12309

No. 12310

IN THE SUPREME COURT OF THE STATE OF MONTANA

THE STATE OF MONTANA,
ex. rel. STANLEY C. BURGER,

Petitioner,

vs.

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

Respondent.

BRIEF OF PETITIONER STANLEY C. BURGER

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Filed _____

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STATEMENT OF THE CASE

On June 20, 1972, under cause number 12310 of this Court, Petitioner, Stanley C. Burger, brought this action on an original proceedings in this Court by his Application for Declaratory Judgment, Alternate Writ of Injunction, Alternate Writ of Prohibition or other appropriate writ, against Forrest H. Anderson, As Governor of the State of Montana, as Respondent, seeking relief of this Court to prohibit the Governor from proclaiming the adoption of the Proposed Constitution. On the same date and prior to the completion of the hearing on the Application, the Respondent proclaimed the adoption of the Proposed Constitution.

The Petitioner also sought a determination of whether or not the proposed constitution voted on at the election of June 6, 1972, received the approval of a majority of the electors voting at the said election, under the requirements of Section 8, Article XIX, of the Montana Constitution, so as to warrant any such proclamation.

On June 22, 1972, this Court accepted original jurisdiction of the action, and ordered an adversary hearing

before this Court on the 17th day of July, 1972, and ordered that briefs, in typewritten form, should be filed with the Clerk of this Court at least three days before the day set for argument.

The Court further ordered that this cause be consolidated with cause of action numbered 12309, being William F. Cashmore, M.D., relator, vs. Forrest H. Anderson, as Governor of the State of Montana.

STATEMENT OF FACTS

It is submitted that the facts necessary to a determination of this matter are not in dispute, and that all parties can agree:

1. That pursuant to the authority of Section 8, of Article XIX, of the Montana Constitution, the legislature of the State of Montana submitted to electors the question of whether a constitution convention should be called,under Chapter 65 of the Session Laws of 1969, and that at the general election which was held on November 3, 1970, a measure was approved by the voters that the legislative assembly at the 1971 session should call a convention to revise, alter, or amend the constitution of Montana, in accordance with Section 8, Article XIX, of the Montana Constitution.

2. That under Chapter 296, Laws of 1971, as amended by Chapter 1, Extraordinary Session Laws of 1971, the 1971 Legislature of Montana did call a Constitutional Convention to meet in 1971 and 1972, to submit proposals to the electorate not more than six months after adjournment of the convention.

3. That Section 17 of Chapter 296, Laws of 1971, as amended, reads:

"Section 17. (1) The revision or alteration of,

or the amendments to the constitution, adopted by the convention, shall be submitted to the electors of this state for ratification or rejection, at an election appointed by the convention for that purpose, not less than two (2) months nor more than six (6) months after the adjournment of the convention.

(2) The convention may submit proposals to the electorate for ratification in any of the following forms:

(a) submitted as a unit in the form of a new constitution;

(b) submitted as a unit with the exception of separate proposals to be voted upon individually, or

(c) submitted in the form of a series of separate amendments.

(3) The proposals adopted by the convention shall be certified by the president and secretary of the convention to the secretary of state.

(4) Each proposed revision, alteration, or amendment, together with appropriate information explaining each revision, alteration, or amendment, shall be published in full and disseminated to the electors upon adjournment of the convention but not later than thirty (30) days preceding the election and in such manner as the convention prescribes.

(5) The convention shall also publish a report to the people explaining its proposals.

(6) Notice of the election shall be given in the manner and form prescribed by the convention.

(7) The convention shall prescribe the manner and form of voting at such election.

(8) The votes cast at such election shall be tabulated, returned and canvassed in such manner as may be directed by the convention.

(9) If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana. The new constitutional provisions shall take effect as provided therein, or as provided in a schedule of transitional provisions attached thereto.

(10) The election laws of the state of Montana shall apply in all other respects to the election conducted under this section."

4. That the Montana Constitutional Convention under its Resolution No. 11, introduced on March 1, 1972, did under Section 1, resolve as follows:

"A RESOLUTION TO APPOINT AN ELECTION FOR RATIFICATION OR REJECTION OF THE PROPOSED CONSTITUTION AND TO PROVIDE FOR PUBLICATION OF THE PROPOSED CONSTITUTION WITH COMMENTS

Section 1. In accordance with Section 17 of the Constitutional Convention Enabling Act (Chapter 296, Laws of 1971 as amended by Chapter 1, Extraordinary Session, Laws of 1971) the Convention hereby

resolves that:

(1) An election separate from the state primary election shall be held simultaneously on June 6, 1972, for the purpose of ratifying or rejecting the proposed Constitution.

(2) The question of adopting the proposed Constitution and related questions shall be submitted to the people on a separate ballot which shall be certified by the Secretary of State in the form to be adopted by the Constitutional Convention.

(3) The County Commissioners in each County shall furnish separate pollbooks, precinct registers, tally sheets and any other supplies necessary for holding a separate election.

(4) The votes cast for the ratification or rejection and related questions shall be tabulated, returned and canvassed separately from the votes cast in the primary election but in the same manner, and by the same election judges, clerks and canvassers.

(5) The Secretary of State shall prescribe the form of the election notice and direct each Clerk and Recorder to post the notice in public places in their precincts at least 20 days prior to the election and direct each board of county commissioners to publish notice of the election in a newspaper of general circulation in the county once at least 10 days before the election.

(6) The election laws of Montana shall apply in all other respects to the Constitutional ratification or rejection election including notice of close of registration."

5. That on June 6, 1972, the election was held, and electors were directed to cast their votes on the approved ballot, a copy of which is attached to the addendum of this brief.

6. That pursuant to the election laws of Montana, canvass of the ballots was completed for each county of the State of Montana, by each board of county canvassers, which boards did file their certificates with the Secretary of State, on official forms provided therefor, a sample copy of which is attached to the addendum of this brief.

7. That pursuant to the election laws of Montana, and the direction of the Montana Constitutional Convention, the Secretary of State, State Treasurer, and the Governor of the State of Montana did, beginning on June 15, 1972, at 9:00 o'clock A.M., proceed to canvass the votes cast at the election held on June 6, 1972, and on June 20, 1972,

the Secretary of the State, Frank Murray, did execute and file a CERTIFICATE OF THE ABSTRACT OF VOTES CAST FOR AND AGAINST THE PROPOSED CONSTITUTION AND THE SEPARATE PROPOSITIONS THEREON AT THE SEPARATE ELECTION APPOINTED BY THE CONSTITUTIONAL CONVENTION TO BE HELD SIMULTANEOUSLY WITH THE PRIMARY ELECTION IN THE STATE OF MONTANA ON TUESDAY, JUNE 6, 1972. This certificate declared the results to be as follows:

"For the proposed Constitution.	116,415
Against the proposed Constitution.	113,883
2A. For a unicameral (1 house) legislature.	95,259
2B. For a bicameral (2 houses) legislature.	122,425
3A. For allowing the people or the legislature to authorize gambling.	139,382
3B. Against allowing the people or the legislature to authorize gambling.	88,743
4A. For the death penalty.	147,023
4B Against the death penalty.	77,733
Total number of electors voting.	237,600"

8. That on June 20, 1972, the Governor of the State of Montana, Forrest H. Anderson did issue a proclamation wherein he proclaimed and declared that the proposed Constitution had been adopted by the people of Montana.

9. That Section 8 of Article XIX of the Montana Constitution, reads as follows:

> "Sec. 8 The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter, or amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof. The number of members of the convention shall be the same as that of the house of representatives, and they shall be elected in the same manner, at the same places, and in the same districts. The legislative assembly shall in the act calling the convention designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of

the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States and of the state of Montana, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of the members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the legislative assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary, which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." (underlining supplied)

ARGUMENT

ISSUE: HAS THE PROPOSED CONSTITUTION BEEN ADOPTED PURSUANT TO THE LAWS OF THE STATE OF MONTANA?

1. Remedy of Declaratory Judgment.

There should be no question by respondent or any intervenors that this court has original jurisdiction to enter a declaratory judgment on the question of the interpretation of constitutional provisions on election laws. There is precedence in Montana for such action from the case of Maddox v. Board of State Canvassers, 149 P.2d 112, 116 Mont. 217. In that case, this court entertained original jurisdiction on an action for declaratory judgment determining rights and duties of the citizens of Montana under statutes which gave members of the military forces, the right to vote absentee ballots. The court interpreted that the language of Section 5 of Article III of the Montana Constitution, did not prohibit such voting.

2. Construction of Section 8, of Article XIX.

The basic issue before this court, will require the court to determine the intent of the framers of the Montana Constitution, when they adopted Section 8 at the Constitu-

tional Convention, August 17, 1889.

Section 8 of Article XIX of the Montana Constitution, reads in part:

> "and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration, or amendment shall take effect."

The Montana Court has previously set forth certain basic rules of construction to be followed in interpreting constitutional provisions. In State ex rel Gleason v. Stewart, 188 Pac. 904,906, 57 Mont. 397, the court stated:

> "The same rules apply to the construction of provisions of the constitution as apply to the construction of statutes. State v. Kenney, 11 Mont. 553, 29 Pac. 89; Dunn v. City of Great Falls, 13 Mont. 58, 31 Pac. 1017. As we have said, the section, as a whole, is not expressed in the clearest and most appropriate language; yet, when we have elicited from it the particular purposes and intentions of its several provisions, taking in their obvious sense the terms in which they are expressed, calling to our aid the ordinary rules of grammer, our task is ended. This is the elementary rule of construction. Other rules may be resorted to only when this fails. Jay v. School District No. 1, 24 Mont. 219, 61 Pac. 250, and authorities cited; Cooley's Const. Lim. (7th Ed) 89."

The Court has also held in Vaughn & Ragsdale Co. v. State Board of Equalization, 96 P.2d 420,423, 109 Mont. 52 that:

> "When the terms of a statute are plain, unambiguous, direct, and certain, it speaks for itself, and there is nothing for the court to construe. State ex rel. Public Service Commission v. Brannon, 86 Mont. 200, 283 P. 202, 206, 67 A.L.R. 1020. See, also, State ex rel. Du Fresne v. Leslie, 100 Mont. 449, 50 P.2d 959, 101 A.L.R. 1329. This is a rule universally followed by all authorities on statutory construction, and the same rule applies in the construction of provisions of the Constitution. State ex rel. Gleason v. Stewart, 57 Mont. 397, 188 P. 904; State ex rel. Du Fresne v. Leslie, supra. 'If no ambiguity exists * * * the letter of the law will not be disregarded under the pretext of pursuing its spirit.' Cruse v. Fischl, 55 Mont. 258, 175 P. 878, 881."

Also, this Court has held in Rankin v. Love, 232 P.2d 998, 1000, 125 Mont. 184 that:

"It is the duty and responsibility of this court to ascertain the meaning of the Constitution as written, neither to add to nor to subtract from, neither to delete nor to distort."

The traditional rules of construction in cases of this kind, have been succinctly set forth in the classic decision in Knight vs. Shelton, 134 Fed. 423, E.D. Ark. 1905, wherein the court was confronted with the construction of the constitutional provision in the Arkansas Constitution concerning amendment to its constitution. There the court summarized:

"1. There are certain rules of law which are so well settled that it is unnecessary to refer to authorities to sustain them. Among these are the following: A Constitution can be amended only in the mode that is prescribed. The construction of constitutional provisions is governed by the same rules which apply to the construction of statutes. The language used is to be given the natural signification that the words imply, in the order and grammatical arrangement in which the framers used them, and if, thus regarded, the words convey a definite meaning which involves no absurdity, and no contradiction between parts of the same writing, then the meaning apparent upon the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. If there is no ambiguity in the language used, there is nothing to construe, and courts must follow the letter of the Constitution. It is only when the language used is not clear or unambiguous that courts are permitted to resort to the rules of construction which govern courts in ascertaining the intent of the framers. If any of the provisions are unjust, so that their enforcement will work a hardship to any class of persons, the remedy must come from the people who have adopted them. Construction can furnish no remedy under our system of government."

Under Section 8, the natural significance of the phrase "majority of the electors voting at the election," is that to determine whether the revised constitution was adopted, you count the total number of electors voting at the election, and one-half (1/2) plus one (1) must have voted for the measure or it fails.

The Secretary of State has certified that 237,600 electors voted at the election held on June 6, 1972, with

regard to the ballots issued concerning the proposed constitution. Mathematically, a majority of these would require 118,801 votes for the proposed constitution. The certificate of the Secretary of State reveals that only 116,415 electors voted for the proposed constitution. Therefore, the issue failed and under the plain, definite meaning of the phrase in Section 8, the proposed constitution was not adopted by the people of Montana, under the very laws by which they have chosen to be governed.

It should be noted that our state legislature, meeting in 1971, found no difficulty in determining what was meant by the language in Section 8, when they recited in subsection (9) of Section 17 of Chapter 296, Laws of 1971, that:

> "If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana."

The constitutional convention was, or should have been aware of Section 8 of Article XIX of the Montana constitution, and the above mentioned legislative enactment, when the convention determined to submit to the electors at the special election the four proposals concerning the proposed constitution. It should be of no surprise to the members of the constitutional convention, that as a result of the official canvass of votes, the proposed constitution failed to receive the approval of a majority of the electors voting at the election, and, hence, was not adopted under Montana law.

The respondents may contend that the phrase "majority of the electors voting at the election" should be construed to allow adoption of the proposed constitution if one-half (1/2) plus one (1) of the electors who voted on the first issue voted "for" the proposed constitution. However, it must be pointed out the Section 8 phrase says "voting at the election" and not "voting on the question". Any such suggested construction would be an

unnatural conclusion from the language used in Section 8. There is a definite meaning to the words used by the framers and this Court should not hesitate to confirm this meaning by declaring that the proposed constitution was not adopted at the election.

If the framers of Section 8 had intended to allow adoption of a revised, altered or amended constitution, by a simple majority of the electors who voted on the question, the framers would most certainly have used language as contained in the first sentence of Section 8 of Article XIX of the Montana constitution, which reads:

> "The legislative assembly may at any time, by a vote of two-thirds of the members elected to each house, submit to the electors of the state the question whether there shall be a convention to revise, alter or amend this constitution; and <u>if a majority of those voting on the question</u> shall declare in favor of such convention, the legislative assembly shall at its next session provide for the calling thereof." (underlining supplied)

Under this language it is clear that only a majority of the electors who vote on the question of calling a convention are necessary to require the legislature to call the convention. If only "a majority of those voting on the question" of the adoption of the constitution was all that was necessary, as urged by respondents, why didn't the framers of the constitution use that language, instead of the language "majority of the electors voting at the election"? It should be clear to all that the framers of the constitution meant what they said, and as a result, the proposed constitution was not adopted by the people of Montana, because a majority of those who voted at the election did not vote for the proposed constitution.

The Idaho Supreme Court, in the case of <u>Green v. State Board of Canvassers</u>, 47 P. 259 (Id. 1896) was faced with provisions in its constitution similar in character to our Section 8 of Article XIX. In that case, an amendment on women's suffrage had been presented at an election and 12,126 had voted for the amendment

and 6,282 had voted against it, and some 10,000 other electors did not cast a ballot on this amendment issue. The Canvass Board, however, declared that the amendment did not pass, under Section 1 of Article 20 of the Idaho constitution, which provided that "if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this constitution". In determining what was meant by that phrase, the Idaho Court looked to the language of Section 3 of Article 20 concerning the calling of a convention to alter the constitution which used language like Montana's Section 8 of Article XIX, being "a majority of all of the electors voting at said election", (there specifically referring to a general election). The Idaho Court then concluded:

> "We confess ourselves unable to appreciate the argument which would make the language of Section 1 of Article 20 and Section 3 of said Article synonymous or expressive of the same intention. If they were, as counsel for defendants contend, intended to mean the same thing, why was not the same language used? We know of no rule of construction, nor has our attention been called to any, that would warrant us in arbitrarily saying that the language used in the two sections was intended to mean the same thing. On the contrary, the reason seems to us to be the other way. We can understand why the makers of the constitution should apply a different and more stringent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment."

Applying the same reasoning and analogy of the Idaho constitutional situation to our own constitution, it should be concluded that the framers did not intend that phrases in the first sentence of Section 8 and the latter portion of Section 8 of Article XIX were to be synonymous or expressive of the same intention concerning the number of electors necessary to adopt a measure thereunder, otherwise they would have used the same language. Further, there is good reason to believe that the framers intended to make a more stringent rule on "altering, revising or amending" the constitution as compared to the mere calling of the constitutional convention. Therefore, the two phrases of Section 8 cannot

receive a synonymous interpretation as contended by respondents. Section 8 must be construed in its plain language, to require a "majority of the electors voting at the election"in order to alter, revise or amend our constitution. As such, a majority did not approve of the proposed constitution and it should be declared as not adopted.

Along the same line, this Court should note that the framers of Section 9 of the same Article XIX, set forth the criteria for the number of electors who could adopt single amendments to the constitution as contrasted to alteration or revision, by stating:

> "Sec. 9. Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the Secretary of State shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be) for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election." (underlining supplied)

There should be little question that under Section 9, a single amendment to the Montana constitution would be adopted if it was "approved by a majority of those voting thereon", so that one-half (1/2) plus one (1) of those electors voting on the amendment issue would be sufficient. There would be no need to determine how many electors voted at the election, but only how many people voted for and against the amendment. Therefore, again, it must be asked if the framers intended the criteria of Section 8, being "majority of electors voting at the election", to be the same significance as Section 9, "a majority of those

voting thereon", why did they not use the same language? Obviously, the framers had no such intention, and under the reasoning of the Idaho Court, in the Green case, it must be assumed that the framers intended a more stringent rule on "altering, revising or amending" the constitution, as compared to the mere single amendment of the constitution. Again, as a majority of the electors who voted at the election did not approve of the proposed constitution, the proposed constitution was not adopted, and this Court should so determine.

3. Voting at the Election.

It is contemplated that respondents will urge that since the canvass found that 237,600 electors voted at the election, and since only 116,415 electors voted for the proposed constitution, that only 230,298 electors actually voted at the election and that 7,402 electors did not vote a ballot at the election and, hence, should not be counted under the meaning of Section 8, of Article XIX of the Montana constitution. We further contemplate that the respondents will rely on the cases of Tinkel v. Griffin, 26 Mont. 426, 68 P. 859; and Morse v. Granite County, et. al., 44 Mont. 78, 119 P. 286. This contention cannot stand the tests.

To begin with, there is no evidence that 7,402 electors did not vote "at the election" on June 6, 1972. The ballot submitted to the electors, and approved by the constitutional convention contains the heading:

"OFFICIAL BALLOT

PROPOSED CONSTITUTION

Please vote on all four issues"

The ballot then contained four (4) numbered issues, including being for or against the proposed constitution, being for a unicameral legislature or for a bicameral legislature, being for or against allowing the people or the legislature to authorize

gambling, and being for or against the death penalty. The constitutional convention characterized this ballot in subparagraph (2) of Section 1 of Resolution Number 11, as follows:

> "The question of adopting the proposed constitution and related questions shall be submitted to the people on a separate ballot which shall be certified by the Secretary of State in the form to be adopted by the constitutional convention."

Thus, it becomes clear that the constitutional convention intended to advise the people of Montana at the election that the whole ballot was concerned with the proposed constitution and all issues were related.

From the Certificate of Canvass by the Secretary of State, it is obvious that some electors did not vote for or against all of the issues, on the ballot. A total of 230,298 electors voted on the first issue, 217,684 electors voted on the second issue, 228,125 electors voted on the third issue, and 224,756 electors voted on the fourth issue. The total number of electors voting was certified as 237,600. Nowhere on the Certificate of the Secretary of State is there any total of the actual ballots issued. Therefore, this Court must conclude that the certification of "total number of electors voting" is a net total after deducting void ballots. Subsection (4) of Section 23-4002, of the Revised Codes of Montana, 1947, being part of what is known as Montana's Election Laws, provides:

> "A ballot which is not endorsed by the official stamp is void and shall not be counted. A ballot or part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If a part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

This Court must presume by virtue of paragraph 15 of Section 93-1301-7, R.C.M., 1947, absent clear evidence to the contrary, that the election judges regularly performed their duty, and voided all ballots which had absolutely no markings on them for any of the four issues. Thus, the certified total of 237,600

"total number of electors voting" means that those electors marked and voted on one or more of the issues. Since Section 8 of Article XIX spoke of a "majority of electors voting at the election", and not a "majority of electors voting on issue one", the majority must be calculated on the total of 237,600 electors, and, hence, the 116,415 electors who voted for issue one were not a majority of the total number of electors voting at the election.

It should be noted that the language in the Oklahoma constitution concerning the adoption of an amendment being "majority of all the electors voting at such election" was so clear to both parties in the case of State ex. rel. Hayman v. State Election Board, 75 P. 2d 861, 864, 181 Okla. 622 (1938) that the parties conceded that:

> "...every voter appearing at the polls and casting a vote for or against any candidate or measure submitted is to be considered in determining the total number of 'electors voting at such election.'"

The same language found in the Illinois constitution was given the same judicial interpretation in People v. Stevenson, 281 Ill. 17, 117 N.E. 747 (1917).

4. Tinkel and Morse cases.

The case of Tinkel v. Griffin, 26 Mont. 426, 68 P. 859 decided by the Montana Supreme Court on April 28, 1902, is not controlling, as it discusses language different from that involved in the case at bar and is concerned with construing a different section and Article of the Montana constitution under a different set of facts with a different historical background.

In the Tinkel case, the Court was construing Section 5, Article XIII of the Montana constitution, concerning a limitation that "no county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000.00) without the approval of a majority of the electors thereof, voting at an election to be provided by law." The

question of a bond to secure a loan of $55,000.00 to build a new courthouse and jail in Flathead County was placed upon a county ballot at the general election held on November 6, 1900. 1000 votes were cast for the bond issue, and 462 were cast against it. The highest number of votes cast for any office voted upon at the election was 2,400. Under the language of Section 5, Article XIII, the Court found that the votes cast at the general election should not be used to compute whether a majority of the electors "thereof" voted at "an election to be provided by law". The Court stated:

> "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 those who vote upon any other issue at the same or some other time."

However, it must be conceded by all parties to this action that the latter portion of the statement of Justice Brantly, concerning more than one issue, was one of dicta by the Court and not controlling precedent because in the Tinkle case there was only the single issue of the courthouse bond on the election ballot.

The Court then stated:

> "It is the theory of 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."

Justice Brantly closed his opinion by acknowledging, however, that:

> "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."

In summary, the Tinkel case was attempting to determine the intent of the framers of Section 5 of Article XIII of the Montana constitution, concerning the provision of "majority of the

electors thereof voting at an election". This is a different subject and a different phrase than what is involved in the case at bar. In the present case, considering the language of Section 9, as compared to the various phrases in Section 8, of Article XIX, the framers of Article XIX of the constitution made clear their intention that no alteration or revision of the constitution could be adopted without approval of "a majority of the electors voting at the election". With this expressed direction, the Tinkle case should not be held to alter the intent of the constitutional framers.

The case of Morse v. Granite County, et. al., 44 Mont. 78, 119 P. 286, was decided November 11, 1911. This case was again concerned with the subject of bond issues to be submitted to the people under Section 5 of Article XIII of the Montana constitution, and cited the Tinkel case in support of the interpretation of the election phrase. The bond issue in the Morse case was again for the construction of a courthouse. The only new issue raised concerned some legislative enactments, made pursuant to Section 5 of Article XIII, which according to the Plaintiffs required a larger number of votes for the bonds than did the original Section 5. The Court held that this was not the intention of the legislature, and allowed the bond issue to stand, although there were 1,302 electors legally qualified to vote in Granite County, and only 483 voted for the bond issue, and 378 voted against it.

For the same reasons stated above, the Morse case is not controlling of the issues in the case at bar, and adds nothing to the plain meaning of the language used by and the intent of the framers of Section 8 of Article XIX of the Montana constitution.

The Tinkel and Morse cases are further distinguishable in that the most recent constitutional convention submitted four related issues to the people on one ballot at the election on June 6, 1972. This created an entirely different question to be

determined than that contemplated by the Court in the Tinkel and Morse cases, where there was, in both cases, only one bond issue on the special county election. The prevailing view of Courts presented with evidence of more than one issue on a ballot, is exemplified in the California cases, including Law v. City and County of San Francisco, 144 Cal. 384, 77 P. 1019 (1904); City of Pasadena v. Chamberlain, 192 Cal. 275, 219 P. 965 (1923); People v. City of Woodlake, 106 P. 2d 71, 41 Cal. App. 199, (1940). In these cases, the Courts construed language such as "majority of the electors voting at such election" to mean that individual proposals failed if they did not receive the proper percentage of all electors voting at the election on one or more of the proposals. Under these authorities, and the evidence before this Court, the proposed constitution failed. The Tinkel and Morse cases are not contrary precedence.

A final and most compelling reason why the Tinkel and Morse cases are not applicable to a proper determination of this case, comes from the Supreme Court of the State of Michigan, in the recent decision Stoliker v. Waite, et. al., 101 N.W. 2d 299, 359 Mich. 65 (1960). In the Stoliker case, the issue before the Court was whether the Michigan constitution required a different vote for the call of a constitutional convention than it required for the adoption of an amendment to the constitution. The vote for the call of the convention required "a majority of such electors voting at such election". The vote for an amendment required only a "majority of the electors, voting thereon". The Court held that a different vote was required, and found that a call for a convention was not approved by the electors voting at the election. The Court discussed the issue, in this language:

> "The question before us is not the wisdom of providing for a different vote. That is a question for the draftsmen of the constitution. Our duty is not to draft a constitution but to uphold the one adopted by the people.

Nor is the question before us whether the constitution should be changed because it is allegedly an outmoded, horse-and-buggy, contraption better suited to the needs of 50 years ago, when it was adopted, than those of today. If it should be changed, it must be changed by the sovereign power that created it, the people. This Court does not have the jurisdiction to change the constitution."

The Court then went on to discuss the historical background of altering and revising constitutions:

"Before proceeding to re-examination of the words employed, and their meaning, it would be helpful to our understanding if we were to examine their origins, to ascertain, if possible, the reasons behind their inclusion. The words of a constitution normally carry the gloss of history. They come to us not as the apt alliterations of the moment of draftsmanship but as the verbal symbols of political turmoil. So it is with the constitutional clauses before us. They do, indeed, mean far different things. The reasons for their differences are plain to all who stop to read for they lie deep in the roots of our political life.

It was the conviction of our forbears that our people should be safeguarded by a written constitution, a device unknown to our English ancestors. It was intended by them to be a sacred and invulnerable document. It had been purchased at a staggering cost. It was not easily to be abandoned, in favor of new and more enticing structures of government, by mere temporary majorities. The allurements of the unknown and the untried are not unknown to government itself, as our founding fathers had good reason to know in this new world. The problem involved in the constitutional change, as clearly seen since our earliest days and as expressed in The Federalist, is the contest between 'that extreme facility, which would render the constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.' In short, it has been feared that easy change might degrade our constitutional principles to the level of statutes, some of which are hastily drawn and reflect excessive and partisan zeal. The threat of such action directed against our basic liberties has not been regarded as insubstantial. Daniel Webster denied the necessity for a revision of the whole constitution once a government had been framed and spoke against providing for such an event. James Madison suggested the concurrence of two of the three departments of state. Rohlfing points out that only a minority of the original 13 states made provisions for changes in the basic law and that Delaware and South Carolina, the first states to authorize specific amendment, as well as general revision, were not followed by other states until 1835. Whatever the particular safeguards employed in the various state constitutions, the procedures looking towards general constitutional revision were both dilatory and cumbersome as compared with the more expeditious procedures set up for less momentous changes. It has been the practice of the people of this country (and Michigan is no exception) to hedge about with

numerous safeguards, sometimes called obstructions, the power to call conventions empowered to revise the organic law of the state. The problem presented is one of the balancing of interests. (This, we stress, was the problem facing the framers of our constitution in 1908, not the courts of the State). At the one extreme of voter participation, the calling of a constitutional convention empowered to rewrite the basic charter of government by the same simple procedures or majorities as are required for usual voter approval has been rejected much more often than accepted. At the other extreme, there has been no adoption of a requirement that such vote be unanimous. What has emerged from the debates between constitutional draftsmen in state after state has been a compromise as to safeguards, the form of which is a matter for determination by the people of the state, and not by the courts. It has varied from state to state. In some states, a two-thirds (not a mere majority) vote of the members of each house of the legislature is required to submit the question of calling a convention. In Kentucky, action not at one session of the General Assembly but at two is necessary, and, moreover, the majority voting on the question must equal one-fourth of the number of electors voting in the last preceding general election. In still other states, the majority must be a majority of those voting at the election at which the question is submitted. Michigan is among the latter. There is nothing ambiguous, confused, or contradictory here. A call for a convention cannot be carried by the indifference of the electorate: the constitution itself demands participation.

The constitution also requires that a proposed constitution adopted by a constitutional convention be approved by a majority of the electors voting thereon. The measure of such approval, we observe, again, is a matter of weighing opposing considerations, some states specifically require a majority of the electors voting on the proposal. Others require a majority of those voting at the election. (citing among other state provisions, Montana constitution, Section 9, of Article XIX) Still others require different measures of approval. It is not unknown, in fact, that a constitution be not submitted to the people for approval, once having been drafted by a convention duly called."

Thus, while the decisions in the Tinkel and Morse cases, may be appropriate for the determination of the vote required on county bond issues, yet, in light of the historical concern with revising and altering the whole constitution of the state, this Court should hold that the vote required for the alteration or revision of the constitution was not the same as for the adoption of an amendment to the constitution. More than a simple majority of those voting "on the question" was required to adopt the constitution as proposed "at the election". As the Court, in the Stoliker case, at page 305 of 101 N.W. 2d, concluded:

> "The constitutional scheme is clear. The reasons for its adoption are manifest, whether wise or unwise. The words employed are 'plain and free from ambiguity.' The arguments and authorities once more urged upon us as aids to 'interpretation' have gained nothing in validity or applicability since our prior determination of this matter, and those newly devised are unimpressive. The simple, inescapable fact is that the constitution clearly distinguishes between the vote required to approve a constitutional amendment and that required to call a constitutional convention."

Likewise, in the case at bar, the Montana constitution clearly distinguishes between the vote required to approve a constitutional amendment under Section 9 of Article XIX and that required to alter or revise the constitution under Section 8 of Article XIX. Hence, by virtue of the official canvass which determined the number of electors voting at the election, as compared to those who voted "for" the proposal, the proposed constitution was not approved.

CONCLUSION

The constitutional convention submitted to the electors of Montana at an election on June 6, 1972, a new proposed constitution, altering and revising the current constitution. 237,600 electors voted at that election, on one or more of the four issues on the ballot offered, and of those electors who voted, only 116,415 voted for the proposed constitution. In order to alter or revise the current constitution, Section 8 of Article XIX of the constitution of Montana requires approval by a "majority of the electors voting at the election". This language means that you count the total number of electors voting at the election, and one-half (1/2) plus one (1) must have voted for the constitution or it fails. This would have required 118,801 electors voting for the constitution. If the framers of the constitution, whose language was approved by the people of Montana in 1889, would have wanted any other result, they would have said so. Therefore, this Court should declare that the

proposed constitution was not adopted by the people of Montana in 1972, and the proclamation of the Respondent, Governor of the State of Montana, is of no force and effect, and said Forrest H. Anderson, as Governor, should be ordered to proclaim that the proposed constitution was not adopted.

Respectfully submitted,

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