

MINUTES OF MEETING - ASSEMBLY COMMITTEE ON JUDICIARY, 54th Session, February 21, 1967

Meeting was called to order at 2:00 P.M.

Present: Wooster, Lowman, White, Schouweiler, Torvinen, Dungan, Kean, Hilbrecht,
Swackhamer (late)

Absent: None

AB 131: Provides penalties for wrongful diversion of construction funds.

Mr. Ernest Cuno, of the Builders Association of Northern Nevada, was present to speak on this bill. He said the language of the bill is such that it would be very difficult for contractors to get by with it. He said there is no provision for any difference of opinion, or for any customary hold-back or any special hold back. No provision for this tradition in the industry. He said the industry does not oppose section 3. He added that there is some objection to the wording "false voucher" and asked if the word "voucher" is necessary. Wouldn't "release" be better?

Mr. Cuno asked, Do you expect funds to be escrowed during litigation?

Mr. Hilbrecht said the construction people he had talked to in Las Vegas were not in favor of this being on two levels.

SB 48: Limits exemption from taxation of federally owned real property.

Mr. Wooster reminded the committee that he had been holding this bill for Mr. Swackhamer. Mr. Swackhamer said that his group is going to have a bill drafted to take care of this one particular situation, so they have no further objection to this bill going forward.

Mr. Torvinen moved Do Pass

Mr. Lowman seconded

Motion passed unanimously

AB 210: Includes deeds of trust in single action rule for foreclosure proceedings, establishes procedure for determining amount of deficiency judgment, and forbids deficiency judgment for purchase money.

Mr. Cuno asked that Mr. Hilbrecht, the author of the bill, give his reasons for having it drafted.

Mr. Hilbrecht said the intention is to bring the statute up to date. It provides a method for determining deficiencies and has a provision prohibiting purchase money transaction deficiencies with respect to real property. Section 3 is to prohibit any kind of deficiency judgment for money loaned for real property. The purpose is to hold down the excessive valuation of property.

Mr. Torvinen asked what about the case where the purchaser commits waste.

Mr. Swackhamer asked if this would jeopardize the money market. Mr. Hilbrecht said that most of our money institutions operate on the same principle as the ones in California where they have these provisions already. He said it has not hurt them in California. He said you would never run into this problem with FHA loans because they always appraise low.

February 21, 1967

Assembly Committee on Judiciary

-2-

Mr. Cuna asked how this would affect someone who had sold the property and assigned the Deed of Trust.

Mr. Hilbrecht said the assignee can get no greater return than the assignor. Mr. Wooster said assignment would have no effect on this.

Mr. Cuno said he did not think the bill would have any effect on the money situation. It would bring some practices more into line. He said any problems we have had in the past twelve months have been because of okaying people who should not have received loans. He would support the bill.

Mr. Kean asked Mr. Cuna if he would contact Harry Swanson because he takes an opposite view.

Mr. Torvinen asked where you have a hearing in a non-judicial foreclosure. Mr. Hilbrecht said there is already a procedure outlined in the statute.

Mr. Hilbrecht said he had talked with construction people from Southern Nevada and they are eager to get something like this for a more substantial base.

Mr. Lowman asked Mr. Cuna: In view of your objections on 131 do you feel a need for some legislation of this type, whether or not you agree with this bill?

Mr. Cuna replied that there have been abuses and his organization would be ill-advised to oppose it. He said maybe we should have this procedure outlined by more guide lines.

AB 215: Authorizes judges to impose fine or require attendance at traffic school of juvenile traffic offenders.

Mr. Getto, introducer of the bill, was present for the discussion on the bill.

Mr. Wooster said that AB 215 as drawn just will not work but a new amendment has been drawn up by Judge Collins.

Mr. Getto said that they were probably the last county to start this traffic survival school. it is self-supporting and will be no expense to the taxpayers.

Mr. Swackhamer said this bill will require attendance at a traffic school but would that answer the problem? Would it not be better and more sensible to require completion of the school?

Mr. Getto said the school requires that they attend four sessions and pass a test. If they don't pass they have to take it again.

Miss Dungan inquired if this is part of the juvenile traffic court and Mr. Getto said it was not.

Mr. Lowman said he thought "if financially able" was excess verbage.

Mr. Torvinen said that Judge Waters says he cannot impose a fine or send the juvenile traffic offenders to survival school. He says that, according to the wording, the legislative system cannot impose a fine.

February 21, 1967

-3-

Assembly Committee on Judiciary

Mr. Hilbrecht said that what he is saying is that maybe we should add "paying a fine".

Miss Dungan asked if this bill would preclude the pulling of drivers' licenses and Mr. Wooster said that is certainly not the intent.

Mr. Hilbrecht said we should leave in specifically the right to levy a fine.

Mr. Lowman moved Do Pass with section 1 left as is and with Judge Collins amendment as section 2, and with the words "financially able" to be stricken.

Miss Dungan suggested we could say "impose a fine or other penalty" with them still to be able to suspend licenses.

Mr. Wooster then appointed a subcommittee to draft language for the bill. It is to consist of Mr. Lowman as chairman, with Miss Dungan and Mr. Schouweiler. They are to get together with Mr. Getto and get something good that can be passed out. They are also to check with Mr. McDonald to see how this would affect any other substantive provisions of the law.

AB 129: Extends protection afforded owners and encumbrancers of vehicles left stored or parked.

Mr. Wooster said the subcommittee consisting of himself and Mr. Kean had made some changes and redrawn the whole bill. He passed out copies of the new bill.

Mr. Robert Gwynn was present to speak on the bill. He said the terms of the present law on holding cars in garages before notification is so vague and nebulous that it isn't obeyed. The garage owner gets the \$300 storage off the top before the legal owner can repossess.

Mr. Gwynn said the First National Bank has drafted language giving the garage owner 35 days in which to notify the police. If it is over that, the garage keeper could not get over 45 days storage costs. The new draft says he must notify in 30 days, then his rights are limited to 30 days. There is a \$3 cost assessed against the legal owner for notifying him.

Mr. Gwynn discussed this with Mr. Don Horner of the First National Bank, who thinks the garage owner should have the responsibility of notifying the legal owner. He expressed concern over the \$3 charge because many of these notifications would be written and sent to people they did not concern because it would not be their vehicle. Would they then have to pay the charge?

Mr. Wooster said the Department of Motor Vehicles is "authorized" to collect a \$3 fee. It does not say they must collect it. This whole procedure will not get to the Motor Vehicles until it is determined what the status of the car is. There did not seem to be any practical way of accomplishing having the garage owner notify the legal owner.

Mr. Kean said that if the garage keeper were required to notify the legal owner he would immediately go to the Bureau of Motor Vehicles anyway, so the Bureau would not be relieved of anything.

Mr. Wooster said that, while most of their new draft is from the California law, the \$3 fee is not.

Mr. Torvinen said it would be impossible to collect the \$3 fee.

AB 71: Revises criminal penalties and provides for determinate sentences.

Present for the discussion on this bill were: Mel Close, Justice Collins, Justice Zenoff and Justice Thompson.

Mr. Wooster said it was the plan to discuss today only sections 2 and 239 having to do with determinate sentencing and the section which pertains to proportionate sentences.

Mr. Kean asked Mr. Close if he would briefly tell the committee what these terms mean.

MR. CLOSE: I will try to tell you something of our philosophy for the past one and one half years that we have been meeting as a committee to work out what we thought were proper changes to our criminal code.

We all agreed that our present system, although adequate, left much to be desired. We felt that the ultimate thing we could go to would be indeterminate sentencing. We were also aware that in state that have indeterminate sentencing they have professional parole and probation departments. They are much better equipped to handle this system than we are.

We relied heavily on George Reed, our former Parole and Probation officer in making our decisions. He was formerly the federal probation officer. He indicated to us that at this time we are not prepared, either financially or with personnel, to go into a system of indeterminate sentencing. He recommended to us that the judge be allowed to set the sentence within a certain sphere and then later on we could move to a form of indeterminate sentences.

We felt it would be improper to sentence one man to a particular sentence for a particular crime and another habitual criminal to the same sentence. We felt, also, that the legislature was not the proper person to set what a sentence should be. We felt a judge was the proper person. He has the pre-sentence report and more knowledge of the man's background, circumstances surrounding the crime, etc. Legislators are too far from the crime to do a good job of setting a sentence.

We had numerous judges working with us, in addition to the Supreme Court Judges. Since that time, I have spoken with many judges in Clark County and all but one have concurred with our decision on the sentencing. There is a problem with different judges setting different sentences for the identical crimes. George Reed suggested that there should be presented to the various court judges the average sentence, the average time in jail served by a man for a specific crime. We should also compute the average time served in the State of Nevada for each crime. This would give the judge a "norm" and he would have something to go on.

We arrived at these maximum sentences by first determining what the worst crimes are. We decided they are Murder, Rape, Narcotics, and Forcible Kidnapping. All other areas we have grouped the crimes downward from those we consider the most serious. We have grouped related and equal crimes. You may agree with us, but we were able to come up with what we thought was a pretty workable scheme and formula.

I feel that this determinate sentence has great value over what we have now. It is time now for Nevada to take a step forward. Hopefully, in two to four years from now, we should be able to go to indeterminate sentencing. By then we should have a professional parole board who work full time at their job. We should have additional facilities and men to do all these things. According to Mr. Reed, and according to

the way I have analyzed the situation, we are not now in a position to go to indeterminate sentences.

JUDGE THOMPSON: My opinion is completely in harmony with Mel's. We are not ready for indeterminate sentences. The proposed measure is far better than what we have now because it allows the judge to assess each case on its individual merits. It is hard to decide in advance how much sentence each crime should carry. This will result in more justice. No court can know in advance how a particular case should be tried.

Whenever such a production as the Criminal Code is presented, there will be many, many errors or differences of opinion. THIS JUST HAS TO PASS. It gives rules of criminal procedure compatible with federal rules of criminal procedure. Also, the Code gives us rules on appeal, of which we have none now. We are presently working blindly. Also, the Code provides needed guides in the area of post-conviction remedies. In the past ten years, this has become an increasingly large part of the court's business. The Code provides for many innovations in this area which are highly desirable.

On the sentencing provision: There are parts of the Code with which I do not agree, but it is so much better than what we have that the wise thing would be to accept the package and then after working with it for two to four years work out the difficulties that will come to life.

JUDGE ZENOFF: I urge the adoption of the Code. There must be a start. We will never get there unless we start. Some states have statutory revision boards to review these things. Judges are human beings and sometimes are vulnerable to influence. In my mind there is no alternative but to accept and pass this. We can't go on until we have trained professional people on our Parole Board. When we do this we will have reached the ultimate in criminal procedure. This is a very admirable bill.

JUDGE COLLINS: I would like to call attention to the fact that on the trial level up to this point we have had discussion to decide whether probation or prison. Probation is an excellent plan if you have facilities. Parole and Probation is just emerging in this state. I had a man who was admitted for murdering his wife, shot her in the forehead with a high-caliber rifle. He finally pleaded guilty to second degree murder. The only way I could urge the Parole Board not to release him was to write a letter to them. I knew more about it than anyone at that time but I could not do anything.

Later on maybe we can do better than AB 71 but we are not ready yet. We are a long way away. It is better to invest judgment in the trial judge right now than any place else.

WOOSTER: Didn't Illinois do something along these lines? Didn't you use them for a pattern?

CLOSE: Yes, they have recently revised their law.

DAYKIN: They did not go into determinate sentences. However, the State of Illinois is much further along with parole and probation and much better able to deal with indeterminate sentencing.

CLOSE: The Federal Government used it before going into indeterminate sentences the last ten to fifteen years.

DAYKIN: Other states have used the determinate sentence and have gradually moved

away from it toward the ultimate concept of indeterminate sentencing.

HILBRECHT: There was extensive testimony before the committee and it was almost unanimous that this bill is a giant step backward. You say, also, that this is not the ultimate. Is there something in AB 71 to insure the progress and development of the state so we can eventually go to the indeterminate?

CLOSE: I disagree that this is a step backwards. We have lived with this bill for two years and feel that this is the best that Nevada can do at this time.

You always hear from the people that are against a bill but you seldom hear from the people that are for it. I would like to make two points. First, opponents are opposed to change. They are comfortable where they are and nervous about going some place else. Secondly, I can see where the Parole and Probation would be wanting to have more power vested in their office. I doubt that they have even read the bill. If I had to choose between the Parole and Probation Board at present and a judge, believe me I would choose the judge.

This bill will not keep us from moving forward. George Reedy himself recommended that we do this. We were not trying to work out a "soft on crime" or a "hard on crime" thing. We were trying to work out an equitable solution. It was by hard work and a lot of it that we came up with this bill.

WOOSTER: How do you envision the change in the future?

CLOSE: We had envisioned: That there would be a professional Parole Board; that we would expand the staff of the Parole and Probation officers and that they would then be full time; more complete and thorough pre-sentence reports for the judges; more funds for the Parole and Probation Department. This, of course, is up to the Governor and his proposed budget, and the present chief of our Parole and Probation Department. The warden has nothing to do with it. His job is to keep people in prison and feed and clothe them.

WOOSTER: Assuming that you get a professional Parole Board, is this set up in such a way that they could take over?

CLOSE: Yes, I am sure that they could. There would be corrective legislation to conform AB 71 to the new system.

DAYKIN: Such a change would affect only two sections of 71, sections 2 and 39, relating to determinate sentences. Otherwise, the structure is here. The statutory periods lend themselves equally well to the action of a trial judge or a State Board of Parole.

HILBRECHT: Assuming that we disagree with determinate sentences but agree with the rest, could we adjust to the other kind of sentence?

CLOSE: Yes.

DUNGAN: I can see no difference in allowing a judge to sentence a man to so many years. The Parole Board is faced at some time in the future with making the decision as to whether a man is probationable. How can we ever get up to the area of indeterminate sentences? The decisions made by the legislature will get worse rather than better.

February 21, 1967

Assembly Committee on Judiciary

-7-

CLOSE: It won't get any easier to pass a bill. You will always lose some. A strictly indeterminate sentence would be easier to pass if we get a proper department to handle it. The mere fact that it may be difficult in the future is no reason to defeat this bill.

WHITE: I feel that the determinate sentence will be a deterring factor. I am not concerned with doing away with determinate sentencing.

CLOSE: Right now a judge is really a moderator. When I told people that a judge has no power to sentence they were absolutely shocked. They couldn't believe that the judge's hands are tied. All he can do is give them a statutory sentence that the legislature decided on years ago.

JUDGE COLLINS: Somebody is making a shrewd, critical judgment as to the rights of this criminal against the rights of society. This is a tough problem to decide, and the man who knows more about it than anybody has his hands tied by the present determinate sentence.

HILBRECHT: We know that oftentimes the state is saved a lot of money and justice is served by a kind of bargaining that goes on between counsel and prosecutor. Doesn't the determinate sentence have some bearing on the freedom that these two have to enter into a settlement?

JUDGE COLLINS: The Court is not bound by any deal.

HILBRECHT: But the deal does work with the exception of probation.

JUDGE COLLINS: The District Attorney has a certain discretion.

CLOSE: AB doesn't make any difference at all to this discretionary power of the D.A. to make a deal.

DUNGAN: If we do go to a form of determinate sentence, will more pressure be placed on the legislature to get adequate personnel for Parole and Probation?

JUDGE COLLINS: The cost of keeping a person in prison is very high and we have lots of crimes. Some way has got to be found to get people back in the mainstream of life as soon as possible. How do you come to that practical decision? Everyone contributes to this. We are trending toward getting more competent people to work with the prison.

JUDGE THOMPSON: I don't think this bill will have anything at all to do with it. We are taking a step forward over what we presently have. Depending upon money, when it is available, a professional Parole Board and a greater staff will be available.

JUDGE ZENOFF: It will come in time, but only after the inadequacies of the indeterminate sentence have given public attention and notice. This bill is a step forward, not a step backward. Based on experience, I feel that when the public becomes aware of what happens when a person convicted for first degree burglary gets two years and one convicted of the same thing from another locality gets ten years and they sit side by side in the prison cell, this will become such a public problem that we will take the next step forward. The public will react, but it will be slow.

WHITE: In your opinion, will this give the judges a broader base, more authority?

ZENOFF: We have sometimes had judges who are weak. I have seen injustices done, maybe in a wholesale quantity, but it is still injustice. Maybe a judge is up for reelection. He recites to the prisoner to be quoted. Some improvement is needed. I think this bill provides it, but this is not the final result.

HILBRECHT: It seems almost inescapable that inequalities will be increased under AB 71. The district judges are not going to come up with a more equitable sentence than an impersonal board. Depending on the frailties of the judges, inequality would creep in.

JUDGE THOMPSON: This is based on the assumption that two cases are the same. This is not so. No two cases are the same. The fallacy of your position is that no two crimes are the same, and you should not have the right to expect the same sentence.

CLOSE: There cannot be a situation where a man will sit in jail for two years and another for ten years, unless the probation officers so decide. What you are talking about is an impossible situation to ever happen.

WHITE: Indeterminate sentencing would take the judge out of the picture?

CLOSE: Absolutely. Completely.

WOOSTER: This is an important matter and I would like to fully discuss it but I would like also to discuss the proportionate sentencing. Section 8.

SWACKHAMER: Would you please tell us, what is a public offense?

DAYKIN: A public offense is any offense for which there is a penalty. It includes misdemeanors, gross misdemeanors, and felonies.

The thought behind the proportionate sentence is that there have been many crimes for which a single penalty is provided. For instance, vandalism is a misdemeanor whether it is chipping a piece of a stone or completely desecrating a couple of graves. Breaking into an orchard is a misdemeanor whether you take one apple or go in with a bulldozer and uproot trees. The committee felt that many of these offenses should be categorized according to the amount of harm done. A person is guilty of an offense proportionate to the amount of the damage. Each penalty is spelled out. If the loss is \$5,000 or more, it is a felony. If the value is less than \$5,000 but more than \$2500, it is a gross misdemeanor. Under \$2500 it is a misdemeanor and if it is under \$25 the offense is punishable only by fine and not a term of imprisonment. This is analagous to the difference between grand and petit larceny. The indictment would spell out what the damage was and the trial would proceed on that basis.

DUNGAN: Could you take out section 8 without destroying the whole thing?

DAYKIN: You would have to go all through the bill with amendments. This applies only to offenses against property. Thus, a traffic light offense is not even in this proportionate part.

SWACKHAMER: Would it be possible to have a fine and a jail sentence and restitution of the amount of damage done.

JUDGE COLLINS: We can make restitution a condition of probation. Usually the defendant who does this is penniless. You don't usually give a man a fine if he can't pay it.

I urge you to use caution in amending seriously or taking out from the whole because it is an integrated whole. It could be amended but you should use great care and caution. Unless the matter is going to be adopted as a package, we might better stay with what we have. If you hack it up, you may very well cause more problems than you will solve. The present law has already been interpreted.

HILBRECHT: I am not so much concerned with whether it is one or two or three years in jail as I am with the extra penal factors which go along with being convicted of a felony. Was any consideration given by this committee that drafted the bill to having punishment of a gross misdemeanor punished with more time in jail and more fine but the crime not being called a felony.

WOOSTER: This is a legitimate philosophical question but it is far afield from determinate sentencing.

TORVINEN: I would like to ask Mr. Daykin to furnish me with a list of crimes that come under proportionate sentences. Felonies should have an element of intent.

DAYKIN: In no case has an offense been made a proportionate offense in which there was not an element of positive intent.

DUNGAN: What does the word "value" mean?

DAYKIN: It would mean the fair value as set by a jury of the damage done. In some cases the loss is referred to.

SWACKHAMER: Do you want to act on this bill today? It is a good bill and a step in the right direction.

Mr. Swackhamer moved Do Pass
Mr. Lowman seconded

WOOSTER: I would like to prove or disapprove these two basic concepts of determinate and proportionate sentences.

Mr. Swackhamer moved that this committee at this time do approve of determinate and proportionate sentencing.

Mr. White seconded

HILBRECHT: We might re-define the felony section of 71 and allow someone to be convicted of a gross misdemeanor in order to avoid the extra felony penalties.

DAYKIN: The committee made an early decision that we were not going to attempt to re-define elements of crimes. We made an attempt to harmonize sentences, feeling that the other was a task beyond the committee's powers. You can go ahead with this. It will not conflict with what Mr. Hilbrecht is wanting to do.

Mr. SWACKHAMER'S MOTION WAS CARRIED WITH YES VOTES FROM WOOSTER, SWACKHAMER, LOWMAN WHITE, TORVINEN AND SCHOUWEILER.

A "NO" VOTE WAS CAST BY HILBRECHT AND DUNGAN

Assembly Committee on Judiciary

-10-

February 21, 1967

WOOSTER: I will prepare for this committee a section by section deal of all the objections to this bill. I will give each member a copy of all the written objections. I would like each member of the committee to give me a list of objections and we will get all these together. AB 81 will be harder. There are more objections and in fairness we should consider all of them.

AB 129: Extends protection afforded owners and encumbrancers of vehicles left stored or parked.

Mr. Hilbrecht moved Do Pass after removing the \$3 fee

Mr. Lowman seconded

Motion passed unanimously

Meeting was adjourned at 4:45 P.M.