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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 12309

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STATE OF MONTANA

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.

MEMORANDUM IN SUPPORT OF APPLICATION FOR DECLARATORY JUDGMENT

Original Proceeding for Declaratory Relief

APPEARANCES:

PAUL T. KELLER
HELENA, MONTANA

Attorney for Relator,
WILLIAM F. CASHMORE, M. D.

MORROW, NASH & SEDIVY
BOZEMAN, MONTANA

Attorneys for Relator,
STANLEY C. BURGER

ROBERT L. WOODAHL
HELENA, MONTANA

Attorney General for the State of Montana for FORREST H. ANDERSON, as Governor of the State of Montana, Respondent

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

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Respondent.

MEMORANDUM IN SUPPORT OF APPLICATION FOR DECLARATORY JUDGMENT

STATEMENT OF ISSUES

1. Whether the proposed Constitution received the requisite number of votes to have been ratified by the voters at the election on June 6, 1972.

STATEMENT OF CASE

This is an original proceeding brought to determine whether a proposed constitution was ratified by the electors of this state. The relators filed separate applications for declaratory judgment, injunctive relief or other appropriate relief to prohibit a proclamation by respondent. The Court heard the applications ex parte and issued its order setting July 17, 1972 as the date for an adversary hearing on the matter and consolidated the two applications.

STATEMENT OF FACT

The electors of this state voted to call a Constitutional Convention, and pursuant to their vote and legislative enactment, delegates to such a convention were selected. The Convention adopted a Constitution and submitted it to the electorate on June 6, 1972. Two Hundred Thirty-seven Thousand Six Hundred (237,600) electors voted; One Hundred Sixteen Thousand Four Hundred Fifteen (116,415) cast votes in favor of the Constitution, and One Hundred Thirteen Thousand Eight Hundred Eighty-three (113,883) cast votes against it.

ARGUMENT

In this matter, WILLIAM F. CASHMORE, M. D., a life-long resident of the State of Montana, is bringing an action to determine the validity of the proposed Constitution submitted to the voters of Montana on June 6, 1972, on the ground that the proposed Constitution did not receive a majority of the votes of those electors who voted on June 6, 1972, at the special election upon the Constitutional issue.

In Montana, there is no problem determining who voted on the proposed Constitution because it was a separate special election from the regular primary, and separate poll books were kept in all precincts in the State. The number of voters casting a ballot on the issue was kept in those poll books. The number of votes cast on the Constitution and the three other issues has been determined by the Board of State Canvassers of the State of Montana

to be Two Hundred Thirty-seven Thousand Six Hundred (237,600) votes. This is not conjecture. We are calling this to the Court's attention at this time because in many states, there has been no accurate record kept of the persons who voted on special issues. State ex rel. Denman v. Cato (1923) 131 Miss. 719, 95 So. 691. By a reading of the cases, this Court will find that the number of votes actually cast in those cases was highly conjectural because no accurate list of the people was kept. No such conjecture needs be engaged in in Montana because each person who received a ballot on the Constitutional issue signed a poll book, and their number is known. They have a right to vote as they please, and if they did not vote for the Constitution, their vote cannot be counted as approving it.

There is a further thing in Montana which is highly important to the determination of this question. The Constitution of Montana provides for a convention to revise, alter or amend the Constitution. In so doing, substantially different language is used than is used in the subsequent section which relates only to amendments. Article XIX, Section 8, reads as follows: We have underlined the portion which is important here.

> "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 mem-

bers 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." (Emphasis supplied.)

Article XIX, Section 9, reads as follows:

"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 nor more than three amendments to this constitution shall be submitted at the same election." (Emphasis Supplied)

We wish to emphasize to the Court the difference in the language in Section 8 and Section 9. A Constitution "takes a majority of the electors voting at the election", while an amendment takes "a majority of those voting thereon".

We submit that it is beyond legitimate argument that because of the clearly differentiating mandatory provisions and requirements of Section 8 and those of Section 9 of Article XIX, the framers of the Constitution had one thing in mindthat to revise, alter or amend the Constitution by the convention method, a majority of the electors voting at the election must approve such revision, alteration or amendment. In contrast, where the amendment is submitted through the legislature, only a majority of the persons voting on the specific amendment is needed to pass that amendment. We have examined the proceedings of the 1889 Constitution and have found that it was adopted from the 1884 Constitution; the same language was used there. The language in itself is crystal-clear.

We feel that it is not necessary to go beyond these two items; (1) That Montana has poll books which show exactly who voted on June 6, 1972 on the Constitution submitted by the convention; (2) that Section 8 requires that a majority of the electors voting at the election must approve the Constitution.

1. A MAJORITY OF ELECTORS VOTING AT

THE ELECTION DID NOT APPROVE THE PROPOSED CONSTITUTION

The cases on this subject at first blush may seem to be split but there is something we should call to the Court's attention which we feel reconciles any apparent variance in the cases. That point is that Montana in the recent election of June 6, 1972, treated the vote on the proposed Constitution and the three matters submitted with it as a separate election from the regular primary. The fact that the Constitutional election was a separate one is conclusively established by the mandatory requirement of Article XIX, Section 8 (supra) which states that the radification or rejection by the people must be by an election "for that purpose." This is more clearly pointed out when it is found that the poll books disclose that more people voted in the regular primary than voted on the Constitutional issue. Also, the facts are that there was a great variance in the number of people who voted on the other three matters referred and on the proposed Constitution itself so it would be pure conjecture to determine who voted on the Constitution and who did not. We must have reference entirely to the poll books.

But we do know that Two Hundred Thirty-seven Thousand Six Hundred (237,600) votes were cast on the Constitutional issue of which One Hundred Sixteen Thousand Four Hundred Fifteen (116,415) were for the proposed Constitution and One Hundred Thirteen Thousand Eight Hundred Eighty-three (113,883) were against the proposed Constitution. As is clear

from these figures, less than a majority of those who voted at the election voted affirmatively, for such a majority would have been 118,801.

State ex rel Hayman, et al. v. State Election Board, et al. (1938) 181 Okla. 622, 75 P.2d 861 is a case in which a constitutional amendment was submitted to the voters, and the constitution of Oklahoma provided, in part:

> "... if a majority of all electors voting at election shall vote in favor of any amendment thereto, it shall thereby become a part of the Constitution ..."

Oklahoma also has a statute which makes every precinct election board return to the county election board the total number of electors voting at the election so the State Election Board could certify the total number of ballots cast at the particular election. The same statute requires the county election boards to record the number of ballots spoiled or not voted, all of which is reported to the state election board. The proposed amendment received an affirmative vote of 379,405, and a negative vote of 219,996. The total votes cast as shown by the certificate was 767,745 votes, and the election board determined that the amendment did not pass. An action was brought, and the Supreme Court held that the election board was correct. The Supreme Court refused to issue the writ to change what the election board had reported, and among other things made the following observation:

> "Under this suggested method, no elector would be considered who did not vote on the office or measure

receiving the highest vote, thereby eliminating many voters who, in in the instant case, voted only State, county, or precinct ballots. The inaccuracy and fallibility of this method are conspicuously apparent. They assert that this number should arbitrarily be considered as representing the number of 'electors voting at such election.' This is predicated upon a presumption which is significantly contrary to the actual and admitted facts as presented in this case. By this method every voter appearing at the polls who did not see fit to cast a vote for presidential electors, but who may have voted for every other State officer, or county or precinct officer, or on the submitted amendment itself, is eliminated from consideration as an 'elector voting at such election.' This is in direct discord with the theory conceded by all parties to this proceeding 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.'" (Emphasis supplied.)

In People v. Stevenson (1917) 281 Ill. 17, 117 NE 749, a constitutional amendment had been submitted to the voters by the legislature. The canvassing board returned that 1,343,381 male electors voted at the election ; 656,782 voted for the proposed amendment, and 295,782 voted against it. The canvassing board then determined the highest number of votes cast for the members of the legislative assembly, and since the vote on the constitutional amendment was more than half of the vote for the members of the assembly, as figured by their formula, the canvassing board determined that the amendment had been adopted. The trial court reviewed the decision of the canvassing board and determined that the

amendment had not been adopted. In affirming this decision, the appellate Court discussed the 1818 constitution of Illinois and the 1848 constitution of Illinois. The decision was given under Section 1 of Article 14 of the constitution of 1870 which provided that "if a majority voting at the election" voted for the amendment, it was carried. The Court made the following observations:

> "It seems to us that the people who read and voted on the adoption of the Constitution would not have understood it to mean that an election at which a constitutional amendment was voted on, whether it was adopted or rejected, was to be determined by the vote of those, only who voted for members of the General Assembly. A more reasonable understanding, requiring no construction or conjecture, would seem to be that the amendment must receive a majority of the votes cast at the election.
>
> * * *
>
> [3] The intention to which force is given in construing constitutional provisions is that which is embodied and expressed in the language of the provisions.
>
> [4] As a Constitution is dependent upon adoption by the people, the language used will be understood in the sense most obvious to the common understanding.
>
> [5] The language and words of a Constitution, unless they be technical words and phrases, will be given effect according to their usual and ordinary signification, and courts will not disregard the plain and ordinary meaning of the words used, to search for some other conjectural intention. 6 R.C.L. 52; Law v. People, 87 Ill. 385; Hills v. City of Chicago, 60 Ill.86."

The Wyoming supreme Court in State ex rel Blair v. Brooks, (1909) 17 Wyo. 344, 99 P.874, considered

a vote on a constitutional amendment. The Wyoming Constitution, in Article 20, Section 1, requires that an amendment receive a majority of the electors. It appeared that 37,561 votes were cast at an election on a constitutional amendment and 12,160 voted in favor of the amendment, and 1,363 voted against the amendment. The Court observed that the cases are in conflict but that the language used in the Wyoming Constitution referred to the electors of the state so that the matter must carry by more than a majority of those voting on the proposition, and it must be a majority of those who showed themselves to be electors.

In Green v. State Board of Canvassers, (1896) 5 Ida. 130, 47 P. 259, the Supreme Court of Idaho had before it a constitutional amendment which was voted upon by the electorate of Idaho to give women sufferage; 12,126 voted for and 6,282 voted against. The board of canvassers reported the amendment as not being adopted and an action ensued. The Idaho State Constitution contains a provision that amendments are approved " ... if a majority of the electors shall ratify the same ...". Idaho also has in Article 20, Section 3, a provision similar to ours, " ... if a majority of all electors voting at said election shall have voted for a convention ...". The Idaho Court made a great distinction between the meaning of the two provisions and made the following observation which is important here because of the similarity of the language construed to that to be construed in the instant case:

"... 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 constuction, 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 strigent rule in the adoption of a call for a constitutional convention from what they would in the matter of a mere amendment. It is true, the amendment under consideration is one of vast importance, but so, likewise are the other amendments submitted at the same time. With the character or importance of the amendment we have nothing to do in this consideration. Was the amendment adopted as required by the terms and provisions of the constitution? To hold that it was not is virtually to say that no amendment of the constitution is practicable. In fact, counsel do not strenuously contend for a construction involving such a conclusion, but rather insist that the words 'majority of the electors,' in section 1, should be construed to mean the same as the words 'majority of all the electors voting at such election,' in section 3. Even the authorities cited by counsel do not go to such an extent to sustain such a conclusion.

* * * "

It is submitted that the reasoning and construction of the Idaho Court is proper and logical. It is a maxim of statutory construction, no less applicable to constitutional law that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all," R.C.M. 1947, 93-401-15. Moreover, the intent of the framers must be determined from the language used in the document. The reasoning of the Idaho Court is consistent with these principles

for it gives effect to two differently worded sections "majority of the electors" and "majority of all electors voting at said election." The apparent intent of the framers to impose a stricter requirement in convening a convention than in ratifying an amendment is also considered.

In the case of Lee v. State of Utah, (1962) 13 Utah 2d. 15, 367 P.2d 861, a constitutional amendment relating to wartime and emergency powers of the legislature was submitted to the voters and thereafter was attacked on the grounds that a majority of the electors registered had not voted. The Supreme Court of Utah held that as the majority of electors voting thereon, as provided by their constitution had voted in favor, the amendment had been ratified.

In Town of Pine Bluffs et al v. The State Board of Equalization, (1958) 79 Wyo. 262, 333 P.2d 700, 704, it was contended that a constitutional amendment was not properly adopted because it was not supported by a majority of the electors of the state although it got a majority of those voting on the proposition. However, it did have a majority also of those voting at that particular election. The argument was that there were more franchised voters in the state taking into consideration all the people who were registered, and as a consequence, it did not receive the support of a majority of the electors. The Court there held citing Indiana that a sensible construction had to be applied, and the wording "all electors of the state" are the electors voting at the particular election.

Article XIX, Section 8 of the Montana Constitution, relating to the ratification of constitutional revisions after a convention, provides in part that such ratification must be "by a majority of the electors voting at the election." Section 9, relating to the ratification of amendments proposed by the legislature, provides in part that such amendments must be "approved by a majority of those voting thereon." (Emphasis supplied.) It is this difference in language which dictates that the proposed Constitution failed. "Voting thereon" as interpreted by the Idaho Court in Green v. State Board, supra, may be taken to mean a count of ayes and nays. "Voting at the election" must mean something different and more; that is, all those who cast ballots whether ayes, or nayes, on any one of the four issues submitted.

In fact, in Stoliker v. White (1960) 359 Mich. 65, 101 NW.2d 299, the Court based its decision on such a distinction. The Court said at page 300:

> "The question before us is this: Does the Constitution require a different vote for the call of a constitutional convention than it requires for the adoption of an amendment to the Constitution?
>
> * * *
>
> What the Constitution actually says is that the adoption of a constitutional amendment requires a majority of the electors 'voting thereon,' whereas a call for a constitutional convention requires 'a majority of such electors voting at such election.'" (Emphasis supplied.)

Later at page 304, the Court said:

"In short, we are now asked to hold

that the people did not clearly understand what they were thus doing. We are asked to hold that, despite the 1899 opinion of the Attorney General upon the unsuccessful legislative attempt to overcome it immediately thereafter, despite the ruling of the Board of State Canvassers that the 1904 proposition had failed to carry for lack of the necessary majority, and despite the re-enactment in the new Constitution of the very language over which all of this turmoil had raged, the people did not really understand the clear meaning of the words they were using, once again, in their new Constitution. (Constitution of 1850, article 20, § 2: '* * * In case a majority of such electors voting at such election shall decide in favor of a convention * * *.') We are to hold that when they required to pass a constitutional amendment a majority of the votes cast thereon, and when they required to call a constitutional convention a majority of the votes cast at such election, they were actually prescribing no difference between the two votes but were in fact merely calling for the same vote on each. All of this we decline to do. The understanding of our people is not so meager. Their distinguished leaders who framed the Constitution were not so inept, so thoughtless, so blind to the issues of the day. From the language used it is clear that they meant to distinguish between the votes required for a simple amendment and those required to call a constitutional convention, and our holding is that they did so distinguish.

We have thus relied upon the contemporaneous understanding of the people. Their understanding is as relevant today as it was a half-century ago and it has a direct applicability to the situation before us. When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with the contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereon. Such is not only the clear phrasing of the Constitution but the highest court in the State had unanimously so ruled with respect thereto. We have no way of knowing how many of the 900,000 electors who failed to vote on the issue would have voted

in the affirmative thereon, had they voted, or how many who failed to vote did so because of reliance upon the practical effect of their failure to vote. Obviously we cannot say that the proposition carried nor can we command the Board of State Canvassers, as plaintiff wishes, 'to certify that the revision question carried.'"

There are two Montana cases construing the election provisions of the current Constitution voting on bond election. In Tinkel v. Griffin, (1902) 26 Mont. 426, 68 P. 859, the Supreme Court had before it a vote in Flathead County for the building of a new county courthouse and jail. The County Commissioners had regularly submitted to the voters the matter of the loan. That election was held under Article XIII, Section 5 of the Constitution which contains the following language:

"... 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."

We should call attention to the Court that this language is somewhat different than the language in Sections 8 and 9 of Article XIX of the Constitution. The question arose as to what constituted a majority of the electors of the county voting. The Court pointed out that the election could have been held by itself or at any time. As a consequence, the majority of the electors voting at the election to be provided by law would be only those who voted on the bonds themselves. We should bear in mind here that the Supreme Court treated the election on bonding the county as a special election although

it was held at the same time as the general election. Thus there were two elections the same day. The Court in that case made the following observations:

> " 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, art. 13, of the constitution. 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. ***"

2. SEPARATE ELECTIONS

The Court felt that only those who voted on the bond issue should have been counted in determining whether a majority voted for or against the bonds. We have no argument with that philosophy. It is the same argument that this applicant feels is applicable to the case at bar because the total number of votes for the proposed Constitution was less than a majority of those who voted on that separate issue.

That case was followed by the case of Morse v. Granite County, (1911) 44 Mont. 78, 119 P.286. The County Commissioners called an election to submit to the voters the matter of borrowing $50,000 to build a courthouse. The district court of Granite County ruled inter alia that not sufficient voters had voted in favor of the bond and held the bond issue void and ordered an injunction to issue. At page 296 of the Pacific Reporter, the Court cited with approval the case of Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859. "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 the 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..." The Court then goes to say that the laws and the Constitution should be so interpreted as to become useful. We insist that a majority of the electors who voted at the election on the Constitution did not vote for the proposed Constitution,

the same as the Court held in the two Montana cases just cited.

That is our argument here. The election on the proposed Constitution submitted by the Convention was a separate election from the primary. The fact that it was held at a time when another election was held is completely irrelevant. We are relying on the poll books which state that 237,600 persons voted at that election, and only 116,415 voted in favor of the Constitution which is not a majority of the electors voting at that election.

3. CONSTITUTIONAL CONSTRUCTION

In State ex rel Durland v. Board of County Commissioners, (1937) 104 Mont. 21, 64 P.2d. 1060, 1962, the Court said:

> "A part of the quotation from another case cited (Newell v. People, 7 N. Y. 9) is as follows: 'Whether we are considering an agreement between parties, a statute or a constitution, with a view to its interpretation, the thing we are to seek is, the thought which it expresses. To ascertain this, the first resort in all cases is the natural signification of the words employed in the order and grammatical arrangement is which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involved no absurdity or no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case, there is no room for construction. That which the words declare, is the meaning of the instrument; and neither courts nor legislatures have the right to add to or take away from that meaning."

4. WHO IS AN ELECTOR

Article IX, Section 2 of the Montana Constitution

which was just revised by the legislature and the voters in 1970 and became effective on November 20, 1970, makes 19-year old persons qualified to vote provided they have certain other qualifications set forth in the article which makes anyone who is registered over 19 an elector.

Chapter 296 of the laws of 1971 as amended by Chapter 11 of the Extra-ordinary session of 1971, sets forth the authority of the Constitutional Convention. Section 16, Subdivisions 6, 7, 8 and 9 of that act set forth the manner in which the election is held, and Section 18 of that chapter provides that every person who is a qualified voter shall be entitled to vote at such election. Section 19 provides for the county officers cooperating in the election.

The convention proclaimed the 6th day of June, 1972, as the time and used the regular out election procedures for holding the election. It would seem that Section 37105 relating to constitutional amendments probably applies to the voting on this constitution, and the ballots were supposed to be printed in accordance with Section 23-3507, R.C.M. 1947.

Since the general election laws are to be followed, all of Title 23, Chapters 26 through 46 would apply. Sections 23-3601 through 23-3618 set the procedure for voting in the State of Montana. This is important in this case because it shows that the canvassers were able to ascertain exactly how many voters voted on the proposed Constitution

submitted by the convention. The voting on the Constitution was treated as a special election and special poll books were kept on the voting of the constitution so that the Board of State Canvassers in making the final canvass could tell exactly how many persons voted on the constitution in each county. Section 23-3610, R.C.M. 1947, provides that the person's name must be recorded in the poll book as he voted. Section 23-4003 provides for the keeping of records for the list of all voters who voted, and a certification by each precinct as to whom voted. Section 23-3610 provides that the clerk of elections shall keep a list of persons voting. The name of each person who votes must be entered thereon and numbered in the order voting. Such list is known as the poll book. From these poll books each county clerk knows exactly how many persons voted on the constitution. That was reported to the County Board of Canvassers, who in turn reported to the State Board of Canvassers.

This election was conducted under the amended sections on voting and elections, 23-3601 through 23-3618, R.C.M. 1947, as amended by the laws of 1969. We will call to the attention of the Court to subdivision 11 of Section 23-3605, R.C.M. 1947, which provides that an unmarked ballot should be returned to the election judges.

Subdivision 3 of 23-3606 provides for the voting on issues such as the constitution. Subdivision 7 of that section provides for the voter receiving a new ballot for a spoiled one.

Section 23-3610, R.C.M. 1947, as amended, provides for marking the precinct register books for electors who voted. Chapter 40, Sections 23-4001 through 23-4019 relates to the counting of the votes. Section 23-4002 relates to the method of canvass, and that means the original counting of the ballots at the precinct level. That section provides for spoiled ballots and an actual tally of the number of ballots with the number of voters who cast ballots. Section 23-4004 provides for rejected ballots. Subdivision (5), Section 23-4003, provides that a rejected ballot or vote is not included in the count of the electors voting at the election.

We point out these provisions to show that the number of votes counted were all from good ballots. The precinct canvass submitted to the county canvassing board includes only ballots of persons who voted a ballot which was counted. We should also call to the attention of the court, subdivision (4) of Section 23-4002 which provides if part of the ballot is marked sufficiently plainly to determine the elector's intention, the election judges shall count that part.

This Court has previously passed upon this Section in the case of Peterson v. Billings, (1939) 109 Mont. 390, 96 P.2d 922, where the Court quoted with approval an Illinois case:

> "...The decision does hold the statutory provision as to the manner of making the cross to be directory and not mandatory, and then says [158 Ill. 609, 41 N.E. 1004, 30

L.R.A. 227]: 'It has always been held in this state that if the intention of the voter can be farily ascertained from his ballot, though not in strict conformity with the law, effect will be given to that intention. In other words, that the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot.'"

A public official, which these election judges are, and all of the canvassing boards, local, county and state, are presumed to do their duty in a proper manner, under the provisions of Section 93-1301-7, subsection 15. It is presumed that all of the election canvassers, precinct, county and state, did their lawful duty. Suffice it to say that it is presumed that an official does his duty as required by law.

Since the advent of voting machines, the entire election laws have been changed. The Board of County Commissioners are the Board of County Canvassers in Section 23-4009, R.C.M. 1947. Section 23-4012, R.C.M. 1947, as amended by the laws of 1969, provides that a record shall be made of the votes cast in the county and subdivision 5 provides for a record of the votes cast for or against a proposition. The County Clerk certifies to the Secretary of State and the Board of State Canvassers meet with the Secretary of States who is the Secretary of the Board under the provisions of Section 23-4016, R.C.M., 1947. It should be remembered here that the poll books were kept separately on the proposed Constitution, and these show that 237,600

votes were cast on the proposed Constitution which was submitted by those separate poll books. The Secretary of State received a report from each county showing the number of voters actually voting, and this number did not include spoiled ballots or ballots issued to absentee voters which were not returned. It was the number of votes actually cast at the election, including absentee voters who actually voted their ballots. The numbers, therefore, that were submitted by the Secretary of State to the Governor were not the number of ballots issued but the number of voters who actually voted.

The Constitutional Convention by Resolution 11 attached to petitioner's application as Exhibit "A" advised the Secretary of State how he should handle the election. It told him that there had to be separate poll books and an accurate count kept of the voters voting on the Constitution, and that tally sheets and other supplies necessary for holding a separate election should be furnished which was done. A report was made by each county on that showing exactly how many people voted. Each county has the name of each voter who voted on the Constitutional issue so the 237,600 is a figure of the people who actually voted on the Constitution. We refer the Court to Exhibit "A" attached to the application for declaratory judgment on file herein.

5. MULTIPLE SUBJECTS ON ONE BALLOT

As we have pointed out to the Court earlier in this brief, the election on the Constitution

was a separate election from the regular primary. That is more specifically pointed out by the fact that separate poll books were kept. 237,600 Montanans voted in the constitutional election, whereas the record in the Secretary of State's office shows that 238,215 voted in the regular primary, which election was held on the same day being June 6, 1972.

The fact is that the ballot upon which the constitutional issue was submitted contained four (4) integral parts. The report of the Board of Canvassers shows a divergence of opinion between the four parts that were submitted on the constitutional ballot. In other words, some people voted for one part and did not vote for another. A question might be raised--did a person vote who voted for or against gambling and did not vote on the proposed Constitution, and it is our position, of course, that he did. There are several California cases to sustain our position on that statement.

In Law v. City and County of San Francisco, (1904) 144 Cal. 384, 77 P. 1014, there was one ordinance submitting a bond issue which involved many different items. Several technical objections were raised but on the final proposition which was whether the bonds received two-thirds of those voting at the election, the Court had this to say:

> "...But, upon the other hand, where the meaning of the law is plain, and permits of but one construction, naught is left for a court to do but to give legal effect to its provisions. Thus, in City of Santa Rosa v. Bower, 142 Cal. 299, 75 Pac. 829, this court,

by the language of the law, which in terms required that the proposition ordered submitted at a general or special election must receive the assent of the majority of the qualified electors voting at that election, was reluctantly compelled to hold that the proposition there under consideration had not been carried, notwithstanding the fact that it had received the requiste majority of those voting upon the proposition."

To the same effect see:

City of Pasadena v. Chamberlain, (1923) 192 Cal. 275, 219 P. 965.

In People ex rel. Rowe v. West Side County Water District, (1952) 112 Cal. App.2d 128, 246 P.2d 119, two propositions were voted upon, and one failed to get a majority of the votes cast at the election.

In People ex rel. Smith v. City of Woodlake, (1940) 41 Cal. App.2d 119, 106 P.2d 71, there was an election to determine whether a town should be incorporated, and the state statute required also that the voters should vote on the persons to fill the various offices if the town was incorporated. Three hundred forty-three valid ballots were cast at the election; 170 for incorporation, 164 were against incorporation and 9 of the votes expressed no choice on incorporation. At the trial all of the ballots were recounted, and the vote was found to be 171 for, 163 against and 9 expressing no choice. The question was, were all of the voters at the election to be counted or only those who actually cast ballots on the proposition of incorporation. The Court there observed:

"[1] Cases from without this jurisdiction based on different statutes can be found which support either contention herein. 20 C.J., page 206, sec. 266; 20 C.J., p. 207, sec. 266, notes 38 and 39. It is the general rule that when a proposition is required to carry by a majority *of the votes cast* at a certain election the proposition must receive the favorable vote of a majority of all valid votes cast at the election, as distinguished from the votes on a particular question. 20 C.J., p. 207, sec. 266, note 39; People v. Town of Berkeley, 102 Cal. 298, 36 P.591, 23 L.R.A. 838. California has been classed among the majority holding to this construction. The case of People v. Town of Berkeley, supra, is cited as a case in which the identical question here presented was decided. That case involved the re-organization of the town of Berkeley under the Municipal Corporation Bill of 1883. This appears from the opinion of the court (page 307 of 102 Cal., page 593 of 36 P., 23 L.R.A. 838):

'At the election held on May 8th, a majority of all the electors who voted upon the proposition to reorganize were in favor of it, but not a majority of all who voted as the election.

'The provision of the constitution in regard to elections like that under consideration has been quoted, and it will be observed that the words used are, "whenever a majority of the electors voting at a general election shall so determine." These words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required. And such was evidently the interpretation placed upon this provision by the legislature when it passed the general municipal incorporation act of 1883. * * *'

This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize."

* * *

" [2,3] The matter of electing officers

was an indivisible part of the election. The law required the matters to be submitted at the same time and one the same ballot and under the same call. It would be a strained construction of the law to hold that a valid vote for officers was not a vote cast at the election. To strengthen the position we here assume, it should be noted that the Municipal Bond Act of 1901, under which many of the above-cited cases were decided, was amended, Stats. 1927, chap. 315, p.527, to provide for the issuance of bonds when authorized by 'the votes of two-thirds of all the voters *voting on any such proposition*'. If the legislature had intended that the total votes cast the election here involved should be predicated on the total votes cast on the proposition, they might well have so provided. This should not be accomplished by judicial decision when the statute is clear and unambiguous. The governing statute is plain. It requires a clear majority of all votes cast at the election for the incorporation to succeed. Since that majority was not had, it follows that incorporation failed."

Thus, we see that each of the issues submitted had to have a majority of the votes cast to carry. The proposed Constitution and the three other issues submitted to the voters each had to receive a majority of the electors voting at the election to carry. The proposed Constitution did not have that majority and thus failed.

CONCLUSION

It is therefore the conclusion of the applicant that it would be torturing the language of Section 8 of Article XIX of the Constitution to interpret it in any other manner than to require a majority of the electors voting at the election which means that the proposed Constitution in this case did not receive the majority required for it to be adopted.

it did not receive one-half of 237,600 votes, and to construe that section any other way would be denying the plain meaning of the English language.

There is no question who is an elector voting at the election. Any person who receives a ballot and properly marks any portion thereof has a ballot which was voted at the election. Neither this Court nor any other Court should now attempt to speculate why certain people voted in a certain way. The fact that there were four issues on the ballot should make no difference to us. The voter becomes a voter when he voted one of those issues.

There is nothing in the Constitution which provides that when a special election is set for voting on a Constitution that only those voting on the particular Constitution and not on the side issues should be construed as electors.

This Court should follow the reasoning of the Michigan case. It is the better reasoning.

DATED this 12 day of July, 1972.

Respectfully submitted,

PAUL T. KELLER, PAUL F. REYNOLDS
CHARLES E. PETAJA, P. KEITH KELLER

By: Paul T. Keller

South Annex of the Power Block
Helena, Montana 59601

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum of Relator, WILLIAM F. CASHMORE, M.D., upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid, addressed to:

Joseph P. Monaghan
2218 Elm Street
Butte, Montana 59701

Hibbs, Sweeney, Colberg & Koessler
P.O. Box 1321
Billings, Montana 59101

Douglas Y. Freeman
Courthouse
Hardin, Montana 59034

Marshall G. Candee
P.O. Box 617
Libby, Montana 59923

A. W. Scribner
Power Block Bldg.
Helena, Montana 59601

Gerald J. Neely
2822 First Ave. North
Billings, Montana 59101

Jerome T. Loendorf
2225 11th Avenue
Helena, Montana 59601

C. W. Leaphart, Jr.
Montana Club Building
Helena, Montana 59601

Diana S. Dowling
519 N. Rodney
Helena, Montana 59601

D. Patrick McKittrick
1713 - 10 Ave. South
Great Falls, Montana 59401

Lawrence Eck
310 N. Higgins
Missoula, Montana 59801

Franklin S. Longan
Securities Buildng
Billings, Montana 59101

John Layne 3rd
1301 University Ave.
Helena, Montana 59601

Clayton R. Herron
P.O. Box 783
Helena, Montana 59601

Donald C. Robinson
Silver Bow Block
Butte, Montana 59801

William F. Meisburger
Courthouse
Forsyth, Montana 59327

Robert L. Kelleher
2108 Grand Ave.
Billings, Montana 59103

Robert L. Woodahl
Attorney General
Helena, Montana 59601

Calvin A. Calton
P.O. Box 1178
Billings, Montana 59101

Forrest H. Anderson
Governor of the State of Montana
Helena, Montana 59601

Morrow, Nash & Sedivy, P.C.
208 E. Main Street
Bozeman, Montana 59715

DATED this 12 day of July, 1972.

PAUL T. KELLER, PAUL F. REYNOLDS
CHARLES E. PETAJA, P. KEITH KELLER

By: Paul T. Keller
South Annex Power Block
Helena, Montana 59601
Attorneys for Relator, William F. Cashmore, M.D.