12309

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

THE STATE OF MONTANA, ex rel.
WILLIAM F. CASHMORE, M.D., and
STANLEY C. BURGER,

Relators,

vs.

FORREST H. ANDERSON, as Governor
of the State of Montana,

Respondent.

FILED
JUN 28 1972
Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

BRIEF OF RESPONDENT

FORREST H. ANDERSON
Attorney Pro Se

STATE
PUBLISHING CO.
HELENA, MONT.

TABLE OF CONTENTS

TABLE OF CASES

STATE PUBLISHING CO. HELENA, MONT.

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

THE STATE OF MONTANA, ex rel.
WILLIAM F. CASHMORE, M.D., and
STANLEY C. BURGER,

Relators,

vs.

FORREST H. ANDERSON, as Governor
of the State of Montana,

Respondent.

B R I E F

The question presented by order of this Court for briefs and argument by all interested parties is a simple one; whether the number of votes cast in favor of adopting the new constitution proposed by the Montana Constitutional Convention of 1972 is sufficient to ratify that document and make it effective as the fundamental charter of the State of Montana.

The question raised by the Relators in these combined actions are predicated on the language of Article XIX, Section 8 of the Montana Constitution of 1889, which requires that new constitutional changes proposed by a Constitutional Convention must be ". . . submitted and approved by a majority of the electors voting at the election . . . ."

The Relators have questioned the meaning of the phrase, ". . . majority of the electors voting at the election . . . ."

As Governor, I proclaimed the proposed Constitution effective as having been approved by a majority

STATE PUBLISHING CO. HELENA, MONT.

of the electors voting at the election. A proper majority of the votes were cast in favor of the proposed Constitution. The traditional and accepted democratic electoral processes of the State and long-standing declarations of this Court were followed.

Language identical with the words questioned here is used in Article XIII, Section 5 of the 1889 Constitution. That section in part provides:

> No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law.

With the exception of the word "thereof", which does not and cannot in any way alter the meaning of the phrase, the wording is identical to that placed in question here.

Seventy years ago, in the case of Tinkle vs. Griffin, 26 M. 426, this Court was called upon to decide what those words meant. The fact situation was in all pertinent respects identical with that set out in the petitions now before the Court.

The Court noted that the same question had been litigated in other jurisdictions with differing results. Two separate lines of authority were even then well developed, one holding that a majority of those registered, or presenting themselves at the polls, or signing pollbooks or receiving ballots was required. The other line of cases accepted the view that a majority of those casting valid ballots upon the issue in question, separate and apart from any other issues or matters being voted upon at the same time was all that was necessary.

Given this clear choice, the Montana Supreme Court speaking through Chief Justice Brantley decided that the Constitution required only a majority of those casting valid ballots upon the issue. In announcing the decision of the Court, the Chief Justice clearly explained the reason behind the decision and the soundness of that reasoning is as clear today as it was in the year 1902.

Chief Justice Brantley said:

> 2. It appears that the highest number of votes cast for any office voted upon at the election was 2,400, that 1,000 were cast in favor of the issuance of the bonds, and that 462 were cast against it. It thus clearly appears, counsel say, that the proposition did not receive a majority of the electors voting, within the meaning of Section 5, Article XIII, of the Constitution, *supra*.
>
> It will be observed that the requirement is that the approval must be by a majority of the electors of the county voting, not at a general election, but at *an election to be provided by law*.
>
> As we have seen, such an election has been provided by law to be held at any time it may be deemed necessary by the board of commissioners. It happens, also, that the manner of holding it is the same as that prescribed for general elections. Thus it may, with perfect propriety, be held at the same time at which a general election is held; but the fact that this is the case does not require a different standard of estimating the majority necessary from that which would govern if the election is held on a different day. The evident meaning of the constitution is that the approval must be the result of an expression of a majority of those voting. The expression "majority of the electors thereof voting at an election," etc., clearly means a majority of those who vote, and not a majority of all the electors of the county, or of those who vote upon any other issue at the same or some other time. If the election on the issue of a loan had been upon another day, there would have been no question but that it would have had a majority of the electors of the county who voted. It was none the less a special election, within the meaning of the law, though in this particular instance it was held, for convenience, on the day fixed for a general election. It is the theory of

STATE PUBLISHING CO. HELENA, MONT.

our government that those electors control public affairs who take a sufficient interest therein to give expression to their views. Those who refrain from such expression are deemed to yield acquiescence.

In a recent case the court of appeals of Kentucky, having under consideration a similar constitutional provision, said: 'It is a fundamental principle in our system of government that its affairs are controlled by the consent of the governed, and, to that end, it is regarded as just and wise that a majority of those who are interested sufficiently to assemble at places provided by law for the purpose shall, by the expression of their opinion, direct the manner in which its affairs shall be conducted. When majorities are spoken of, it is meant a majority of those who feel an interest in the government, and who have opinions and wishes as to how it shall be conducted, and have the courage to express them. It has not been the policy of our government, in order to ascertain the wishes of the people, to count those who do not take sufficient interest in its affairs to vote upon questions submitted to them. It is a majority of those who are alive and active, and express their opinion, who direct the affairs of the government, not those who are silent and express no opinion in the manner provided by law, if they have any. Before reaching a conclusion that those who framed our fundamental law intended to change a well-settled policy by allowing the voter who is silent and expresses no opinion on a public question to be counted, the same as the one who takes an interest in and votes upon it, we should be satisfied that the language used clearly indicates such a purpose.' (*Montgomery County Fiscal Court v. Trimble*, 47 S. W. 773, 42 L. R. A. 738.)

We are aware that the decided cases are somewhat in conflict; but, in the absence of an express direction requiring the application of a different rule, we think this fundamental principle should control in this case, as giving effect to the clear intention of the constitution. The following cases we cite as support of this view: *Smith v. Proctor*, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403; *Howland v. Board of Supervisors*, 109 Cal. 152, 41 Pac. 864; *Case County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; *Gillespie v. Palmer*, 20 Wis. 544.

The order of the district court was correct, and must be affirmed.

Affirmed.

STATE PUBLISHING CO. HELENA, MONT.

An additional fact about this decision is worthy of attention today. At the time that Tinkle v. Griffin was decided, the 1889 Constitution had been in effect only a little over twelve years. The convention and its debates and determinations were still quite recent history, and the reasons for those actions were reasonably fresh in the minds of those called upon to carry out the Constitution's provisions. Chief Justice Brantley and his colleagues were in a far better position to know intimately the intention of the framers of the Constitution than we are at a remove of over eighty years.

The same provision construed in the Tinkle case was challenged again nine years later in the case of Morse v. Granite County, 44 Mont. 78, 19 Pac. 286. The Court reaffirmed the rule of Tinkle v. Griffin and said:

> In the case of *Tinkle v. Griffin*, 26 Mont. 426, 68 Pac. 859, this court, construing the provision of the Constitution, *supra*, said: 'The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' *etc.*, clearly means a majority of those who vote, and not a majority of all the electors of the county, or of those who vote upon any other issue at the same or some other time.' This conclusion was reached because the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in them to give expression to their views at the ballot-box.

The Morse decision laid the question to rest for these past sixty years but we are now faced again with the contention rejected twice by this Court more than three generations ago.

Constitutions are intended to be the firm

bedrock upon which our public institutions are built. Their language should be clear and understandable so questions do not arise, but if questions arise, there is clearly a need that the Court's determinations of those questions be as permanent and imperishable as the language of the document itself. If a decision adhered to for seventy years and followed and acquiesced in by public officers and financiers in funding governmental projects is now to be overturned, an element of uncertainty and disorder is introduced into our fundamental scheme that should, in my judgment, be avoided at all costs.

The reasoning of the Court so ably expressed by Chief Justice Brantley speaks to us down through the intervening years with all the force and vigor that it carried on the day of its original announcement, and its logic is uncontestable.

The conduct of public affairs must be placed in the hands of those who take an interest in government, make decisions based upon their studies of it and express their opinions in the proper form, electoral or otherwise. The power to make fundamental decisions of the gravest nature to our entire society must never be left in the hands of those who are so indifferent, so inert, or so negligent that they do not express themselves upon a public issue by even so simple a means as correctly marking a ballot and depositing it in a ballot box. The makers of our Constitition could never have intended so grotesque a result.

I have spent a lifetime in public service and have many times submitted my hopes and ambitions to the electoral process. I have deep faith in that

process, and I have always honored it and abided by its mandate whether it was favorable to my desires or not. The procedure whereby we submit our most important determinations, individually and as a society, to the decision of the majority is the most fundamental principle in the political life of our State and Nation. I cannot believe that the framers of our Constitution or of any constitution ever intended that a declaration of a clear majority of the people making their declaration of their belief at the polls should be dishonored and held for naught. Such a result would, in my judgment, cause the gravest dangers to our entire government and shake and perhaps shatter the belief of the people, whatever their feelings on this particular issue, in the integrity of our entire electoral process. I cannot believe that the members of the Constitutional Convention of 1889 intended such a result. This Court did not so believe seventy years ago, and I do not so believe now.

The actions of the Montana electorate demand, and the integrity and continuity of our entire governmental structure demand, that the decision freely expressed by the majority of the voters to adopt a new constitution must be given effect. I proclaimed the new Constitution effective, and I stand on that decision.

Respectfully submitted,

Forrest H. Anderson
FORREST H. ANDERSON
Governor
Attorney Pro Se

STATE PUBLISHING CO. HELENA, MONT.