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The constitutions of Kansas, Missouri, *Montana* and Oklahoma require that compensation be paid or deposited in court in advance of taking possession. This type of provision is not a hindrance, rather it may form the basis for an enactment of an early possession statute. Such States as Arizona, California and Florida have similar constitutional provisions and yet have statutes authorizing possession at an early stage of the proceedings. *It would seem that in these jurisdictions the problem is one of lack of legislation rather than a constitutional prohibition.* [Emphasis added.]

Montana is in the position of being able to adopt an up-to-date condemnation procedure. The procedure suggested by this article preserves the rights of the individual property owner and still allows the condemnor a reasonable means of obtaining immediate possession. Furthermore, the adoption of such a procedure could be accomplished with little difficulty by simply amending five existing statutes. Whether or not the Montana legislature will see fit to adopt such a procedure rests as a matter of decision for the individual legislators.

GARY L. BEISWANGER

INITIATION OF PROSECUTION BY INFORMATION—LEAVE OF COURT OR PRELIMINARY EXAMINATION?

INTRODUCTION

A felony prosecution in Montana may be initiated by either a grand jury indictment or by an information. A prosecution by information may be commenced by filing the information either after examination and commitment by a magistrate, or after leave is granted by the district court. The purpose of this article is to examine the process of initiating prosecutions by obtaining leave of court; its origins, its use in Montana and other states, and to determine whether such practice should be retained in Montana.

HISTORY

The authority to initiate prosecution by information after leave is granted by court is provided by Article III, Section 8 of the Montana Constitution. This section was adopted by the constitutional convention of 1889, upon the motion of W. W. Dixon of Silver Bow County.¹ He stated that Section 8 was largely copied from California's constitution, but that the provision relating to leave of court to file an information was not.² Unfortunately, the record of the Montana Constitutional Conven-

¹It appears that Section 8 was a compromise between those members of the constitutional convention who wanted to abolish the grand jury altogether and those members who wanted to retain it. See generally, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 110-112 (1889).

²W. W. Dixon, speaking in a debate on the provisions of Section 8, said: "With these exceptions, reducing the number of the grand jury and providing for information to be filed by the court as well as by the magistrate, the proposition offered here is

tion proceedings does not reveal the origin of this particular provision. A search of the various state constitutions reveals no comparable provision. Thus, it seems probable that the idea was original.

COMPARISON WITH OTHER STATES

The method of initiating criminal prosecutions is not uniform throughout the states. Some states require that felony prosecutions be initiated solely by grand jury indictment,³ while others also allow prosecution by information.⁴ Many of the states which allow prosecution by information require that a preliminary examination be held prior to the

taken almost literally from that of California." *Id.*, at 108. In response to a later motion to strike the words "or by leave of court," Dixon stated the reason for the provision: "I think that these words are important, and should be left there. It is intended to apply to crimes that might be committed during a session of court when the expenses of examination and commitment by a magistrate would be entirely unnecessary when the court might have the discretion of filing a commitment without going to the expense of preliminary proceeding by a magistrate. It seems to me they are very necessary. So too, there might be cases in which the magistrate might fail in his duty. I think the clause is very important, and that it will be found in practice to be very useful and a great saving of time, and an unnecessary delay and expense involved in preliminary examinations." *Id.* at 251.

³The following constitutions provide that prosecution must be by indictment or presentment of a grand jury in all cases except; cases of impeachment, cases arising in the land and naval forces or in the militia when in actual service in time of war or public danger, and cases cognizable by justices of the peace: ALA. CONST. art. I, § 8 (1901) amended by amend. 37, § 8 (1939); ALASKA CONST. art. I, § 8; ARK. CONST. art. II, § 8; DEL. CONST. art. I, § 8; KY. CONST. Bill of Rights, § 12; MISS. CONST. art. III, § 27; N. J. CONST. art. I, §§ 8; N. C. CONST. art. I, § 12; ORE. CONST. art. VII, § 5; PA. CONST. art. I, § 10; S. C. CONST. art. I, § 17; TENN. CONST. art. I, § 14; W. VA. CONST. art. III, § 4. In the following constitutions, prosecutions for capital and other infamous crimes must be by indictment or presentment of a grand jury: HAWAII CONST. art. I, § 8; ME. CONST. art. I, § 7; N. Y. CONST. art. I, § 6; OHIO CONST. art. I, § 10; R. I. CONST. art. I, § 7. In the following constitutions, it is provided that no person shall be held to answer for a criminal offense unless on indictment, except in cases in which the punishment is by fine or imprisonment otherwise than in the penitentiary: ILL. CONST. art. II, § 8 (legislature given power to allow prosecution by information which was done in certain classes of crimes); NEB. CONST. art. I, § 10 (legislature exercised delegated power to provide for prosecution by information); TEX. CONST. art. I, § 10. The following constitutions provide that no person shall be tried for a felony unless on presentment or indictment by a grand jury: COLO. CONST. art. II, § 8 ("Unless otherwise provided by law") (present law permits prosecution by information); N. D. CONST. art. I, § 8 ("Unless otherwise provided by law") (present law permits prosecution by information); FLA. CONST. Declaration of Rights, § 10 (present law permits prosecution by information); WYO. CONST. art. I, § 13 ("Unless otherwise provided by law") (present law permits prosecution by information or indictment).

⁴The following constitutions provide generally that no person shall be held to answer for any criminal charge except on presentment or indictment of a grand jury, or on information of the public prosecutor: ARIZ. CONST. art. II, § 30; CAL. CONST. art. I, § 8; IDAHO CONST. art. I, § 8; LA. CONST. art. I, § 9; MO. CONST. art. I, § 17; MONT. CONST. art. III, § 8; NEV. CONST. art. I, § 8; N. M. CONST. art. II, § 14; OKLA. CONST. art. II, § 17; S. D. CONST. art. VI, § 10, and art. V, § 21; UTAH CONST. art. I, § 13; WASH. CONST. art. I, § 25. The constitutions in the following groups do not specifically provide the method of prosecution: (a) The only constitutional provisions affecting the methods of prosecution are that the accused be given the right to demand the nature and the cause of the accusation against him, and that no person shall be deprived of life, liberty or property without due process of law. GA. CONST. art. I, § 1, para. V; MD. CONST. Declaration of Rights 21, § 1; MASS. CONST. art. XII, § 13, pt. 1; MICH. CONST. art. II, §§ 16, 19; MINN. CONST. art. I, §§ 6, 7; N. H. CONST. art. XV, pt. 1; VT. CONST. ch. I, art. 10; VA. CONST. art. II, § 8; WIS. CONST. art. I, §§ 7, 8; (b) The only constitutional provision relative to prosecution is that the accused be given the right to demand the nature and the cause of the accusation against him. IND. CONST. art. I, § 13, and art. VII, § 17; KAN. CONST. Bill of Rights, § 10.

filing of the information.⁵ However, the Supreme Court of the United States has ruled that this is not a requirement of "Due Process."⁶

There are seven states besides Montana which do not require a preliminary examination prior to the filing of an information. These are Connecticut,⁷ Florida,⁸ Indiana,⁹ Iowa,¹⁰ Louisiana,¹¹ Vermont,¹² and Washington.¹³ Of this group only two, Indiana¹⁴ and Iowa,¹⁵ require leave of court before an information can be filed. However, Florida¹⁶ and Louisiana¹⁷ require indictment by a grand jury in all capital offenses, and Vermont¹⁸ and Connecticut¹⁹ have a similar requirement whenever punishment may be life imprisonment or death. Indiana does not allow an information to be filed in cases of murder or treason.²⁰

Montana has made no distinction between capital and non-capital offenses, and has refused to require a preliminary examination in either situation.²¹ Washington seemingly does not require either a preliminary examination or leave of court prior to the filing of an information.²² In Louisiana, a defendant has the right to demand a preliminary examination, but whether it is granted is wholly within the discretion of the court and its determination is not subject to review by any other court.²³

⁵The following states have provisions which relate to the necessity of having a preliminary examination before an information can be filed: (a) The constitutions provide that no person shall be prosecuted by information unless a preliminary examination has been had or waived. ARIZ. CONST. art. II, § 30; CAL. CONST. art. I, § 8; IDAHO CONST. art. I, § 8; N. M. CONST. art. II, § 14; OKLA. CONST. art. II, § 17; UTAH CONST. art. I, § 13; (b) The constitutions authorize prosecution by information in all cases, but make no provision for a precedent preliminary examination. However, state statutes require such examination. MO. CONST. art. I, § 17 (Mo. REV. STAT. § 544.250 (Vernon 1953)); NEV. CONST. art. I, § 8 (NEV. REV. STAT. § 173.140 (1960)); S. D. CONST. art. VI, § 10 (S. D. CODE § 34.1503 (1939)); (c) The constitutions provide inferentially for prosecution by information, but do not require a precedent preliminary examination. However, such examination is specifically required by statute. COLO. CONST. art. II, § 8 (COLO. REV. STAT. ANN. § 39-5-1 (1953)); NEB. CONST. art. I, § 10 (NEB. REV. STAT. § 29-1607 (1943)); N. Y. CONST. art. I, § 6 (N. Y. CODE CRIM. PROC. § 190); N. D. CONST. art. I, § 8 (N. D. REV. CODE ch. 29-07 (1960)); WYO. CONST. art. I, § 13 (WYO. STAT. ANN. § 7-124 (1957)); (d) There is no constitutional provision for prosecution by information, but statutes provide for such prosecution and require preliminary examination. KAN. GEN. STAT. ANN. § 62-805 (1949); MICH. STAT. ANN. § 28.982 (1954); MINN. STAT. ANN. § 628.31 (1947); WIS. STAT. ANN. § 955.17 (1958).

⁶Lem Woon v. State of Oregon, 229 U.S. 586 (1912).

⁷CONN. GEN. STAT. REV. § 54-42 (1958).

⁸FLA. STAT. § 904.01 (1961).

⁹IND. ANN. STAT. § 9-908 (Burns 1956).

¹⁰IOWA CODE § 769.1 (1962).

¹¹LA. REV. STAT. § 15:154 (1950).

¹²VT. STAT. tit. 13, ch. 183, § 5653 (1947).

¹³WASH. REV. CODE § 10.37.015 (1961).

¹⁴See note 9 *supra*.

¹⁵IOWA CODE § 769.7 (1962).

¹⁶See note 8 *supra*.

¹⁷LA. REV. STAT. § 15:2 (1950).

¹⁸VT. STAT. tit. 13, ch. 183, § 5652 (1947).

¹⁹CONN. GEN. STAT. REV. § 54-45 (1958).

²⁰See note 9 *supra*.

²¹See, e.g., State v. Brett, 16 Mont. 360, 40 Pac. 873 (1895); State v. Spotted Hawk, 22 Mont. 33, 55 Pac. 1026 (1899).

²²WASH. REV. CODE § 10.37.030 (1961).

²³See note 11 *supra*.

Either method of initiating prosecution by information in Montana provides the defendant with the basic protection of forcing the state to show there is substance to the charge on which he is being held.²⁴ In this respect, Montana's provision affords the defendant more protection than do those statutes or constitutional provisions which do not require either a grand jury indictment, a preliminary examination, or leave of court in any case, or which provide this protection only in limited classes of crimes.

MANNER OF OBTAINING LEAVE OF COURT

As noted previously, there are two ways of initiating prosecutions by information in Montana. One is to conduct a preliminary examination before a magistrate and the other is to obtain leave of the district court.²⁵

In order to obtain leave of court to file an information, an application must be made to the court on the written motion of the county attorney.²⁶ The form and contents of this application are not specified either by statute or by case law, and the application need not set forth the facts from which the court draws its conclusion that leave should be granted.²⁷ Also, the application need not be verified.²⁸

Obtaining leave of court has been held to be sufficient if satisfactory reasons are presented to the court, whatever the form or manner of their presentation.²⁹ However, it should not be assumed that obtaining leave of court is merely perfunctory, as the Montana Supreme Court has repeatedly held that there must be a showing of sufficient facts to move the district court's discretion.³⁰

PRACTICAL ASPECTS

The following information concerning prosecution by information was gathered through the use of a questionnaire mailed to the county attorneys of Montana's 56 counties. Four questions were asked:

1. Which method is more commonly used in criminal proceedings in your county?
2. In approximately what percentage of cases is each method used?
3. What considerations do you employ in choosing one method or the other?
4. What advantages do you think are to be gained by the use of one method or the other?

²⁴State v. Brett, 16 Mont. 360, 364-5, 40 Pac. 873, 875 (1895).

²⁵MONT. CONST. art. III, § 8.

²⁶REVISED CODES OF MONTANA, 1947, § 94-4910. Hereinafter, REVISED CODES OF MONTANA are cited R.C.M.

²⁷State v. Martin, 29 Mont. 273, 74 Pac. 725 (1903).

²⁸State v. Kacar, 74 Mont. 269, 240 Pac. 365 (1925).

²⁹State *ex rel.* Juhl v. District Court *et al.*, 107 Mont. 309, 84 P.2d 979 (1938).

³⁰See, *e.g.*, notes 26 and 28 *supra*.

The response to the questionnaires was excellent, with 45 out of the 56 letters being answered. The amount of the information on the answers varied greatly, but on the whole it proved adequate in almost every instance.

The practice of filing an information after leave of court has been granted is very widespread in Montana. It appears that in at least 33 counties, 90-100% of all felony prosecutions are initiated by information after leave of court has been granted, and in three more counties 50% or more are similarly handled.³¹ These counties are spread across the state and reflect no discernible pattern based on population, nor does the practice differ depending on whether there is a judge in residence.

The county attorneys of the state, in response to question three concerning the considerations they employed in determining whether to obtain leave of court or to conduct a preliminary examination, gave many different reasons for their particular choice. However, it was possible to categorize most of the reasons given.

The considerations which seem to prompt most of the county attorneys to obtain leave of court fell into the category of speed and convenience.³² The considerations in this category were not only mentioned the most number of times, but they also were often the primary ones taken into account in making the decision. The county attorneys simply felt that it is much quicker and more convenient to obtain leave of court rather than to conduct a preliminary examination.

The second most important consideration, in terms of times mentioned, was that obtaining leave of court prevents disclosure of the prosecution's case.³³ Some county attorneys seemed to feel that when they are forced to hold a preliminary examination, they must of necessity disclose too much of their case in order to show probable cause.

A number of county attorneys mentioned that the expense of a preliminary examination to the county is a proper consideration.³⁴ Several others thought that the justices of the peace are incapable of determining probable cause, or are just plain inadequate.³⁵ A few stated that they do not conduct preliminary examinations because there is more chance for error in the proceedings, thereby giving the defendant grounds on which to appeal.³⁶ Other considerations mentioned were: "apparent guilt of the defendant," "judges require that it be done that way," and "a preliminary examination is an uncontrolled never-never land that makes a simple matter more complex."

Although some of these considerations seem to put a price tag on justice, still there can be noted in most of the answers expressions of intention to always make sure that the defendant's rights are adequately

³¹These counties are shown on the map which is attached as Appendix A.

³²These reasons were mentioned in fifteen replies. They were expressed in both a positive and negative manner, that is, "leave to file is quicker and more convenient," or "preliminary examinations take up too much time."

³³This was mentioned in nine of the replies.

³⁴Eight of the responses stated this as a consideration.

³⁵Five of the responses listed this as a reason.

³⁶This was mentioned as a consideration in four of the replies.

protected. While these considerations, to be sure, are in some measure self serving, they do reflect a sensitivity to the importance of protecting the rights of the criminally accused.

It is apparent that informations filed after a preliminary examination has been conducted are not common in Montana. The Sixteenth Judicial District is an exception to this general rule. The county attorneys of that district, which is comprised of seven counties in the south-eastern part of the state, conduct preliminary examinations in the great majority of cases.³⁷ This is because one of the judges of that district has indicated that he prefers this manner of proceeding, and several of the county attorneys feel that conducting preliminary examinations is more convenient.³⁸ The three other counties where preliminary examinations are almost always conducted are located in the western and central parts of the state.³⁹ The county attorneys of two of these counties stated that their decision is controlled by consideration of speed and convenience. In the third county, preliminary examinations are conducted in all cases where they are not waived, as the county attorney feels that otherwise an information might possibly be subject to a motion to dismiss.⁴⁰

The county attorneys of those counties where obtaining leave is the usual way of proceeding and only a few preliminary examinations are conducted, gave various reasons for conducting the occasional examination. One reason frequently given was that by the use of the preliminary examination the prosecution can obtain sworn testimony from a reluctant or adverse witness and freeze it until the trial. Another recurring reason was that a preliminary examination is a convenient way to dispose of a case where a complainant or the public is demanding action, and there is a very weak case against the defendant. One county attorney stated that he uses the preliminary examination in juvenile delinquency cases involving first offenders, when it is desired to handle the matter without any formal action.

CONCLUSION

The administration of criminal justice involves a consideration of two policies. One policy stresses the effectiveness and economy of its admin-

³⁷These counties are shown on the map which is attached as Appendix B, and the percentage of cases in which each county attorney employs a preliminary examination is shown on the map which is attached as Appendix A.

³⁸There was a discrepancy in the responses from this group of county attorneys. Two of them stated that both district judges required preliminary examinations, while one of them stated that only one judge required them and the other judge preferred leave to file. The other three did not mention any requirement by the bench, but gave speed and convenience as the reason for conducting preliminary examinations.

³⁹These counties are shown on the map which is attached as Appendix A.

⁴⁰R.C.M. 1947, § 94-6601 was cited as warranting this caution. This statute provides in part, "The indictment or information must be set aside by the court . . . in either of the following cases: If it be an information—

1. That leave to file the same had not been granted by the court;
2. That before the filing thereof the defendant had not been legally committed by a magistrate;
3. That it was not subscribed by the county attorney, or attorney prosecuting."

The county attorney stated that he feels that these provisions could be read conjunctively, and so he not only conducts a preliminary examination in every case, but also requests leave to file as a matter of precaution.

istration, while the other stresses the protection of the defendant's rights. These policies sometimes clash, and a balance is struck between them. This balancing often results in the abridgement of the defendant's rights in order to obtain either one or both the following objectives: (1) increased effectiveness in the apprehension and conviction of criminals; (2) greater savings of the taxpayer's money.

Such balancing should occur only when the abridgement of the defendant's rights is slight. However, this is not always the practice in the everyday administration of criminal justice.⁴¹ The Montana Constitutional provision allowing six-man juries in justices' courts is an example of this "balancing" where the abridgement is slight. The policy of some states not to provide indigents with counsel in non-capital cases is an example where there is a greater abridgement of the defendant's rights. However, the United States Supreme Court has recently held this practice to be a violation of "Due Process."⁴² It is obvious that in any balancing, the protection of the defendant's rights weighs heavily on the scales so far as the courts are concerned. This is evidenced by the many procedural safeguards afforded defendants; for example, protection against self-incrimination, right to have illegally obtained evidence and coerced confessions suppressed, and now, right to have aid of counsel.

At the outset, it should be noted that any proposal advocating a change in the present requirements for initiating prosecutions, and demanding a grand jury indictment or a preliminary examination in every felony prosecution, would necessitate a constitutional amendment. However, this does not answer the question as to whether a change is desired. It is submitted that there are good reasons for retaining the present requirements. First, the defendant's rights are as adequately protected when an information is filed after leave of court has been granted as they are when a preliminary examination has been conducted. Second, obtaining leave of court is a desirable alternative to conducting preliminary examinations insofar as the expense of administering criminal justice is concerned.

It must be remembered that as to the protection of the defendant's rights, the function of a preliminary examination is to force the state to show there is probable cause for holding him. It is submitted that the procedure of obtaining leave of court serves this function just as well as, and in some instances better than, the conducting of a preliminary examination. Instead of conducting a preliminary examination, a district court judge holds a hearing on a motion for leave to file an information. The granting of this motion has the same effect as a showing of probable cause in a preliminary examination, in that it allows the county attorney to proceed to the filing of the information. Justices of the peace, before whom preliminary examinations are conducted, are not

⁴¹A recent article on arrest in Michigan reveals some of the practices indulged in by law enforcement officials which violate the rights of the defendant. One such practice is to arrest a suspect and then hold him while an investigation is being conducted, even though there is no evidence on which to hold him. This period of detention varies from 24 to 72 hours. LAFAYE, *THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES—A MONOGRAPH ON ARREST IN MICHIGAN*, pt. V, 105-112 (Unpublished monograph on file with the AMERICAN BAR FOUNDATION).

⁴²*Gideon v. Wainwright*, 372 U.S. 335 (1963).

required to have, and an overwhelming majority of them do not have, any legal training. Thus, for the purpose of determining whether probable cause exists, justices of the peace are usually poorly prepared. It is obvious as between a district court judge and a justice of the peace, who is better qualified to make his respective decision.

Furthermore, in spite of one county attorney's statement that in his district leave to file is a mere formality, it is submitted that it will take just as much or more evidence to move the discretion of a district court judge to grant the motion as it will to convince a justice of the peace that probable cause exists. Also, it should be noted that there is less chance that the prestige and reputation of a county attorney will influence a judge to accept a lesser quantum of evidence in granting leave to file than there is of it influencing a justice of the peace to accept a weaker showing of probable cause. Finally there is less chance of an overzealous prosecutor pressuring a district court to grant leave to file than there is of pressuring a justice of the peace to find that probable cause exists.

The proper administration of criminal justice requires a minimizing of expense, no matter how many offenders are prosecuted. Montana, having a small population, has relatively few criminal prosecutions. Obtaining leave of court is a much less expensive manner of proceeding, in terms of both time and money, than is the conducting of a preliminary examination. The responses to the questionnaires indicate that it takes less of the county attorney's time to go before a district judge and obtain leave of court to file, than it does to conduct a preliminary examination before a justice of the peace. Also, upon formal examination, the defendant may require the testimony of all witnesses to be reduced to writing by a stenographer.⁴³ The expense of having a stenographer take and transcribe testimony is very great.

However, as previously noted, situations may arise in which a county attorney determines that the preliminary examination is the more desirable avenue of approach.

For the foregoing reasons, it is submitted that preliminary examinations should not be done away with, and that the present methods of initiating prosecution by information be maintained as they presently exist.

JAMES R. BECK.

