Aldahl, 106 M 390, 78 P 2d 935.

Religious, Fraternal and Charitable Organizations

Religious, fraternal and charitable organizations and private homes are by section 94-8-403 exempt from the payment of license fees but are not exempt from the provisions of this act which existed prior to the 1937 amendment. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988; State v. Israel, 124 M 152, 220 P 2d 1003.

Slot Machines

Slot machines are not included among the enumerated "hickey" games nor among the "trade stimulators" from which the ban was lifted by the 1937 amendment known as the "Hickey Law." State v. Israel, 124 M 152, 220 P 2d 1003; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

This section, banning the possession of slot machines, was not repealed by sections

84-3601 to 84-3610 (since repealed). State v. Engle, 124 M 175, 220 P 2d 1015; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

The ban against slot machines was not lifted by sections 84-5701 and 84-5702 (since repealed). State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

94-8-402, 94-8-403. Repealed.

Repeal

Sections 94-8-402, 94-8-403 (Secs. 2, 3, Ch. 153, L. 1937), relating to gambling licenses, were repealed by Sec. 27, Ch. 508, Laws 1977.

94-8-404. (11160) **Possession of gambling implements prohibited.** Any person who has in his possession or under his control or who permits to be placed, maintained, or kept in any room, space, inclosure, or building owned, leased, or occupied by him or under his management or control any faro box, faro layout, roulette wheel, roulette table, crap table, punchboard, or any machine or apparatus of the kind mentioned in 94-8-401 is punishable by a fine of not less than $100 or more than $1,000 and may be imprisoned for not less than 3 months or more than 1 year in the discretion of the court, provided that this section shall not apply to a public officer or to a person coming into possession thereof in or by reason of the performance of an official duty and holding the same to be disposed of according to law.

History: En. Sec. 2, Ch. 115, L. 1907; Sec. 8417, Rev. C. 1907; re-en. Sec. 11160, R. C. M. 1921; Sec. 94-2404, R. C. M. 1947; redes. 94-8-404 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 20, Ch. 508, L. 1977.

Amendments

The 1977 amendment substituted "punchboard, or any machine or apparatus of the kind mentioned in 94-8-401" in the middle of the section for "slot machine, or any machine or apparatus of the kind mentioned in the preceding section of this act"; and made minor changes in phraseology, punctuation and style.

Effect of Other Laws

This section was not affected by the 1937 amendment to section 94-8-401. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

This section, banning the possession of slot machines, was not repealed by sections 84-3601 to 84-3610 (since repealed). State v. Engle, 124 M 175, 220 P 2d 1015; State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

Possession of Equipment

This section prohibits mere possession of gambling equipment and does not require intent to use it unlawfully; defendant who openly rebuilt and manufactured gambling devices for shipment to Nevada, where they were legal, was in violation of this section. State v. Wilson, 160 M 473, 503 P 2d 522.

Prosecution of Gambling Laws

Actions for violation of the gambling laws may be prosecuted under either this section and section 94-8-401 or as a nuisance under the abatement law. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

94-8-405. (11161) **Obtaining money by means of gambling games or tricks considered theft.** Every person who, by means of any game, device, sleight-of-hand trick, or other means whatever, by the use of cards or other implements other than those mentioned in 94-8-406, or while betting on sides or hands of any such game or play, fraudulently obtains from another person money or property of any description is guilty of theft of property of like value.

History: En. Sec. 3, Ch. 115, L. 1907; Sec. 8418, Rev. C. 1907; re-en. Sec. 11161, R. C. M. 1921; Sec. 94-2405, R. C. M. 1947; redes. 94-8-405 by Sec. 29, Ch. 513, L.

1973; amd. Sec. 70, Ch. 359, L. 1977; Cal. Pen. C. Sec. 332.

Amendments

The 1977 amendment substituted "theft" near the end of the section for "larceny"; and made minor changes in phraseology and punctuation.

94-8-406. (11162) **Brace and bunco games prohibited.** Every person who uses or deals with or wins any money or property by the use of brace faro, or of any two-card faro box, or any brace roulette wheel or roulette table, or any brace apparatus, or with loaded dice or with marked cards, or by any game commonly known as a confidence game or bunco, is punishable by imprisonment in the state prison not exceeding five years.

History: En. Sec. 4, Ch. 115, L. 1907; Sec. 8419, Rev. C. 1907; re-en. Sec. 11162, R. C. M. 1921; Sec. 94-2406, R. C. M. 1947; redes. 94-8-406 by Sec. 29, Ch. 513, L. 1973.

Confidence or Bunco Game

Any game which is by this statute outlawed may be a confidence or bunco game, for the design and conduct of those who use it gives it its character under this statute. State v. Hale, 134 M 131, 328 P 2d 930.

Gambling Devices

The games described in this section are purported gambling devices so contrived, although masked as legitimate operations, as to bilk the victim of his wager by manipulation. These games do not depend upon the active or passive emotions of the victim. State v. Hale, 134 M 131, 328 P 2d 930.

Morocco

Defendant who used and dealt with game of "Morocco," a confidence game and bunco game, to win money from his victim was properly convicted of the crime prohibited by this section. State v. Hale, 134 M 131, 328 P 2d 930.

Penalty

The penalty of violating this statute is imposed upon every person who uses or deals with any game commonly known as a confidence game or bunco, as well as one who wins. State v. Hale, 134 M 131, 328 P 2d 930.

Purpose of Statute

This statute is aimed at the person who uses or deals with a confidence game, or bunco game, and not so much against the inanimate paraphernalia so used. State v. Hale, 134 M 131, 328 P 2d 930.

Separate and Distinct Crime

This statute covers a separate and distinct crime from that covered by former section 94-1806. State v. Hale, 134 M 131, 328 P 2d 930.

94-8-407. (11163) **Soliciting or persuading persons to visit gambling resorts prohibited.** Any person who persuades or solicits another to visit any room, tent, apartment or place used, or represented by the person soliciting or persuading to be a place used for the purpose of running any of the games prohibited by this act, shall be punished by a fine of not less than one hunded dollars nor more than one thousand dollars, or imprisonment not less than three months nor more than one year, or by both such fine and imprisonment in the county jail.

History: En. Sec. 5, Ch. 115, L. 1907; Sec. 8420, Rev. C. 1907; re-en. Sec. 11163, R. C. M. 1921; Sec. 94-2407, R. C. M. 1947; redes. 94-8-407 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 318.

94-8-408. (11164) **Penalty for second offense.** Every person who, having been convicted of a violation of any of the provisions of this act, which is punishable by fine, commits another such violation after such conviction, is punishable by a fine of not less than five hundred nor more than one thousand dollars, and by imprisonment in the county jail for not less than six months nor more than one year.

History: En. Sec. 6, Ch. 115, L. 1907; Sec. 8421, Rev. C. 1907; re-en. Sec. 11164, R. C. M. 1921; Sec. 94-2408, R. C. M. 1947; redes. 94-8-408 by Sec. 29, Ch. 513, L. 1973.

94-8-409. (11165) **Maintaining gambling apparatus a nuisance.** Any article, machine or apparatus maintained or kept in violation of any of the provisions of this act is a public nuisance, but the punishment for the maintaining or keeping of the same shall be as provided in this act.

History: En. Sec. 7, Ch. 115, L. 1907; re-en. Sec. 8422, Rev. C. 1907; re-en. Sec. 11165, R. C. M. 1921; Sec. 94-2409, R. C. M. 1947; redes. 94-8-409 by Sec. 29, Ch. 513, L. 1973.

Nuisances

Any article, machine or apparatus maintained or kept in violation of any of the provisions of sections 94-8-401 or 94-8-404 is a public nuisance. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P 2d 1029.

Slot Machines

The using, operating, keeping, and maintaining for use, of slot machines constitutes a nuisance. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988; State v. Israel, 124 M 152, 220 P 2d 1003; State ex rel. Brown v. Buffalo Rapids Club, 124 M 172, 220 P 2d 1014.

94-8-410. (11166) **Duty of public officer to seize gambling implements and apparatus.** It shall be the duty of every officer authorized to make arrests, to seize every machine, apparatus, or instrument answering to the description contained in this act, or which may be used for the carrying on or conducting of any game or games mentioned in this act, and to arrest the person actually or apparently in possession or control thereof, or of the premises in which the same may be found, if any such person be present at the time of the seizure and to bring the machine, apparatus, or instrument and the prisoner, if there be one, before a committing magistrate.

History: En. Sec. 8, Ch. 115, L. 1907; Sec. 8423, Rev. C. 1907; re-en. Sec. 11166, R. C. M. 1921; Sec. 94-2410, R. C. M. 1947; redes. 94-8-410 by Sec. 29, Ch. 513, L. 1973.

Destruction of Machines

Decree requiring sheriff to sell seized slot machines was amended on appeal to require the sheriff to destroy them. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P 2d 988.

94-8-411. (11167) **Duty of magistrate to retain gambling implement or apparatus for trial.** The magistrate before whom any machine, apparatus, or instrument is brought pursuant to 94-8-410 must, if there is a prisoner and if he holds such prisoner, cause the machine, apparatus, or instrument to be delivered to the county attorney to be used as evidence on the trial of such prisoner. If there is no prisoner or if the magistrate does not hold the prisoner, the magistrate must cause the immediate and public destruction of the machine, apparatus, or instrument in his own presence. No person owning or claiming to own any such machine, apparatus, or instrument so destroyed has any right of action against any person or against the state, county, or city for the value of such article or for damages. It is the duty of the county attorney to produce such articles in court on the trial of the case. It is the duty of the trial court, after the disposition of the case and whether the defendant is convicted, acquitted, or fails to appear for trial, to cause the immediate and public destruction of any such article by the sheriff or any other officer or person designated by the court.

History: En. Sec. 9, Ch. 115, L. 1907; Sec. 8424, Rev. C. 1907; re-en. Sec. 11167, R. C. M. 1921; Sec. 94-2411, R. C. M. 1947; redes. 94-8-411 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 21, Ch. 508, L. 1977.

Amendments

The 1977 amendment substituted "94-8-410" in the middle of the first sentence for "the preceding section"; and made minor changes in phraseology and punctuation.

Return of Machines Erroneous

It was error for district court to order slot machines and other gambling equipment returned to defendant on an ex parte proceeding before the disposition of the case and the order was void ab initio. State v. Israel, 124 M 152, 220 P 2d 1003.

94-8-412. (11167.1) **Disposal of moneys confiscated by reason of violation of gambling laws.** All moneys seized or taken by any peace officer and confiscated by order of any court, by reason of a violation of the gambling laws of the state of Montana, shall be deposited with the county treasurer of the county in which such seizure and confiscation was made, and shall be credited to the poor fund of the county.

History: En. Sec. 1, Ch. 25, L. 1933; Sec. 94-2412, R. C. M. 1947; redes. 94-8-412 by Sec. 29, Ch. 513, L. 1973.

94-8-413. (11168) **Repealed.**

Repeal

Section 94-8-413 (Sec. 10, Ch. 115, L. 1907), relating to peace officers entering places where gambling is conducted, was repealed by Sec. 27, Ch. 508, Laws 1977.

94-8-414. (11169) **Duty of public officer to make complaint.** Every county attorney, sheriff, constable, chief of police, marshal, or police officer must inform against and make complaint and diligently prosecute persons whom they know, or concerning whom they may be informed, or whom they may have reasonable cause to believe to be offenders against the provisions of this act. The neglect or refusal of any such officer to make complaint against or diligently prosecute persons he has reasonable cause to believe to be offenders against the provisions of this act shall be deemed sufficient cause for removal from office.

History: En. Sec. 11, Ch. 115, L. 1907; Sec. 8426, Rev. C. 1907; re-en. Sec. 11169, R. C. M. 1921; Sec. 94-2414, R. C. M. 1947; redes. 94-8-414 by Sec. 29, Ch. 513, L. 1973.

Failure to Diligently Prosecute

Where county attorney moved to dismiss for lack of evidence charges against four persons accused of cheating at cards and the district court granted the motion, the stamp of judicial approval overcame the presumption otherwise arising under this section that failure to prosecute constituted sufficient grounds for removal of the county attorney from office, and the district judge erred in ordering his removal. State ex rel. Forsythe v. Coate, — M —, 552 P 2d 60.

94-8-415. (11170) **Duty of mayors to enforce law.** It shall be the duty of every mayor of every town or city in this state to cause this act to be diligently enforced and to cause the police officers of his city or town to arrest and to make complaint against any and all persons whom he or they know, or have reasonable cause to believe to be offenders against any of the provisions of this act.

History: En. Sec. 12, Ch. 115, L. 1907; Sec. 8427, Rev. C. 1907; re-en. Sec. 11170, R. C. M. 1921; Sec. 94-2415, R. C. M. 1947, redes. 94-8-415 by Sec. 29, Ch. 513, L. 1973.

94-8-416. (11171) **Officers neglecting duty subject to forfeiture of office.** Every county attorney, sheriff, mayor, constable, chief of police, marshal, or police officer who shall refuse or neglect to perform any of the duties imposed upon him by any of the provisions of this act, shall be guilty

of a misdemeanor and be punishable by a fine of not less than one hundred nor more than three thousand dollars, or imprisonment for not less than six months nor more than one year in the county jail. A conviction under this section shall, unless set aside, also work a forfeiture of the office of such officer and operate as a removal from office. But a prosecution under this section shall not bar or interfere with any proceeding or action for removal from office which may be brought under any other provision of law or statute, nor affect or limit the effect or operation of any other statute regarding removals or suspensions from office.

History: En. Sec. 13, Ch. 115, L. 1907; Sec. 8428, Rev. C. 1907; re-en. Sec. 11171, R. C. M. 1921; Sec. 94-2416, R. C. M. 1947; redes. 94-8-416 by Sec. 29, Ch. 513, L. 1973.

94-8-417. (11172) **Receiving money to protect offenders prohibited.** Every state, county, city, or township officer, or other person, who shall ask for, receive, or collect any money or valuable consideration, either for his own or for the public use, or the use of any other person or persons, for and with the understanding that he will protect or exempt any person from arrest or conviction for any violation of the provisions of this act, or that he will abstain from arresting or prosecuting, or causing to be arrested or prosecuted, any person offending against any of the provisions of this act, or that he will permit any of the things prohibited by this act to be done or carried on, and every such state, county, city, or township officer who shall grant, issue, or deliver, or cause to be issued or delivered to any person or persons, any license, permit, or other privilege giving or pretending to give any authority or right to any person or persons to carry on, conduct, open, or cause to be conducted or opened or carried on, any game or games which are forbidden by any of the provisions of this act, is guilty of a felony.

History: En. Sec. 14, Ch. 115, L. 1907; Sec. 8429, Rev. C. 1907; re-en. Sec. 11172, R. C. M. 1921; Sec. 94-2417, R. C. M. 1947; redes. 94-8-417 by Sec. 29, Ch. 513, L. 1973. Cal. Pen. C. Sec. 337.

94-8-418. (11173) **Losses at gambling may be recovered in civil action.** If any person, by playing or betting at any of the games prohibited by this act, loses to another person any sum of money, or thing of value, and pays or delivers the same, or any part thereof, to any person connected with the operating or conducting of such game, either as owner, or dealer, or operator, the person who so loses and pays or delivers may, at any time within sixty days next after the said loss and payment or delivery, sue for and recover the money or thing of value so lost and paid or delivered, or any part thereof from any person having any interest, direct or contingent, in the game, as owner, backer, or otherwise, with costs of suit, by civil action before any court of competent jurisdiction, together with exemplary damages, which in no case shall be less than fifty nor more than five hundred dollars, and may join as defendants in said suit, all persons having any interest, direct or contingent, in such game as backers, owners, or otherwise.

History: En. Sec. 15, Ch. 115, L. 1907; Sec. 8430, Rev. C. 1907; re-en. Sec. 11173, R. C. M. 1921; Sec. 94-2418, R. C. M. 1947; redes. 94-8-418 by Sec. 29, Ch. 513, L. 1973.

Constitutionality

The antigambling law was not rendered invalid by the insertion of this section. The right to exemplary damages thus given is in the nature of a penalty and constitutes a part of the penalty provided by

the act. State v. Ross, 38 M 319, 99 P 1056.

Racing Entry Fee

A complaint in an action to recover the amount of two dollars lost by plaintiff as an alleged bet on a horse race, with exemplary damages, under this section, alleging in substance that defendant fair association had given notice that it would conduct horse racing for purses, at which any owner or co-owner of a horse competing in the races would be required to pay an entrance fee of two dollars and that no person other than such owner or co-owners would be permitted to pay an entrance fee; that plaintiff, representing himself to be a co-owner of a certain horse, paid the required fee; that the horse did not win; that the purse plus an amount equal to the entrance fees for that horse was paid to the owners of the winning horse; that the purse was made up of funds belonging to the association and that the association did not have any interest in the outcome of the race, etc., did not state a cause of action and demurrer thereto was properly sustained. Toomey v. Penwell, 76 M 166, 245 P 943.

94-8-419. (11174) **Action may be brought by any dependent person.** If any person losing such money or thing of value does not, within sixty days, without collusion or deceit, sue and with effect prosecute for the money or thing of value so lost and paid or delivered, any person, or a guardian of any person, dependent in any degree for support upon or entitled to the earnings of such persons losing said money or thing of value, or any citizen for the use of the person so dependent, may, within one year, sue for and recover the same, with costs of suit and exemplary damages as aforesaid, against any and all persons having any interest, direct or contingent, in the said game as backers, owners, or otherwise, as aforesaid.

History: En. Sec. 16, Ch. 115, L. 1907; Sec. 8431, Rev. C. 1907; re-en. Sec. 11174, R. C. M. 1921; Sec. 94-2419, R. C. M. 1947; redes. 94-8-419 by Sec. 29, Ch. 513, L. 1973.

94-8-420. (11175) **Pleadings in actions to recover moneys lost.** In the prosecutions of such actions it shall be sufficient for the complaint to allege that the defendant is indebted to the plaintiff's use, the money or thing of value so lost and paid or delivered, whereby the plaintiff's action accrued to him, or to the person for whose use the suit is brought, without setting forth the special matter. In case suit is brought by a plaintiff for the use of another person, that fact and the name of the person for whose use the suit is brought shall be stated.

History: En. Sec. 17, Ch. 115, L. 1907; Sec. 8432, Rev. C. 1907; re-en. Sec. 11175, R. C. M. 1921; Sec. 94-2420, R. C. M. 1947; redes. 94-8-420 by Sec. 29, Ch. 513, L. 1973.

94-8-421. (11176) **Compelling testimony in such actions.** Every person liable in a civil action under this act may be compelled to answer, upon oath, interrogatories annexed to the complaint in such civil action for the purpose of discovery of his liability; and upon discovery and repayment of the money or other thing, the person discovering and repaying the same, with costs and such an amount of exemplary damages as may be agreed upon by the parties, or fixed by the court, shall be acquitted and discharged from any further or other forfeiture, punishment, penalty, or prosecution he or they may have incurred for so winning such money or thing, discovered and repaid.

History: En. Sec. 18, Ch. 115, L. 1907; Sec. 8433, Rev. C. 1907; re-en. Sec. 11176, R. C. M. 1921; Sec. 94-2421, R. C. M. 1947; redes. 94-8-421 by Sec. 29, Ch. 513, L. 1973.

94-8-422. (11177) **Lessor of buildings used for gambling purposes treated as principal.** Whenever premises are occupied for the doing of any of the things or running any of the games prohibited by this part, the lease or agreement under which they are so occupied shall be absolutely void at the instance of the lessor, who may at any time obtain possession by civil action or by action of unlawful detainer. If any person leases premises for any such purpose or knowingly permits them to be used or occupied for such purpose or purposes or, knowing them to be so occupied or used, fails immediately to prosecute in good faith an action or proceeding for the recovery of the premises, such lessor shall be considered in all cases, civil and criminal, as a principal in running the games or doing the things run or done in such building in violation of this part and shall be dealt with and punished accordingly.

History: En. Sec. 19, Ch. 115, L. 1907; Sec. 8434, Rev. C. 1907; re-en. Sec. 11177, R. C. M. 1921; Sec. 94-2422, R. C. M. 1947; redes. 94-8-422 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 22, Ch. 508, L. 1977.

Amendments

The 1977 amendment substituted "this part" for "this act" in two places; substituted "unlawful detainer" for "forcible detainer" at the end of the first sentence; and made minor changes in phraseology and punctuation.

94-8-423. (11178) **Immunity of witnesses.** No person shall be excused from attending or testifying or producing any books, papers, documents, or any thing or things, before any court or magistrate upon any investigation, proceeding or trial for a violation of any of the provisions of this act, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime, or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence of, documentary or otherwise; and no testimony or evidence so given or produced shall be received against him in any civil or criminal proceeding, action, or investigation.

History: En. Sec. 20, Ch. 115, L. 1907; Sec. 8435, Rev. C. 1907; re-en. Sec. 11178, R. C. M. 1921; Sec. 94-2423, R. C. M. 1947; redes. 94-8-423 by Sec. 29, Ch. 513, L. 1973.

Failure to Claim Immunity

Even though it be assumed that this section is broad enough to include testimony before a grand jury it would have no application where defendant failed to claim either privilege or immunity when called before the grand jury. State v. Saginaw, 124 M 225, 220 P 2d 1021, distinguished in 130 M 299, 300 P 2d 952.

Grand Jury Testimony

The words "grand jury" should not be read into the phrase "court or magistrate." State v. Saginaw, 124 M 225, 220 P 2d 1021.

Defendant cannot, because of testimony before grand jury, be immune from prosecution for offense charged in information filed by county attorney weeks before impanelment of a grand jury. State v. Saginaw, 124 M 225, 220 P 2d 1021; State v. McRae, 124 M 238, 220 P 2d 1025, distinguished in 130 M 299, 300 P 2d 952.

94-8-424. (11179) **Ordinances concerning gambling.** No ordinance regarding gambling or gambling houses may be passed by any city, town, county, or other political subdivision of the state except in compliance with 62-701 through 62-736.

History: En. Sec. 21, Ch. 115, L. 1907; Sec. 8436, Rev. C. 1907; re-en. Sec. 11179, R. C. M. 1921; Sec. 94-2424, R. C. M. 1947; redes. 94-8-424 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 23, Ch. 508, L. 1977.

Amendments

The 1977 amendment rewrote the section which read: "Upon the passage of this act, all ordinances and parts of ordinances of cities and towns in this state regarding gambling and gambling houses shall be inoperative and void, and thereafter no ordinance regarding gambling or gambling houses shall be passed by any city or town."

94-8-425 to 94-8-427. (11181-11183) **Repealed.**

Repeal

Sections 94-8-425 to 94-8-427 (Secs. 3, 4, Ch. 20, L. 1909; Secs. 3, 4, Ch. 92, L. 1909; Secs. 2, 3, 5, Ch. 55, L. 1915), relating to aiding gambling, punishment of gambling, and effective date of the provisions, were repealed by Sec. 27, Ch. 508, Laws 1977.

94-8-428. Slot machines—possession unlawful. From and after the passage and approval of this act, it shall be a misdemeanor and punishable, as hereinafter provided, for any person to use, possess, operate, keep or maintain for use or operation or otherwise, anywhere within the state of Montana, any slot machine of any sort or kind whatsoever.

History: En. Sec. 1, Ch. 197, L. 1949; Sec. 94-2429, R. C. M. 1947; redes. 94-8-428 by Sec. 29, Ch. 513, L. 1973.

94-8-429. Slot machine defined. A slot machine is defined as a machine operated by inserting a coin, token, chip, trade check, or paper currency therein by the player and from the play of which he obtains or may obtain money, checks, chips, tokens, or paper currency redeemable in money. Merchandise vending machines where the element of chance does not enter into their operation are not within the provisions of this part.

History: En. Sec. 2, Ch. 197, L. 1949; Sec. 94-2429, R. C. M. 1947; redes. 94-8-429 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 24, Ch. 508, L. 1977.

Amendments

The 1977 amendment inserted "or paper currency" in two places in the first sentence; substituted "this part" for "this act" at the end of the section; and made minor changes in phraseology and punctuation.

94-8-430. Person or persons defined. In addition to their ordinary meaning, the word "person" or "persons", as used in this part, includes both natural and artificial persons and all partnerships, corporations, associations, clubs, fraternal orders, and societies, including religious, fraternal, and charitable organizations.

History: En. Sec. 3, Ch. 197, L. 1949; Sec. 94-2431, R. C. M. 1947; redes. 94-8-430 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 25, Ch. 508, L. 1977.

Amendments

The 1977 amendment substituted "this part" for "this act" in the middle of the section; and made minor changes in phraseology and punctuation.

94-8-431. Penalty for possession or permitting use of slot machine. Any person, partnership, club, society, fraternal order, corporation, cooperative association or any other person, individual, or organization who violates any of the provisions of this act or who permits the use of any slot machine, as herein defined, on any place or premises owned, occupied, or controlled by him or it is guilty of a misdemeanor and is punishable by a fine of not less than $100 or more than $1,000 or by imprisonment in the county jail for not

less than 3 months or more than 1 year or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 197, L. 1949; Sec. 94-2432, R. C. M. 1947; redes. 94-8-431 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 26, Ch. 508, L. 1977.

Amendments

The 1977 amendment increased the maximum fine from $500 to $1,000; increased the jail term from 30 days to 6 months to 3 months to 1 year; and made minor changes in phraseology and punctuation.

Separability of Provisions

Section 6 of Ch. 197, Laws 1949 read "If any part of this act shall be declared by any court of competent jurisdiction to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act."

Repealing Clauses

Section 32 of Ch. 513, Laws 1973 read "Sections 94-101 through 94-103, 94-105 through 94-119, 94-201 through 94-206, 94-301 through 94-306, 94-501 through 94-506, 94-601 through 94-605, 94-701 through 94-705, 94-801 through 94-807, 94-809 through 94-811, 94-901 through 94-909, 94-1001 through 94-1011, 94-1101 through 94-1103, 94-1106, 94-1201 through 94-1209, 94-1301 through 94-1307, 94-1501 through 94-1519, 94-1601 through 94-1617, 94-1701 through 94-1707, 94-1801 through 94-1831, 94-1901 through 94-1904, 94-2001 through 94-2014, 94-2101 through 94-2104, 94-2202, 94-2301 through 94-2321, 94-2501 through 94-2515, 94-2601 through 94-2604, 94-2701 through 94-2726, 94-2801 through 94-2811, 94-2901 through 94-2919, 94-3109, 94-3111, 94-3202 through 94-3208, 94-3210, 94-3211, 94-3301 through 94-3344, 94-3401, 94-3402, 94-3501 through 94-3512, 94-3514 through 94-3521, 94-3523, 94-3524, 94-3528, 94-3533 through 94-3549, 94-3551 through 94-3554, 94-3556 through 94-3566, 94-3570 through 94-3572, 94-3574 through 94-3577, 94-3581 through 94-35-101, 94-35-104 through 94-35-108, 94-35-110 through 94-35-122, 94-35-124 through 94-35-134, 94-35-137 through 94-35-147, 94-35-149 through 94-35-151, 94-35-163 through 94-35-171, 94-35-175, 94-35-177 through 94-35-183, 94-35-187 through 94-35-198, 94-35-201, 94-35-202, 94-35-208 through 94-35-265, 94-35-269, 94-35-272, 94-35-274, 94-35-275, 94-3601 through 94-3619, 94-3701 through 94-3704, 94-3801 through 94-3813, 94-3901 through 94-3920, 94-4001 through 94-4005, 94-4101 through 94-4120, 94-4201 through 94-4208, 94-4301 through 94-4303, 94-4401 through 94-4427, 94-4501, 94-4502, 94-4601 through 94-4607, 94-4701 through 94-4715, 94-4718 through 94-4725, 94-4801, 94-4802, 94-4804, 94-4806, 94-4808, 94-4809, 94-5001 through 94-5005, 94-5101 through 94-5116, 94-5201, 94-5202, 94-5301 through 94-5314, 94-5501 through 94-5516, 94-5701 through 94-5706, 94-6414 through 94-6421, 94-6423 through 94-6425, 94-6429, 94-6808.1 through 94-6808.5, 94-7208, 94-7211 through 94-7220, 94-7240, 94-7307, 94-8508 through 94-8510, 94-8803, 94-8804, 94-9001, 94-9005 through 94-9007, 94-9201 through 94-9214, 94-9307, 94-9901 through 94-9908, 94-401-1 through 94-401-3, 94-501-1 through 94-501-32, 94-801-1, 94-801-2, 94-1001-1 through 94-1001-11, 95-2006, 95-2206 R. C. M. 1947, and all acts and parts of acts in conflict herewith are repealed."

Section 27 of Ch. 508, Laws 1977 read "Sections 84-5703 through 84-5719, 94-8-402, 94-8-403, 94-8-413, 94-8-425, 94-8-426, and 94-8-427, R. C. M. 1947, are repealed."

Effective Date

Section 33 of Ch. 513, Laws 1973 read "The Montana Criminal Code and all other provisions of this act are effective January 1, 1974, and shall apply to all offenses alleged to have been committed on or after that date. The Montana Criminal Code and all other provisions of this act do not apply to offenses committed prior to its effective date and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this act were not in force. For the purposes of this section, an offense was committed prior to the effective date of this act if any of the elements of the offense occurred prior thereto."

Separability Clause

Section 34 of Ch. 513, Laws 1973 read "It is the intent of the legislative assembly that if a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

CROSS REFERENCE TABLE—MONTANA CRIMINAL CODE OF 1973

Showing the location in the Criminal Code of 1973 (or other titles) of provisions similar to those contained in the original Title 94, Revised Codes of Montana, 1947

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
101	Construction of penal statutes	94-1-102(2)	General purposes and principles of construction
102	Provisions similar to existing law how construed	None	
103	Effect of code upon past offenses	94-1-103	Application to offenses committed before and after enactment
104	Repealed in 1947		
105	What intent to defraud is sufficient	94-2-101(52)	Definition of "purposely"
106	Civil remedies preserved	94-1-104(1)	Civil liability and remedies preserved
107	Proceedings to impeach or remove officers and others preserved	94-7-401(5)	Official misconduct
108	Authority of court-martial preserved—courts of justice to punish for contempt	94-1-104(2)	Contempt power preserved
109	Sections declaring crimes punishable — duty of court	95-2212	Sentence to be imposed by judge
		95-2206	Sentence
110	Punishments, how determined	None	
111	Witness' testimony may be read against him on prosecution for perjury	95-1807	Immunity of witnesses
112	Crime and public offense defined	94-2-101(15), (30) and (36)	Definitions of "felony," "misdemeanor" and "offense"
113	Crimes, how divided	94-2-101(15) and (30)	Definitions of "felony" and "misdemeanor"
114	Felony and misdemeanor defined	94-2-101(15) and (30)	Definitions of "felony" and "misdemeanor"
115	Punishment of felony, when not otherwise prescribed	95-2206	Sentence
		95-2206.4	When no felony penalty is specified
		94-1-105	Classification of offense
116	Punishment of misdemeanor, when not otherwise prescribed	95-2206.3	When no penalty is specified
117	To constitute crime there must be unity of act and intent	94-2-102	Voluntary acts
		94-2-103	General requirements of culpability
		94-2-101	General definitions
		94-2-105	Causal relationships between conduct and result

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
118	Intent, how manifested and who considered of sound mind	94-2-102	Voluntary acts
		94-2-103	General requirements of culpability
		94-2-101	General definitions
		94-2-104	Absolute liability
		95-501 to 95-509	Competency of the accused
119	Drunkenness no excuse for crime—when it may be considered—how insanity must be proven	94-2-109	Responsibility of intoxicated person
		95-501 to 95-509	Competency of the accused
201	Who are capable of committing crimes	94-2-109	Responsibility of intoxicated person
		94-2-102	Voluntary acts
		94-3-110	Compulsion
		95-501 to 95-509	Competency of the accused
202	Who are liable to punishment	95-304	State criminal jurisdiction
203	Classification of parties to crime	94-2-106	Accountability for conduct of another
		94-2-107	When accountability exists
204	Who are principals	94-4-101	Solicitation
		94-2-106	Accountability
205	Who are accessories	94-7-303	Obstructing justice
206	Punishment of accessories	94-7-303	Obstructing justice
		94-2-108	Separate conviction of persons accountable
301	Penalty for abandonment or failure to support wife	94-5-608	Nonsupport
302	Orders which may be entered by the court	94-5-608(4)	Fine or forfeiture of bond
		95-2216(c)	Earnings of prisoners
303	Certain proof made prima facie evidence	94-5-607(3)	Evidence of violation of duty
304	Desertion or abandonment of child or ward a felony—suspension of sentence, when	94-5-607	Endangering the welfare of children
		94-5-608	Nonsupport
305	Disposing of child for mendicant business	None	
306	Cruelty to children	94-5-607	Endangering the welfare of children
		10-901 to 10-905	Reports of child neglect or abuse
401	Administering drugs, etc., with intent to produce miscarriage	94-5-611	Repealed
402	Submitting to an attempt to produce miscarriage	94-5-612	Repealed
501	Purpose of act—short title	None	
502	Arson — first degree — burning of dwellings	94-6-104	Arson
503	Arson — second degree —burning of buildings, etc., other than dwellings	94-6-103	Negligent arson
		94-6-102	Criminal mischief

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
504	Arson — third degree — burning of other property	94-6-102	Criminal mischief
505	Arson—fourth degree—attempt to burn buildings or property	94-4-103 94-4-101	Attempts Solicitation
506	Burning to defraud insurer	94-6-102(c)	Criminal mischief
601	Assault in first degree	94-5-202	Aggravated assault
602	Assault in second degree	94-5-201 94-5-202	Assault Aggravated assault
603	Assault in third degree	94-5-201	Assault
604	Assaults with caustic chemicals, etc.	94-5-202	Aggravated assault
605	Use of force not unlawful	94-3-102	Use of force in defense of person
		94-3-103	Use of force in defense of occupied structure
		94-3-104	Use of force in defense of other property
		94-3-105	Use of force by aggressor
		94-3-106	Use of force to prevent escape
		94-3-107	Use of force by parent
		95-602(b)	Method of arrest
701	Bigamy defined	94-5-604	Bigamy
702	Exceptions	94-5-604(1)(c)	Invalid judgment of divorce or annulment
703	Punishment for bigamy	94-5-604(2)	Punishment for bigamy
704	Marrying a husband or wife of another	94-5-605	Marrying a bigamist
705	Incest	94-5-606	Incest
801	Giving bribes to judges, jurors, referees, etc.	94-7-102	Bribery in official and political matters
802	Receiving bribes by judicial officers, jurors, etc.	94-7-102	Bribery in official and political matters
803	Extortion	94-7-102(c)	Bribery in official and political matters
804	Improper attempts to influence jurors, referees, etc.	94-7-102	Bribery in official and political matters
		94-7-103	Threats and other improper influence in official and political matters
805	Misconduct of jurors, referees, etc.	94-4-103	Attempt
		94-4-101	Solicitation
		94-7-103	Threats and other improper influence in official and political matters
		94-7-401(1)(a)	Official misconduct
806	Embracery	94-7-102	Bribery in official and political matters
		94-7-103	Threats and other improper influence in official and political matters

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
807	Misconduct of officers having charge of jury	94-7-103(e)	Threats and other improper influence in official and political matters
		94-7-401	Official misconduct
808	Justice or constable purchasing judgment	16-3607	No change in text
809	Convicted officer to forfeit and be disqualified from holding office	94-7-401(4)	Official misconduct
810	Bribery of school trustees	94-7-102	Bribery in official and political matters
811	Offender a competent witness	95-1807	Immunity from prosecution
901 to 903	Burglary	94-6-204	Burglary
904	Word "enter" defined	94-6-201	Definition of terms
905	Nighttime defined	None	
906, 907	Burglary with explosives	94-6-204	Burglary
908	Possession of burglarious instruments	94-6-205	Possession of burglary tools
909	Carrying a deadly weapon	94-5-202 94-4-103	Aggravated assault Attempt
1001 to 1011	Common nuisance — alcohol, opium, prostitution, and gambling	94-8-107	Public nuisances
1101	Criminal conspiracy	94-4-102	Conspiracy
1102	No other conspiracies punishable criminally	None	
1103	Overt act, when necessary	94-4-102(1)	Conspiracy
1104	Unlawful trusts and monopolies	51-401	No change in text
1105	Certain agreements between laborers excepted	51-402	No change in text
1106	Persons not to be excused from testifying	95-1807	Immunity from prosecution
1107 and 1108	Discrimination in purchase price of commodities	51-403 and 51-404	No change in text
1109	Penalty for discrimination in purchases	51-405	Minor changes in text
1110 to 1112	Cumulative remedies, discrimination in sales	51-406 to 51-408	No change in text
1113	Penalty for discrimination in sales	51-409	Minor changes in text
1114 to 1118	Cumulative remedies, pooling by warehousemen, destruction of food	51-410 to 51-414	No change in text
1201	Overdriving animals	94-8-106(1)(a)	Cruelty to animals
1202	Abandonment of disabled animals	94-8-106(1)(c)	Cruelty to animals
1203	Failure to provide proper food and drink to impounded animals	94-8-106(1)(b)	Cruelty to animals

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1204	Carrying an animal in a cruel manner	94-6-102 94-8-106	Criminal mischief Cruelty to animals
1205	Poisoning animals	94-6-102	Criminal mischief
1206	Keeping cows in unhealthy places	94-8-106	Cruelty to animals
1207	Promoting fights between animals	94-8-106	Cruelty to animals
1208	Killing, maiming or poisoning livestock	94-8-106	Cruelty to animals
1209	Killing, maiming or poisoning livestock—complaint	None	
1301	Duel defined	94-5-201 94-8-101	Assault Disorderly conduct
1302	Punishment for fighting a duel, when death ensues	94-5-102 94-5-104 94-3-105	Deliberate homicide Negligent homicide Use of force by aggressor
1303	Punishment for fighting a duel, although death does not ensue	94-5-202 94-5-201 94-8-101	Aggravated assault Assault Disorderly conduct
1304	Posting for not fighting	94-5-203	Intimidation
1305, 1306	Officers must prevent duels. Evading dueling laws	None	
1307	Witness' privilege	95-1807	Immunity of witness
1401 to 1476	Election frauds and offenses	23-4701 et seq.	Miscellaneous amendments and repeals
1501	Embezzlement by public officer	94-7-209 94-7-401 94-6-302	Tampering with public records or information Official misconduct Theft
1502 to 1504	Officers neglecting to pay over public moneys and fines	94-6-302 94-7-401	Theft Official misconduct
1505	Obstructing officer in collecting revenue	94-7-302	Obstructing a peace officer or public servant
1506	Refusing to give assessor list of property or giving false name	94-7-302 94-7-204 84-412	Obstructing a peace officer or public servant Unsworn falsification to authorities Powers of department
1507	Making false statement, not under oath in reference to taxes	94-7-204 94-7-203	Unsworn falsification to authorities False swearing
1508	Delivering receipts for poll taxes other than prescribed by law, or collecting poll taxes, etc. without giving the receipt prescribed by law	94-7-401	Official misconduct
1509	Having blank receipts for licenses other than those prescribed by law	94-7-401 94-6-302	Official misconduct Theft

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1510	Refusing to give name of person in employment	94-7-302(1)	Obstructing a peace officer or public servant
		84-4950, 84-4954	Violations by employer
1511	Carrying on business without license	84-3209	Penalty for failure to procure license
1512	Unlawfully acting as auctioneer	66-228	Penalty—public auction
1513	Officer charged with collection, etc., of revenue, refusing to permit inspection of his books	94-7-302	Obstructing a peace officer or public servant
1514	Board of examiners, auditor and treasurer neglecting certain duties	94-7-401	Official misconduct
1515	Having state arms, etc.	94-6-302	Theft
1516	Selling state arms, etc.	94-6-302	Theft
1517	Sheriff falsely representing accounts	94-7-401	Official misconduct
		94-6-302	Theft
		25-225, 25-229	Sheriff, penalties
1518	Trespass on public property	94-6-203	Criminal trespass to property
1519	Limitations on preceding section	None	
1601, 1602	Extortion	94-5-203	Intimidation
		94-5-301	Unlawful restraint
		94-6-302(2)	Theft
		94-6-307	Deceptive practices
1603	Punishment of extortion in certain cases	94-6-302	Theft
1604	Obtaining signature by means of threats	94-6-302	Theft
		94-6-307	Deceptive practices
1605	Compulsion to execute instrument	94-6-302	Theft
		94-6-307	Deceptive practices
1606	Oppression committed under color of official right	94-6-302	Theft
		94-5-201	Assault
		94-5-302	Kidnaping
		94-7-210	Impersonating a public officer
1607, 1608	Extortion committed under color of official right	94-7-401	Official misconduct
		94-6-302	Theft
		94-7-210	Impersonating a public officer
1609	Blackmail	94-6-302	Theft
		94-5-203	Intimidation
1610	Written threats	94-5-203	Intimidation
1611	Verbal threats	94-6-302	Theft
		94-5-203	Intimidation
1612	Unlawful threat referring to act of third party	94-6-302	Theft
1613	Employee of railroad company taking more fare, etc.	94-6-302	Theft
		94-6-307	Deceptive practices

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1614	Requiring release of liability, etc.	94-5-203	Intimidation
		13-803	Employer's rights
1615	Extortion—refusal to pay wages without discount	94-6-302	Theft
		94-5-203	Intimidation
		41-1302	Penalty for failure to pay
1616	Receipt or solicitation of gifts by foreman from employees	94-5-203	Intimidation
		94-6-302	Theft
1617	Immunity of witnesses	95-1807	Immunity of witnesses
1701	Offering false evidence	94-7-203	False swearing
		94-7-204	Unsworn falsification to authorities
		94-7-208	Tampering with or fabricating physical evidence
1702	Deceiving a witness	94-7-204	Unsworn falsification to authorities
		94-7-208	Tampering with or fabricating physical evidence
		94-7-207	Tampering with witness and informants
1703	Preparing false evidence	94-7-208(1)(b)	Tampering with or fabricating physical evidence
1704	Destroying evidence	94-7-208(1)(a)	Tampering with or fabricating physical evidence
1705	Preventing or dissuading witness from attending	94-5-203	Intimidation
		94-7-207	Fabricating physical evidence
1706	Bribing witness	94-7-102	Bribery in official and political matters
		94-7-207	Tampering with witnesses and informants
		94-5-203	Intimidation
1707	Receiving or offering to receive bribes	94-7-102	Bribery in official and political matters
1801	Marrying under false personation	94-7-203	False swearing
1802	Falsely personating another in other cases	94-6-102	Criminal mischief
		94-7-203	False swearing
		94-7-204	Unsworn falsification to authorities
		94-7-209	Tampering with public records or information
1803	False statement respecting financial condition	94-6-307	Deceptive practices
		94-6-302	Theft
1804	Receiving property in a false character	94-6-302	Theft
1805	Obtaining money, property or services by false pretenses	94-6-307	Deceptive practices
		94-6-302	Theft
1806	Confidence games	94-6-302	Theft
		94-6-307	Deceptive practices
1807	Selling land twice	94-6-302	Theft
		94-2-101(48)	Definition of "property"

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1808	Married person selling land under false representations	94-6-302 94-6-307	Theft Deceptive practices
1809	Mock auction	94-6-302 94-6-310 94-6-301 94-6-307	Theft Forgery Definition of terms Deceptive practices
1810	Consignee, false statement by	94-6-307 94-6-302	Deceptive practices Theft
1811	Selling or removing mortgaged property to defraud mortgagee	94-6-313	Defrauding creditors Removing mortgaged property
1812	Conditional sale or lease —removal, sale or concealment of property to defraud vendor or lessor	94-6-313	Defrauding creditors Removing mortgaged property
1813	False pedigree of animals, etc.	94-6-307 94-6-310	Deceptive practices Forgery
1814	Selling animal with false pedigree	94-6-307 94-6-308	Deceptive practices Deceptive business practices
1815	Use of false pretenses in selling mines	94-6-307	Deceptive practices
1816	Interference with samples for assay	94-6-302	Theft
1817 to 1823	False samples advertising, personation and credit cards	94-6-307 94-6-308	Deceptive practices Deceptive business practices
1824	Unlawful to obtain communication services without intention to pay	94-6-302 94-6-304	Theft Theft of labor or service or use of property
1825 to 1830	False use of credit cards	94-6-310 94-6-307 95-402	Forgery Deceptive practices Venue
1831	Obtaining accommodations with intent to defraud	94-6-304	Theft of labor or service or use of property
1832 to 1834	Chain distributor schemes	94-6-308.1	No change in text
1901 to 1904	False weights and measures	Title 90, ch. 1 94-6-302 94-6-308	Weights and measures Theft Deceptive business practices
2001	Forgery of wills, conveyances, etc.	94-6-310	Forgery
2002	Making false entries in records or returns	94-6-310	Forgery
2003	Forgery of public or corporate seal	94-7-204 94-6-310	Unsworn falsification to authorities Forgery
2004	Punishment of forgery	94-6-310	Forgery

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2005	Forging telegraphic messages	94-6-310	Forgery
2006	Possessing or receiving forged or counterfeit bills or notes with intent to defraud	94-6-310	Forgery
2007	Making, passing or uttering fictitious bills, etc.	94-6-309	Issuing a bad check
2008 to 2014	Forgery and counterfeiting	94-6-310	Forgery
2101 to 2104	Fraudulent conveyances	94-6-313 29-101 to 29-113	Defrauding creditors Fraudulent conveyances
2201	Repealed in 1947		
2202	Presenting false proofs upon policy of insurances	94-6-302 94-6-307 94-6-310 94-6-102	Theft Deceptive practices Forgery Criminal mischief
2301	Fraud in publishing false statement of concern	94-6-308 94-6-307	Deceptive business practices Deceptive practices
2302	Frauds in subscription for stock of corporations	94-6-310 94-6-302	Forgery Theft
2303	Fraudulent issue of stock, scrip, etc.	94-6-302	Theft
2304	Frauds in procuring organizations, etc., of corporation	94-7-204 94-6-310	Unsworn falsification to authorities Forgery
2305	Unauthorized use of name in prospectus, etc.	94-6-307 94-6-310	Deceptive practices Forgery
2306	Misconduct of directors of stock corporation	94-2-113 94-6-302	Accountability for conduct of corporation Theft
2307	Savings bank officer overdrawing his account	94-6-302	Theft
2308	Frauds in keeping accounts in books of corporation	94-6-302	Theft
2309	Officer of corporation publishing false reports	94-6-307	Deceptive practices
2310	Officer of corporation refusing to permit an inspection	None	
2311, 2312	Officer of railroad company contracting debt in its behalf exceeding its available means	94-2-113 94-6-302	Accountability for conduct of corporation Theft
2313	Director of corporation presumed to have knowledge	94-2-113	Accountability for conduct of corporation
2314	Director present at meeting, when presumed to have assented to proceedings	94-2-107 94-2-113	When accountability exists Accountability for conduct of a corporation

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2315	Director absent from meetings, when presumed to have assented to proceedings	94-2-107 94-2-113	When accountability exists Accountability for conduct of corporation
2316	Offenses relating to foreign corporations	94-2-112	Criminal responsibility of corporations
2317	Foreign corporations doing business in violation	None	
2318	Agent not complying with foreign corporation requirements	94-2-108	Separate conviction of persons accountable
2319	Corporation not complying with laws	None	
2320	Agent of noncomplying corporation	94-2-108	Separate conviction of persons accountable
2321	Director defined	None	
2322 to 2325	Frauds in management of corporations	15-22-141 to 15-22-144	No change in text
2401 to 2424	Gambling	94-8-401 to 94-8-424	No change in text
2425	Repealed in 1965		
2426 to 2428	Gambling	94-8-425 to 94-8-427	Repealed
2429 to 2432	Slot machines	94-8-428 to 94-8-431	No change in text
2501	Murder defined	94-5-101 94-5-102	Criminal homicide Deliberate homicide
2502	Malice defined — express or implied	None	
2503	Degrees of murder	94-5-101(2)	Classes of criminal homicide
2504	Repealing clause	None	
2505	Punishment for murder	94-5-102 94-5-103 94-5-104	Deliberate homicide Mitigated deliberate homicide Negligent homicide
2506	Petit treason abolished	None	
2507, 2508	Manslaughter, voluntary and involuntary	94-5-103 94-5-104	Mitigated deliberate homicide Negligent homicide
2509	Deceased must die within a year and a day	None	
2510	Proof of corpus delicti	95-3004(a)	The burden in homicide trial
2511	Excusable homicide	94-3-101 to 94-3-112	Justifiable use of force
2512	Justifiable homicide by public officer	94-3-109 94-3-106	Execution of death sentence Use of force to prevent escape
2513 to 2515	Justifiable and excusable homicide and bare fear	94-3-102 94-3-103	Use of force in defense of person Use of force in defense of dwelling

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		94-3-104	Use of force in defense of other property
		94-3-105	Use of force by aggressor
		94-3-106	Use of force to prevent escape
		95-602	Arrest
2601	Kidnaping—place of trial	94-5-302	Kidnaping
		95-411	Venue
2602	Kidnaping with intent to send person from state or confine within state —place of trial	94-5-303	Aggravated kidnaping
		95-411	Venue
2603	Enticing away child	94-5-305	Custodial interference
2604	Prisoner holding hostage	94-5-303	Aggravated kidnaping
2701	Larceny defined	94-6-302	Theft
2702	Uttering fraudulent check or drafts — evidence	94-6-309	Issuing a bad check
2703, 2704	Grand and petit larceny	94-6-302	Theft
2704.1	Possession of stolen livestock as evidence of larceny	94-6-314	Effect of possession of stolen property
2705	Petit larceny defined	94-6-302	Theft
2706	Punishment of grand larceny	94-6-302	Theft
2707	Punishment of petit larceny	94-6-302	Theft
2708	Dogs, property	94-2-101(48)	Definition of "property"
2709	Larceny of lost property	94-6-303	Theft of lost or mislaid property
2710	Larceny of written instruments	94-2-101(48)	Definition of "property"
2711	Value of passage tickets	94-2-101(48)	Definition of "property"
2712	Written instruments completed but not delivered	94-6-302	Theft
		94-2-101(48)	Definition of "property"
2713	Severing and removing part of the realty	94-2-101(48)	Definition of "property"
		94-6-302	Theft
2714	Larceny and receiving stolen property out of the state	94-6-302	Theft
		95-304	Venue
2715	Conversion by fiduciary, larceny	94-6-302	Theft
2716	Verbal false pretense, not larceny	94-2-101(11)(a)	Definition of "deception"
2717	Claim of title, restoration of property as defense	94-6-306	Offender's interest in the property
2718, 2719	Larceny of water, gas and electricity	94-6-302	Theft
		94-2-101(48)	Definition of "property"
2720	False device for measuring gas, water, electricity	94-2-101(48)	Definition of "property"
		94-6-302	Theft
		94-6-304	Theft of labor, services or use of property

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2721	Receiving stolen property	94-6-302 94-6-314	Theft Effect of possession of stolen property
2722	Larceny, destruction etc., of records by officers	94-7-209	Tampering with public records or information
2723 to 2726	Larceny and falsification of public records and jury lists	94-7-209	Tampering with public records or information
2801, 2802	Libel	94-8-111	Criminal defamation
2803	Malice presumed	None	
2804 to 2809	Libel	94-8-111	Criminal defamation
2810	Threatening libel to extort	94-6-302(2)	Theft
2811	Giving false information for publication	94-8-111	Criminal defamation
2901	Preventing the meeting or organization of legislative assembly	94-7-302 94-8-101	Obstructing a peace officer or public servant Disorderly conduct
2902	Disturbing the legislative assembly while in session	94-7-302 94-8-101(1)(g)	Obstructing a peace officer or public servant Disorderly conduct
2903	Altering draft of bill or resolution	94-7-209	Tampering with public records or information
2904	Altering engrossed or enrolled copy of bill or resolution	94-7-209	Tampering with public records or information
2905 to 2909	Legislative bribes	94-7-102	Bribery in official and political matters
2910	Solicitation of bribery	94-7-102 94-4-101	Bribery in official and political matters Solicitation
2911	Personal interest in bill	94-7-401	Official misconduct
2912	Witnesses refusing to attend	43-401 to 43-405	Witnesses before the legislative assembly
2913	Lobbying	95-1807 94-7-102(1)	Immunity from prosecution Bribery
2914	Members of legislative assembly, in addition to other penalties to forfeit office, etc.	94-7-401(4)	Official misconduct
2915 to 2919	Legislative bribes	94-7-102	Bribery in official and political matters
3001 to 3011	Lotteries	94-8-301 to 94-8-311	No change in text
3101 to 3108	Machine Gun Act	94-8-201 to 94-8-208	No change in text
3109	Search warrant	None	
3110	Uniformity of interpretation	94-8-209	No change in text
3111	Short title	None	

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3201	Repealed in 1965		
3202	Injuries to milestones, guideposts, trees	94-6-102	Criminal mischief
3203	Tampering with telegraph, telephone, and electric system	94-6-102 94-6-302	Criminal mischief Theft
3204	Taking water from or obstructing canals	94-6-102 94-6-302	Criminal mischief Theft
3205, 3206	Interference with railroad property	94-6-102	Criminal mischief
3207	Acts causing death punished as murder	94-5-102	Deliberate homicide
3208	Remove waste or packing from locomotives or motors	94-8-108 94-6-102	Creating a hazard Criminal mischief
3209	Repealed in 1963		
3210	Highway construction — leaving hard substance on railroad intersection	94-8-108	Creating a hazard
3211	Removal, injury or destruction of telephone, telegraph and electric facilities	94-6-102	Criminal mischief
3301	Malicious injury or destruction of property	94-6-102	Criminal mischief
3302	Specification in following sections not restriction	None	
3303	Burning buildings, etc., not the subject of arson	94-6-104 94-6-102 94-6-103	Arson Criminal mischief Negligent arson
3304	Destruction of buildings by explosives	94-6-102 94-6-104	Criminal mischief Arson
3305	Use of automobiles without consent of owners	94-6-203 94-6-202 94-6-305	Criminal trespass to property Criminal trespass to vehicles Unauthorized use of motor vehicles
3306, 3307	Possessing automobile from which number or marks have been removed or altered	94-6-311	Obscuring the identity of a machine
3308	Malicious injuries to freehold	94-6-102	Criminal mischief
3309	Injuring fences, building fires, and hunting on premises of another when forbidden	94-6-201 94-6-203 94-6-102	Definition of terms Criminal trespass to property Criminal mischief
3310	Injuries to standing crops	94-6-102	Criminal mischief
3311	Removing, defacing or altering landmarks	94-7-209 94-6-102	Tampering with public records or information Criminal mischief
3312 to 3314	Fences and dams—malicious mischief generally	94-6-102	Criminal mischief
3315	Burning or injuring rafts, setting adrift vessels	94-6-103 94-6-104 94-6-102	Negligent arson Arson Criminal mischief
3316	Obstructing navigable waters	94-8-107(1)(c)	Public nuisance

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3317	Injuries to United States surveyor's monuments	94-7-209	Tampering with public records or information
		94-6-102	Criminal mischief
3318	Destroying or tearing down notices	94-7-209	Tampering with public records or information
		94-6-102	Criminal mischief
3319	Injuring or destroying written instrument	94-6-102	Criminal mischief
3320 to 3323	Letters and telegrams	94-8-114	Privacy in communications
3324 to 3326	Destroying art, literature and malicious mischief generally	94-6-102	Criminal mischief
3327, 3328	Setting and negligent control of fires	28-115	Failure to extinguish fire
		94-6-103	Negligent arson
3329	Setting fire to timber, etc., maliciously	28-115	Failure to extinguish fire
		94-6-104	Arson
3330	Exposing infected clothing or person	69-4509	Duties of public health officers
3331	Driving animals on a sidewalk	94-8-101(1) (e) or (i)	Disorderly conduct
3332	Malicious spiking of saw logs	94-6-102	Criminal mischief
3333	Defacing public buildings	94-6-102	Criminal mischief
3334	Injury to trees on public lands	94-6-102	Criminal mischief
3335 to 3344	Malicious mischief generally	None	
3401, 3402	Mayhem	94-5-202	Aggravated assault
3501	Administrator, etc., must file report—penalty	94-7-401	Official misconduct
		Title 91, ch. 5	Escheated estates—inheritance by nonresident aliens—disposal of unclaimed property
		Title 91, ch. 6	Probate proceedings—public administrator
3502	Adulterating foods, drugs, liquors, etc.	4-1-201	Sale of liquor unlawful—foreign substance in liquor—possession of liquor
		27-703	Prohibited acts enumerated
		27-705	Criminal penalties for prohibited acts—reliance on guaranty or undertaking as defense
		27-710	Adulterated food defined
		66-1524	Quality of drugs sold—adulteration
		94-6-308	Deceptive business practices
3503	Adulterated candies	27-703	Prohibited acts enumerated
		27-705	Criminal penalties for prohibited acts—reliance on guaranty or undertaking as defense
		27-710	Adulterated food defined
		94-6-308	Deceptive business practices

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3504	Altering brands	94-6-312	Illegal branding or altering or obscuring a brand
3505	Apothecary omitting to label drugs or labeling them wrongfully, etc.	94-6-308	Deceptive business practices
		66-1510	Sale of poisons regulated
		66-1515	Penalty for violation of act
		66-1523	Wrongful labeling
		66-1502	Terms defined
3506	Arrests, seizures or levy upon property, dispossession of lands without lawful authority, issuance by justice of the peace of writs or process signed or process signed in blank	94-7-401	Official misconduct
		93-7702	Duties of justice of the peace
3507	Attorneys — misconduct by	93-2105	Punishment for deceit
		93-2106	Punishment for willful delay
		93-2108	Certain other transaction prohibited—penalty
		94-6-302	Theft
3508	Attorneys — buying demands or suits by	93-2107, 93-2108	Attorney acquiring claims for purpose of bringing action
3509	Attorney forbidden to defend prosecutions carried on by their partners or formerly by themselves	93-2111	Partner of public prosecutor not to defend, etc.
		93-2112, 93-2114	Former public prosecutors not to defend, etc.
3510	Attorney may defend self	93-2116	Attorney may defend in person when prosecuted
3511, 3512	Barber business, conducting on Sunday	None	
3513	Repealed in 1953		
3514	Brands—sash or frying pan prohibited	94-6-312	Illegal branding or altering or obscuring a brand
		46-603	Recording of brands required
		46-604	Application for recording record of brands
		46-606	Right of owner of recorded brand
		46-608	Penalty for violation of act
3515, 3516	Branding stock driven into or through state required	Title 46, ch. 6	Brands—recording
		94-6-310	Forgery
3517 to 3520	Branding — miscellaneous offenses	Title 46, ch. 6	Brands—recording
3521	Fines, disposition	None	
3522	Branding cattle running at large	46-1720	No change in text
3523	Bribing members of city or town councils, boards of county commissioners or trustees	94-7-102	Bribery in official and political matters
3524	Bringing armed men into the state	94-7-504	Bringing armed men into the state
3525 to 3527.1	Carrying concealed weapons	94-8-210 to 94-8-213	No change in text

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3528	Arrest without warrant	94-7-401	Official misconduct
3529 to 3532	Concealed weapons—permit	94-8-214 to 94-8-217	No change in text
3533, 3534	Common barratry	93-2105	Punishment for deceit
3535	Compounding crimes	94-7-305	Compounding a felony
3536, 3537	Compulsory company boarding houses	None	
3538	Resisting process after county declared in state of insurrection	94-7-302	Obstructing a peace officer or public servant
3539	Incestuous or forbidden marriages	94-5-605, 94-5-606	Marrying a bigamist
		94-2-107	When accountability exists
		94-7-401	Official misconduct
3540	Criminal contempt	94-7-309	Contempt
3541	Cruel treatment of lunatics, etc.	None	
3542	Dead animals—offal, etc., putting in street, rivers, etc.	69-4518	Dead animals—unlawful disposition
		69-4519	Penalty
3543	Deadly weapons exhibiting in rude, etc., manner or using unlawfully	94-5-201	Assault
		94-8-101	Disorderly conduct
3544	Death from explosions, etc.	94-5-104	Negligent homicide
3545	Death from collision on railroads	94-5-104	Negligent homicide
3546	Death from mischievous animals	94-5-104	Negligent homicide
3547	Debtor fraudulently concealing his property	94-6-313	Defrauding creditors
3548	Litigant fraudulently concealing his property	94-6-313	Defrauding creditors
3549	Defacing marks on logs, lumber or wood	94-6-102	Criminal mischief
3550	Repealed in 1967		
3551, 3552	Depositing coal slack in streams	69-4905	Prohibited acts
		69-4908	Penalty
		69-4806	Pollution unlawful—permits
3553	Disclosing indictment found	94-7-401	Official misconduct
		95-1409	Secrecy of proceedings and disclosure
3554	Disclosing what transpired before the grand jury	95-1409	Secrecy of proceedings and disclosure
		94-7-401	Official misconduct
3555	Discharged employees, protection	41-1325	No change in text

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3557, 3558	Discrimination by hospitals	64-301	Freedom from discrimination as civil right — employment—public accommodation
		64-303	Discrimination as a misdemeanor
		69-5217, 69-5221	Discrimination among patients of physicians
		69-5313	Discrimination prohibited in subsidized facilities
3559	Diseased animals	46-236	Duty to report contagious diseases
		46-237	Diseased animals not to run at large—burial of carcasses
		46-238	Penalty for violation
3560 to 3563	Disturbing the peace	94-8-101	Disorderly conduct
3564	Police power of railroad conductors	None	
3565	Ditch overflowing on highway	94-8-107	Public nuisance
3566	Divorce — advertising to procure	None	
3567 to 3569	Livestock — miscellaneous offenses	46-3001 to 46-3003	No change in text
3570 to 3572	Entertainment in establishments licensed to sell beer	None	
3573	Repealed in 1959		
3574	Exhibiting deformities of persons	None	
3575	Exposing person infected with any contagious disease in a public place	69-4509	Functions, powers and duties of local boards of health
3576	False imprisonment	94-5-301	Unlawful restraint
3577	Fences, unlawful and dangerous	46-1403	Barbed wire fences to be kept in repair
		46-1404	Fallen wire fencing declared nuisance—abatement
3578 to 3578.2	Firing firearms	94-8-218 to 94-8-220	No change in text
3579, 3580	Firearms, use by children	94-8-221, 94-8-222	No change in text
3581 to 3583	Flag desecration	94-7-502	Desecration of flag
3584	Forcible entry and detainer	94-6-203	Criminal trespass to property
3585 to 3587	Fortunetelling	None	
3588	Fraudulent practices to affect the market price	94-6-302	Theft
		94-6-307(b)	Deceptive practice
3589	Fraudulent pretenses relative to birth of infant	94-7-209	Tampering with public records or information
		69-4413	Births—compulsory registration
		69-4436	False statements or information contained in records relating to vital statistics

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3590	Fraudulent pretenses — substituting one child or another	94-5-301 94-5-302	Unlawful restraint Kidnaping
3591, 3592	Gas masks for employees handling crude oil and gas	41-1710, 41-1718	Employers to furnish and require safety devices and practices
3593, 3594	Glanders—disposition of infected animal	46-211 46-238 46-903, 46-905	Promulgation of rules Penalty for violation of act Quarantine of diseased animals—proceeds from sale of stock
3595	Grand juror acting after challenge has been allowed	94-7-210	Impersonating a public officer
3596	Habeas corpus, refusing to issue or obey writ	94-7-401 95-2710	Official misconduct Production of person
3597	Reconfining persons discharged on habeas corpus	94-7-401 94-5-302 95-2710	Official misconduct Kidnaping Production of person
3598	Concealing persons entitled to habeas corpus	95-2710 94-7-401 94-5-305	Production of person Official misconduct Custodial interference
3599	Health laws—willful violation	69-5701	Violations of public health laws or rules of state board of health
35-100	Health laws—neglecting to perform duties	94-7-401 69-5701	Official misconduct Violations of public health laws or rules of state board of health
35-101	Horses, etc., taking up or restraining without owner's consent	94-6-102	Criminal mischief
35-102, 35-103	Repealed in 1953		
35-104	Innkeepers and carriers refusing to receive guests	64-301 to 64-303	Freedom from discrimination
35-105	Inspection of mines, unsafe dams and reservoirs	95-2206.3	When no penalty is specified
35-106	Intoxicating liquors—giving or selling to minor	94-5-609	Unlawful transactions with minors
35-106.1	Jurisdiction of offenses	95-302 95-304	Jurisdiction of justices of peace State criminal jurisdiction
35-106.2	Possession of beer or liquor by minor	94-5-610	Possession of intoxicating substances by minors
35-107	"Intoxicating" liquor defined	94-2-101(24)	Definition of "intoxicating substance"
35-108	Intoxicated physicians	None	
35-109	Intoxication of engineers, conductors or drivers of locomotives or cars	72-671	No change in text
35-110	Issuing fictitious bills of lading, etc.	94-6-310 94-6-302	Forgery Theft
35-111	Issuing fictitious warehouse receipts	94-6-310 94-6-302	Forgery Theft

R.C.M., 1947 Title 94 Old Section	Subject Matter	Montana Criminal Code of 1973	Subject Matter
35-112	Erroneous bills of lading or receipts issued in good faith	None	
35-113	Duplicate receipts marked "duplicate"	94-6-310 94-6-302	Forgery Theft
35-114	Selling, etc., property received for transportation or storage	94-6-302	Theft
35-115	Issuing or circulating paper money	94-6-310 94-6-302	Forgery Theft
35-116	Leaving gates open	94-6-102(d)	Criminal mischief
35-117 to 35-120	Obstructing shoreline	94-8-107	Public nuisance
35-121	False return or record of marriage	94-7-401 94-7-204 48-124	Official misconduct Unsworn falsification to authorities Penalty for failure to return or record
35-122	Maliciously procuring warrant	94-7-203	False swearing
35-123	Repealed in 1969		
35-124	Penalty for violation	None	
35-125	Mining shafts, drifts or cuts to be covered or fenced	94-8-108(b)	Creating a hazard
35-126 to 35-134	Mine shafts	None	
35-135, 35-136	Repealed in 1947		
35-137	Minors, admission to place of prostitution	10-617	Penalty for improper and negligent training of children
35-138	Minors under sixteen, permitting to frequent dance halls	None	
35-139	Obstructing attempts to extinguish fires	94-7-302	Obstructing a peace officer or public servant
35-140	Obstructing ford near ferry	None	
35-141	Omission of duty by public officer	94-7-401	Official misconduct
35-142	Offense for which no penalty is prescribed	95-2206.3	When no penalty is specified
35-143	Oppression and injury by an officer	94-7-401 94-8-113	Official misconduct Mistreating prisoners
35-144	Officers of fire departments issuing false certificates of exemption	94-7-401 11-2004, 11-2005	Official misconduct Exemption certificates
35-145 to 35-147	Oleomargarine, labeling and notice	94-6-308	Deceptive business practices
35-148	Repealed in 1969		
35-149, 35-150	Personating officer	94-7-210	Impersonating a public servant

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35-151	Pesthouse — establishing or keeping within cities, towns, etc.	69-4509	Functions, powers and duties of local boards of health
		69-5213	Rules and standards for long-term care facilities — adoption and publication by state board of health
35-152 to 35-152.18	Repealed in 1965		
35-153 to 35-162	Repealed in 1953		
35-163 to 35-165	Prize fights	None	
35-166	Public administrator, neglect or violation of duty by	94-7-401	Official misconduct
35-167, 35-168	Public nuisances defined	94-8-107	Public nuisance
35-169	Public officers, resisting in the discharge of their duties	94-7-302	Obstructing a peace officer or public servant
35-170	Public officers assaulting under color of authority	94-8-113	Mistreating prisoners
		94-7-401	Official misconduct
		94-5-201	Assault
		94-5-202	Aggravated assault
35-171	Putting extraneous substances in packages sold by weight	94-6-308	Deceptive business practices
		94-6-302	Theft
35-172, 35-173	Sale of diseased carcasses without inspection	46-247, 46-248	No change in text
35-174	Railroads—animals killed by	72-507	No change in text
35-175	Violating railroad regulations	72-219	Penalties
35-176	Repealed in 1969		
35-177	Refusing to aid officers in arrest	94-7-304	Failure to aid peace officer
35-178	Refusing to disperse	94-8-102	Failure to disperse
35-179	Removing skin of animal	69-4518, 69-4519	Dead animals—unlawful disposition
35-180	Returning to take possession of lands after being removed by legal proceedings	94-7-302	Obstructing a peace officer or public servant
		94-7-309	Criminal contempt
35-181, 35-182	Riot	94-8-103	Riot
35-183	Rout defined	94-4-103	Attempt
		94-8-103	Riot
		94-8-104	Incitement to riot
35-184 to 35-186	Sale or manufacture of Maxim silencers and various explosives for wrongful use	94-8-223 to 94-8-225	No change in text
35-187 to 35-189	Diseased sheep	46-237, 46-238	Diseased animals not to run at large—burial of carcasses

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35-190 to 35-192	Importing diseased cattle	46-237, 46-238	Diseased animals not to run at large—burial of carcasses
		46-245	Governor may prohibit importation of animals from localities where disease exists
35-193	State veterinary surgeon —disobeying order of	46-210	Violation constitutes misdemeanor
35-194	Obstructing veterinary surgeon	94-7-302	Obstructing a peace officer or public servant
		46-210	Violation constitutes misdemeanor
35-195	Schoolteachers, abuse of	75-6110	Abuse of teachers
35-196	Selling horses at auction —recording sales	66-210	Book for livestock
35-197, 35-198	Selling merchandise at camp meeting	None	
35-199	Repealed in 1969		
35-200	Sheepherder — abandonment of sheep by	46-3004	No change in text
35-201	Stealing rides upon cars or locomotives	94-6-304	Theft of labor or services or use of property
		94-6-202	Trespass to vehicles
35-202	Stealing rides on trucks, rods or brake beams	94-6-304	Theft of labor or services or use of property
		94-6-202	Trespass to vehicles
35-203	Trainmen constituted peace officers	72-672	No change in text
35-204 to 35-207	Forfeiture of vehicles— Theft	46-3005 to 46-3008	No change in text
35-208	Tobacco sales to minors	None	
35-209, 35-210	Lawyers soliciting business	None	
35-211	Steam boilers— mismanagement	94-8-108	Creating a hazard
35-212	Steam boilers operating without license	69-1517	Operation of boiler or steam engine without license
35-213	Unsafe steam boilers	94-8-108	Creating a hazard
		69-1517	Operation of boiler or steam engine without license
35-214	False certificate of boiler inspection	94-7-204	Unsworn falsification to authorities
35-215	Suicide — aiding or encouraging	94-5-101	Criminal homicide
		94-5-106	Aiding or soliciting suicide
		94-2-107	Accountability
35-216	Sunday, activities forbidden on	None	
35-217	Tainted food, disposing of	27-703	Prohibited acts enumerated
		27-710	Adulterated food defined
		94-6-308	Deceptive business practices
35-218 to 35-221	Telegraph and miscellaneous offenses	94-8-114	Privacy in communications
35-221.1 to 35-221.4	Party line violations	94-8-109	Failure to yield party line

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35-221.5, 35-221.6	Abuse, harassment or extortion by telephone	94-8-114 95-404	Privacy in communications Where a person in one county commits or aids and abets the commission of an offense in another county
35-222 to 35-225	Toy pistols	None	
35-226 to 35-232	Trademarks, forgery, counterfeiting and unlawful use	94-6-308 94-6-310	Deceptive business practices Forgery
35-233 to 35-236	Registration of trademarks	85-101 to 85-105 94-6-308	Registration of trademarks Deceptive business practices
35-237, 35-238	Trespassing stock	94-6-203	Criminal trespass to property
35-239	Fines on trespassing stock	None	
35-240	Range stock exempt	None	
35-241	Unauthorized communication with convict	94-7-307	Transferring illegal articles
35-242 to 35-244	Unlawful assembly—miscellaneous offenses	94-8-102 94-8-103	Failure to disperse Riot
35-245	Magistrate refusing or neglecting to disperse rioters	94-7-401	Official misconduct
35-246	Unlawful entries in horse races	62-505	Duties of commission and licensees—license fee
35-247	Name of race horse	62-505	Duties of commission and licensees—license fee
35-248	Vagrants	None	
35-249	Vending or coin-operated machines, operation with counterfeit slugs	94-6-302	Theft
35-250	Manufacturing tokens, etc., for unlawful use	94-6-310	Forgery
35-251, 35-252	Railroad safety violations	None	
35-253	Wearing certain uniforms prohibited	94-7-210	Impersonating a public servant
35-254	Wearing mask or disguise	None	
35-255	Willfully poisoning food, medicine or water	94-5-202 94-6-102 94-4-103	Aggravated assault Criminal mischief Attempt
35-256, 35-257	Workmen — false representation to procure	41-118	Deceived employees—action for damages
35-258, 35-259	Endurance races of horses	94-8-106(1)(d)	Cruelty to animals
35-260	State tax stamp—failure to affix or cancel — counterfeiting	Repealed	
35-261	Importing or selling machinery with altered, defaced or removed serial number	94-6-308(e) 94-6-311(b)	Deceptive business practices Obscuring the identity of a machine

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35-262	Altering, defacing or removing serial number of farm machinery	94-6-311	Obscuring the identity of a machine
35-263	Penalty	94-6-311	Obscuring the identity of a machine
35-264	Furnishing articles to and receiving from prisoners in state prison	94-7-307	Transferring illegal articles
35-265	Abandoning or permitting abandoned icebox in dangerous condition	94-8-108(1)(a)	Creating a hazard
35-266 to 35-268	Repealed in 1959		
35-269	Hunting in careless or reckless manner—failure to assist person injured	94-8-108(1)(e)	Creating a hazard
35-270, 35-271	Delivery of grain containing toxic chemicals to public warehouses	3-234, 3-235	No change in text
		94-6-308	Deceptive business practices
		27-703	Prohibited acts enumerated
		27-710	Adulterated food defined
		27-713	Additives to conform to regulations
35-271.1 to 35-271.3	Coloration of grain treated with injurious or toxic substances	3-236 to 3-238	No change in text
		94-6-308	Deceptive business practices
		27-703	Prohibited acts enumerated
		27-710	Adulterated food defined
		27-713	Additives to conform to regulations
		27-720	False advertising — representation of curative properties
		27-705	Criminal penalties for prohibited acts—reliance on guaranty or undertaking
35-272	Unlawful operation, use, interference, or tampering of aircraft — penalty	94-8-108	Creating a hazard
		94-6-305	Unauthorized use of motor vehicles
35-273	Switchblade knives—possession, selling, using, giving, or offering for sale	94-8-226	No change in text
35-274, 35-275	Recording of conversation	94-8-114(1)(c)	Privacy in communications
3601, 3602	Obscene literature	94-8-110	Obscenity
3603	Indecent exposure, exhibitions and pictures	94-8-110	Obscenity
		94-5-504	Indecent exposure
		94-8-101	Disorderly conduct
3604	Seizures of indecent articles authorized	95-702	Scope of search without warrant
		95-705	Scope of search with warrant

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3605	Indecent character summarily determined	95-712	Return to court of things seized under search warrant
		95-713	Custody and disposition of things seized under search warrant
		95-714	Custody and disposition of things seized without search warrant
3606	Destruction of indecent articles	None	
3607	Keeping or residing in a house of ill fame	94-5-603	Promoting prostitution
3608	Keeping disorderly houses	94-5-603	Promoting prostitution
		94-8-107	Public nuisance
3609	Advertising to produce miscarriage	None	
3610	Enticing to place of gambling or prostitution	94-5-603	Promoting prostitution
		94-4-101	Solicitation
3611 to 3615	Advertising cures	None	
3616 to 3619	Repealed in 1973		
3620 to 3623	Contraceptive drugs or devices	94-8-110.2	No change in text
3624 to 3626	Public display of offensive sexual material	94-8-110.1	No change in text
3701	Pawnbrokers — doing business without a license	66-1601	Interest pawnbrokers may receive
		84-3201	Billiard tables—pawnbroker—theaters, etc.
		95-2206.3	When no penalty is specified
3702	Failure to keep register	66-1606	Must keep register
		95-2206.3	When no penalty is specified
		94-5-609	Unlawful transactions with minors
3703	Rate of interest	66-1601	Interest pawnbrokers may receive
		95-2206.3	When no penalty is specified
3704	Failure to produce register for inspection	66-1606	Must keep register
		95-2206.3	When no penalty is specified
3801	Perjury defined	94-7-202	Perjury
3802	Oath defined	94-7-202	Perjury
3803	Oath of office	None	
3804, 3805	Witnesses before legislative assembly	94-7-202	Perjury
		94-7-203	False swearing
3806 to 3808	Perjury	94-7-202	Perjury
3809	Making depositions, etc., when deemed complete	94-7-202	Perjury
		94-7-101	Definition of terms
3810	Statement of that which one does not know to be true	None	
3811	Punishment of perjury	94-7-202	Perjury
3812	Subornation of perjury	94-7-202	Perjury
		94-4-101	Solicitation
3813	Procuring the execution of innocent person	94-5-101	Criminal homicide

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3901, 3902	Acting in a public capacity without being qualified	None	
3903	Giving or offering bribes to executive officers	94-7-102	Bribery in official and political matters
3904	Asking or receiving bribes	94-7-102	Bribery in official and political matters
		94-4-101	Solicitation
3905	Resisting officers	94-7-302	Obstructing a peace officer or public servant
		94-7-303	Obstructing justice
3906	Extortion	94-6-302	Theft
		94-7-401	Official misconduct
		94-7-102	Bribery in official and political matters
3907	Officers illegally interested in contracts	94-7-401	Official misconduct
		59-501	Certain officers not to be interested in contracts
		59-502	Interest in certain sales
		59-503	Contracts in violation, voidable
3908	Fraudulent bills or claims presented for allowance or payment	94-7-401	Official misconduct
		94-6-302	Theft
		94-6-310	Forgery
3909	Buying appointments to office	94-7-102	Bribery in official and political matters
3910	Taking rewards for deputation	94-7-102	Bribery in official and political matters
		94-7-105	Gifts to public servants by persons subject to their jurisdiction
3911	Exercising functions of office wrongfully	94-7-210	Impersonating a public officer
3912	Refusal to surrender books, etc., to successor	59-531	Proceedings to compel delivery of
		94-7-401	Official misconduct
		94-7-209	Tampering with public records or information
3913	Scope of application of chapter	None	
3914	False certificates by public officers	94-7-209	Tampering with public records or information
		94-7-203	False swearing
3915	Officer refusing to receive or arrest parties charged with crime	94-7-401	Official misconduct
		16-2702	Duties of sheriff
		95-603	Issuance and service of arrest warrant upon complaint
3916	Delaying to take person arrested before a magistrate	94-7-401	Official misconduct
		16-2702	Duties of sheriff
		95-901	Duty of person who has made an arrest
3917	Inhumanity to prisoners	94-8-113	Mistreating prisoners
3918, 3919	Confessions obtained by duress or inhuman practices	94-8-113	Mistreating prisoners
3920	Importing persons to discharge duties of peace officers prohibited	94-7-504	Bringing armed men into the state

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4001, 4002	Prohibited pool games	None	
4003	Closing hour for pool halls, billiard halls and bowling alleys	None	
4004	Permitting minors in pool or billiard hall	10-617	Improper and negligent training of children
4005	Penalty for violation of act	None	
4101	Rape defined	94-5-503	Sexual intercourse without consent
4102	When physical ability must be proved	94-5-503	Sexual intercourse without consent
4103	Penetration sufficient	94-2-101(55), 94-5-501	Definition of "sexual intercourse"
4104	Punishment for rape	94-5-502	Sexual assault
4105	Abduction of women	94-5-302	Kidnaping
		94-5-203	Intimidation
		94-5-603	Promoting prostitution
4106	Lewd and lascivious acts upon children	94-5-502	Sexual assault
		94-5-503	Sexual intercourse without consent
		94-5-505	Deviate sexual conduct
4107	Open and notorious adultery and fornication	None	
4108	Seduction	None	
4109 to 4117	Other sexual crimes	94-5-603	Promoting prostitution
4118	Crime against nature	94-5-505	Deviate sexual conduct
4119	Penetration sufficient	94-2-101(55)	Definition of "sexual intercourse"
4120	Child under sixteen cannot be accomplice	94-5-505	Deviate sexual conduct
		94-5-501	Definition of terms
		94-2-107(3)(a)	Accountability of victim
4201	Rescuing prisoners	94-5-305	Custodial interference
4202	Retaking goods from custody of officer	94-6-302	Theft
4203	Escapes from state prison	94-7-306	Escape
4204	Attempt to escape from state prison	94-7-306	Escape
		94-4-103	Attempt
4205	Escapes from other than state prisons	94-7-306	Escape
4206	Officers suffering convicts to escape	94-7-306	Escape
4207	Assisting prisoners to escape	94-7-306	Escape
4208	Carrying into prison things useful to aid in an escape	94-7-306	Escape
		94-7-307	Transferring illegal articles
4209	Expense of trial for escape	80-1912	Minor changes in text
4301 to 4303	Robbery	94-5-401	Robbery
4401 to 4406	Sedition—criminal syndicalism—sabotage	94-7-503	Criminal syndicalism
		94-6-102	Criminal mischief
4407, 4408	Assembling to advocate forbidden acts	94-8-103	Riot
		94-7-503	Criminal syndicalism
4409, 4410	Red flag or emblem, display	None	
4411 to 4427	Subversive organizations, registration	None	
4501, 4502	Treason and misprision of treason	None	

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4601, 4602	Unlawful removal of dead body	Title 69, ch. 23	Anatomical Gift Act
		94-6-102	Criminal mischief
4603	Duty of burial	69-5106	Unauthorized post-mortem examinations
		9-601	Persons authorized to control disposition
4604	Omitting to bury	None	
4605	Custody of body	9-601	Persons authorized to control disposition
4606	Arresting or attaching a dead body	None	
4607	Defacing tombs or monuments	94-6-102	Criminal mischief
4701 to 4703	Punishments — attempts and other general provisions	95-1711	Effect of former prosecution
4704	Contempts, how punishable	94-7-309	Criminal contempt
		94-1-104(2)	Contempt powers preserved
4705	Mitigation of punishment in certain areas	None	
4706	Aiding in misdemeanor	94-2-107	When accountability exists
		94-2-108	Separate convictions of persons accountable
		94-4-101	Solicitation
		94-4-102	Conspiracy
		94-4-103	Attempt
4707	Sending letters, when deemed complete	None	
4708	Removal from office for neglect of official duty	94-7-401	Official misconduct
4709	Omission to perform duty, when punishable	94-2-102	Voluntary acts
		94-2-105	Causal relationships between conduct and result
		94-2-106	Accountability for conduct of another
4710, 4711	Attempts to commit crime punishable	94-4-103	Attempt
4712	Commission of offense while unsuccessfully attempting another	94-2-105(2)	Result different than contemplated
4713 to 4715	Repeated offenses	95-1507	Persistent felony offenders
4716, 4717	Repealed in 1967		
4718	Imprisonment for life	None	
4719	Fine added to imprisonment	None	
4720	Civil rights of convict suspended	95-2227	Effect of conviction
4721	Civil death	None	
4722	Conveyances by convict	95-2227	Effect of conviction
4723	Convict as witness	95-2227	Effect of conviction
4724	Person of convict protected	94-8-113	Mistreating prisoners
4725	Forfeitures	1972 Const., Art. II, Sec. 30	Forfeiture of property prohibited
		95-2227	Effect of conviction
4801	No person punishable but on legal conviction	1972 Const., Art. II, Sec. 17	Due process
4802	Public offenses — how prosecuted	1972 Const., Art. II, Sec. 20	Initiation of prosecutions
4803	Repealed in 1967		

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4804	Parties to a criminal action	95-1503	Parties to a criminal action
4805	Repealed in 1967		
4806	Rights of a defendant in a criminal action	1972 Const., Art. II, Sec. 24	Rights of the accused
4807	Repealed in 1969		
4808	No person to be witness against himself or to be unnecessarily restrained	1972 Const., Art. II, Secs. 21, 22, 23	Bail and detention
		1972 Const., Art. II, Sec. 25	Privilege against self-incrimination
4809	No person to be convicted but upon verdict or judgment	1972 Const., Art. II, Sec. 26	Trial by jury
		95-1915	Verdict
4901 to 4917	Repealed in 1967		
5001 to 5004	Lawful resistance	94-3-102	Use of force in defense of person
5005	Persons acting in aid of officers justified	95-609(c)	Assisting a peace officer
5101 to 5116	Security to keep the peace	None	
5201, 5202	Police in cities and towns —organization and attendance at public meetings	None	
5301	Power of sheriff in overcoming resistance	95-609	Assisting a peace officer
5302	Officer to certify to court the name of resisters, etc.	94-7-302	Obstructing officer
5303	Ordering out militia to aid in executing process	77-107	Governor may order out organized militia
5304	Magistrates and officers to command rioters to disperse	94-8-102	Failure to disperse
5305	Arrest of rioters if they do not disperse	94-8-102	Failure to disperse
		94-8-103	Riot
		95-609	Assisting a peace officer
5306	Officers who may order out the militia	None	
5307	Commanding officer and troops to obey the order	77-109	Penalty for failure to obey call
5308 to 5310	Suppression of riots	77-121	Officers to be commissioned by governor
5311	Conduct of troops	77-121	Officers to be commissioned by the governor
		95-602	Method of arrest
5312, 5313	Governor may declare county in state of insurrection	77-107	Governor may order out organized militia
5314	Liability of officers for neglect of duties concerning unlawful or riotous assembly	None	
5401, 5402	Power of impeachment	95-2801, 95-2802	Amended by separate 1973 acts, no other change in text
5403 to 5417	Impeachment proceedings	95-2803 to 95-2817	No change in text

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5418	Repealed by separate 1973 act		
5419	Impeachment no bar to indictment	95-2819	No change in text
5501 to 5516	Removal of officers otherwise than by impeachment	94-7-401	Official misconduct
5601 to 5619	Repealed in 1967		
5701 to 5706	Time of commencing criminal actions	94-1-106 94-1-107	General time limitations Limitations
5801 to 6406	Repealed in 1967		
6407	Repealed in 1961		
6407.1 to 6413	Repealed in 1967		
6414	Presumption of law, etc. need not be stated	95-1503	Form of charge
6415	Judgments, etc., how pleaded	95-1506	Pleading judgment
6416	Private statutes, how pleaded	95-1503	Form of charge
6417	Pleading for libel	95-1503	Form of charge
6418	Pleading for forgery, where instrument has been destroyed or withheld by defendant	95-1503	Form of charge
6419	Pleading for perjury or subornation of perjury	95-1503	Form of charge
6420	Pleading for larceny or embezzlement	95-1503	Form of charge
6421	Pleading for selling, exhibiting, etc., lewd and obscene books	None	
6422	Repealed in 1967		
6423	Distinction between accessory before the fact and principal abrogated	94-2-107	When accountability exists
6424	Indictment against accessory	94-2-107 95-404	When accountability exists Where a person in one county commits or aids and abets the commission of an offense in another county
6425	Accessory may be indited and tried, though principal has not been	94-2-108	Separate conviction of persons accountable
6426 to 6428	Repealed in 1967		
6429	Allegation as to partnership property	95-1503 94-6-306	Form of charge Offender's interest in the property
6430 to 6805	Repealed in 1967		
6806 to 6808	Repealed in 1969		
6808.1 to 6808.5	Double jeopardy	95-1711	Effect of former prosecution
6809 to 7202	Repealed in 1967		
7203	Defendant presumed innocent — reasonable doubt	95-2901	No change in text
7204	Reasonable doubt as to degree convicts only of lowest	95-2902	No change in text
7205	Repealed in 1967		

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7206, 7207	Discharging defendant that he may be a witness	95-1504(d), (e)	No change in text
7208	Effect of such discharge	95-1711	Effect of former prosecution and multiple prosecutions
7209	Rules of evidence in civil actions applicable to criminal cases	95-3001	No change in text
7210	Evidence on trial for treason	95-3002	No change in text
7211	Evidence on trial for conspiracy	94-4-102	Evidence for conspiracy
7212	When burden of proof shifts in trial for murder	95-3004(b)	Burden in a homicide trial
7213	All witnesses need not be called	None	
7214	Evidence on trial for bigamy	None	
7215	Evidence on trial for forging bank bills	None	
7216	Evidence on trial for abortion and enticing females for prostitution	None	
7217	Proof of corporation by reputation	None	
7218	Evidence on trial for selling, etc., lottery tickets	None	
7219	Evidence of false pretenses	None	
7220	Conviction on testimony of accomplice	95-3012	Testimony of persons legally accountable
7221 to 7233	Repealed in 1967		
7234	Repealed in 1969		
7235 to 7239	Repealed in 1967		
7240	Evidence in trials for larceny	None	
7301 to 7306	Repealed in 1967		
7307	When discharged without verdict, cause to be tried again	95-1711	Effect of former prosecution
7308 to 7822	Repealed in 1967		
7823	Repealed in 1955		
7824	Repealed in 1967		
7825 to 7830	Repealed in 1955		
7831 to 7841	Repealed in 1967		
7901, 7902	Uniform Act for Out-of-State Parolee Supervision	95-3201, 95-3202	No change in text
8001 to 8507	Repealed in 1967		
8508 to 8510	Guaranteed arrest bond certificates	None	
8601 to 8718	Repealed in 1967		
8801	Who are competent witnesses	95-3010	No change in text
8802	Competency of husband and wife as witnesses	95-3011	No change in text
8803	Defendant as witness	1972 Const., Art. II, Sec. 25	Privilege against self-incrimination

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8804	Testimony of parties to offense	95-1807	Defendant as witness
8901 to 8909	Repealed in 1967		
9001	Definition of terms	95-1808	Definition of terms
9002 to 9004	Witnesses from without state	95-1809 to 95-1811	No change in text
9005 to 9007	Interpretation, short title and repeal	None	
9201 to 9214	Examination of witnesses on commission	95-1802	Depositions
9301 to 9306	Repealed in 1967		
9307	Expense of sending etc., defendant to asylum	95-506(d)	Expense of sending defendant to hospital
9401 to 9707	Repealed in 1967		
9801 to 9820	Repealed in 1955		
9821, 9822	Probation, parole and clemency	95-3203, 95-3204	No change in text
9823	Definition of terms	95-3205	Amended by separate 1973 act, no other change in text
9824 to 9837	Board of pardons and its procedures	95-3206 et seq.	Miscellaneous amendments and repeals
9838	Return of parole violator	95-3308	Amended
9839, 9840	Parolees' terms of service	95-3221, 95-3222	No change in text
9841, 9842	Executive clemency applications	95-3223, 95-3224	Amended by separate 1973 act, no other change in text
9843 to 9845	Hearings on executive clemency	95-3225 to 95-3227	No change in text
9846	Notice of hearings	95-3228	Minor changes in text
9847 to 9851	Decisions on executive clemency	95-3229 to 95-3233	No change in text
9901 to 9908	Bastardy proceedings	61-301 to 61-327	Uniform Parentage Act
100-1 to 301-21	Repealed in 1967		
401-1 to 401-3	Reward for apprehension of convicts and felons	None	
501-1 to 501-32	Uniform Criminal Extradition Act	95-3101 to 95-3130	Uniform Criminal Extradition Act
601-1 to 601-3	Repealed in 1967		
701-1	Bringing prisoner into court	95-1812	No change in text
801-1, 801-2	Fines and forfeitures, disposition	95-2228, 95-2229	Fines and forfeitures, disposition
901-1 to 901-18	Repealed in 1961		
1001-1 to 1001-11	Criminal law study commission	None	
1101-1 to 1101-6	Interstate Agreement on Detainers	95-3131 to 95-3136	No change in text

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