12309

IN THE SUPREME COURT

OF THE STATE OF MONTANA

No. 12309

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

Relators,

-vs-

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

Respondent.

BRIEF OF INTERVENORS LEO GRAYBILL, JR., JOHN TOOLE, BRUCE BROWN, DOROTHY ECK AND JEAN BOWMAN, AS INDIVIDUALS, TAXPAYERS, VOTERS AND OFFICERS OF THE CONSTITUTIONAL CONVENTION AND REPRESENTING THE DELEGATES TO THE CONSTITUTIONAL CONVENTION AS A CLASS

STATEMENT OF FACTS

The voters of the State of Montana, at the general election held on the 3rd day of November, 1970, voted to call a constitutional convention. Subsequent thereto, a convention was duly convened in accordance with the laws of the state of Montana (Chapter 296, Laws of 1971). The convention completed its work on a proposed constitution on March 24, 1972, and it was submitted to the voters of the state of Montana on June 6, 1972, for their ratification or rejection. The official canvass of the state of Montana indicated that 116,415 electors voted for the proposed constitution, and 113,883 electors voted against the proposed constitution. The official canvass further indicates that the "total number of electors voting" in

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the special election on the proposed constitution and the three alternative issues submitted on the same ballot was 237,600. However, the figure actually represents the total number of electors who are listed in the poll books. A copy of a letter of instructions from the Secretary of State to all County Clerks and Recorders so indicates. Subparagraphs (3) and (4) of that letter specifically instruct the various County Clerks and Recorders to enter the total number of electors who are listed on the poll books for the separate election on the proposed constitution on the front of the abstract book for that election. The blank on the front of the abstract books for entry of the figure of the total number of electors listed in the poll book is labeled "Number of Electors Voting _____." A copy of the Secretary of State's letter and the front page of the abstract book are attached hereto and labeled Exhibit A.

ARGUMENT

Relators, in their application, assume that the figure 237,600 represents the total number of electors voting in the constitutional election. Relators in their application fail to point out to this Court that the figure 237,600 is actually the total number of electors whose names were listed in the poll books. Thus the statement of the facts as contained in said application is incomplete and, as a result, misleading.

The figure 237,600 does not reflect the total number who "voted" in the manner the word "vote" has been defined by this Court, and is therefore meaningless when one attempts to determine the number who voted in the constitutional election. Relators must assume that the recording

of an elector's name in the poll book constitutes voting. However, under the procedures established for voting by the statutes of the state of Montana, the total of the names of electors recorded in the poll book will not necessarily equal the number of electors voting.

The process of voting entails the following:

(1) An elector must sign his name in the precinct register before being permitted to vote (Section 23-3610 (2), R.C.M. 1947).

(2) An election judge then stamps the words "official ballot" on the back of the ballot before delivering it to the elector (Section 23-3603(1) and (2), R.C.M. 1947).

(3) An election clerk enters the name of the elector and the number of the stub attached to the ballot given the elector on the poll lists (Section 23-3603(3), R.C.M. 1947).

(4) The elector must immediately retire to a voting booth on receipt of his ballot and prepare his ballot (Section 23-3606(1), R.C.M. 1947).

(5) If the ballot contains a constitutional amendment, the elector marks an X in the applicable square indicating his vote either for or against the amendment (Section 23-3606(3), R.C.M. 1947).

(6) The elector, after preparing and properly folding his ballot, returns it to an election judge, who shall announce the elector's name and the number on the stub of his ballot. The judge shall record the voter's name in the poll book. (Section 23-3606(5), R.C.M. 1947, and 23-3610(7).

(7) If the elector is entitled to vote and the number on the stub is the same as that entered in the poll

book, the judge shall receive the ballot, remove the stub and deposit the ballot and the stub in the appropriate boxes (Section 23-3606(6), R.C.M. 1947.

At this point in the voting process, it is clear that the ballot box may contain:

(a) ballots on which a choice has been properly expressed on all issues;

(b) ballots on which a choice has been properly expressed on some issues;

(c) ballots on which no choices have been expressed (it should be noted that Section 23-3605(11), R.C.M. 1947, requires blank ballots to be returned to the election judges, and Section 23-3606(9) requires prepared ballots to be returned to the election judges);

(d) ballots which are partially void;

(e) ballots which are wholly void.

When the polls are closed, the election judges must immediately canvass the vote (Section 23-4001, R.C.M. 1947). They must insure that the number of ballots corresponds with the number of names in the poll books (Section 23-4002, R.C.M. 1947). If they find the number of ballots exceeds the number of names in the poll books, they must destroy a number of ballots equal to the excess (Section 23-4002(6), R.C.M. 1947). However, if the number of names in the poll books exceeds the number of ballots, there is no statutory procedure for eliminating names from the poll books. If ballots are found to be void under Section 23-4002(4), R.C.M. 1947, they are not counted and there is no procedure for eliminating a corresponding number of names from the poll books. If, after the process of counting the votes has begun, ballots are rejected as provided in Section 23-4003(5), R.C.M. 1947, they are not

counted and, again, there is no procedure for eliminating a corresponding number of names from the poll books.

Thus the figure 237,600 given by Relators as the total number voting, but in fact being a count of the electors whose names are recorded in the poll books, cannot be assumed to be an accurate count of those who voted when an examination of the statutory procedure for voting shows that the poll books include the names of those who cast blank ballots and void ballots.

It has been assumed in the preceding sentence that voting is not the recording of an elector's name in a poll book. What constitutes voting in Montana?

VOTING IS AN AFFIRMATIVE ACT. IT IS A FORMAL EXPRESSION OF A WILL, PREFERENCE OR CHOICE FOR SOME PERSON OR FOR OR AGAINST A PROPOSED LAW

Voting was defined by this Court in Sawyer Stores v. Mitchell, 103 Mont. 148, 160, 62 P.(2d) 342, as follows: "A vote is a formal expression of a will, preference, wish or choice in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a person to fill a certain situation or office, or in passing laws, rules, regulations, . . ."

In State ex rel. Wolf v. Geurkink, 111 Mont. 417, 109 P.(2d) 1094, 133 A.L.R. 304, this Court described voting as an affirmative act. It stated:

> "Elections are held for the purpose of selecting persons to fill public office and to give the public an opportunity to express their choice in making the selection. Casting a ballot at such an election is an affirmative act, not a negative one. The provisions of our Constitution guaranteeing the citizenry the right to vote, as well as all statutory law enacted to make the exercise of that right available, clearly show that the exercise of the right must be by affirmative action." (Emphasis supplied.)

The Court further stated that a voter who casts a ballot which does not express a preference has not voted at all. It declared, at page 427, as follows:

> "It is our opinion that a voter at the polls, unless he votes for some person, is not voting at all. A ballot cast which does not express the preference of the voter for some person to fill the office is a nullity, cannot be counted and cannot be given any effect in determining the result of the election as to that office."

Voting is completed, not merely by marking the ballot, but by its delivery to the election official and deposit in the ballot box before the closing of the polls on election day. Maddox v. Brd. of State Canvassers, 116 Mont. 217, 223, 149 P.(2d) 112. And before a vote may be counted, it must plainly appear what the intention of the voter was. Peterson v. Billings, 109 Mont. 390, 393, 96 P.(2d) 922.

Section 23-3606, R.C.M. 1947, describes the method of voting. It states:

> "(1) On receipt of his ballot, the elector must immediately retire to one of the booths and prepare his ballot.
>
> ***
>
> "(3) If the ballot contains a constitutional amendment, or other question to be submitted to the vote of the people, he shall mark 'X' in the applicable square indicating his vote, either for or against the amendment or question." (Emphasis supplied.)

Based on the above decisions and statute, it is submitted that the recording of an elector's name in a poll book is not voting. Neither does the depositing of a blank ballot or invalid ballot in the ballot box constitute voting. Rather, when a constitutional question is presented, it is the clear expression of a preference either for or against the amendment.

THE PROPOSED CONSTITUTION OF 1972 WAS CORRECTLY PROCLAIMED AS ADOPTED BY A MAJORITY OF THE ELECTORS, EVEN IF IT IS ASSUMED THAT 237,600 ELECTORS CAST VALID BALLOTS VOTING ON AT LEAST ONE OF THE FOUR ISSUES IN THE CONSTITUTIONAL ELECTION

In the following discussion, it is assumed, for the purposes of argument only, that 237,600 electors cast valid ballots on at least one of the four issues in the constitutional election.

The last sentence of Article XIX, Section 8, of the Constitution of the state of Montana, provides as follows:

> "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."

Relators contend that because 237,600 electors cast ballots at the election, and of these only 116,415 electors voted to ratify the proposed constitution, the constitution was not "approved by a majority of the electors voting at the election," in spite of the fact that only 113,883 electors voted to reject the constitution. The total number of votes on the proposed constitution was 230,298; the total ballots cast at the election on all issues was 237,600, and the difference of 7,302 votes clearly represents voters who cast ballots at the election but did not vote on the primary issue of ratification or rejection of the proposed constitution. Thus, the real question for decision in this case is whether these 7,302 nonvoting electors should be counted in determining the required majority for approval of the constitution.

The answer to this paradoxical situation is found in

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our election laws and in the decisions of this and other courts. Section 23-4002(4), R.C.M. 1947, provides for the method of canvassing votes, and subsection (4) thereof provides that, "a ballot or a part of a ballot is void and shall not be counted if the elector's choice cannot be determined. If part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part."

If the results are analyzed in accordance with this legislative directive, it becomes clear that in counting the ballots the election judges, as the statute directs, counted only those votes where the elector's choice was plain, but did not count the ballots where the elector failed to express his intention. In other words, if an elector failed to vote for ratification or rejection of the proposed constitution, but did express his intention on the composition of the legislature, gambling or the death penalty, his vote on the constitutional issue was void and not counted, but it was counted on such part of the ballot where it was "sufficiently plain to gather the elector's intention." This accounts for the significant difference between the total ballots cast at the special election and the number of votes recorded for and against the proposed constitution, and reflects only the number of electors who failed to vote on that prime issue.

Under the Relators' contention, such portion of the ballots which the election laws declare void should be given the effect of negative votes. Such a contention is untenable. It would not only count as a negative vote a ballot in which the elector intentionally did not express a preference for or against the proposed constitution, but also counts as a negative vote the ballot of an elector

who attempted to vote for the proposed constitution but fouled his ballot on that issue, although he voted properly on one or more of the other issues. Relators' contention really is in opposition to basic democracy in that it proposes the fundamental law of this state be based on something other than an expression of the majority of those voting, as the word "voting" has been defined by this Court and the election laws of this state.

The statutes of this state clearly do not support Relators' contention that the phrase in Article XIX, Section 8, requiring that the proposed constitution be approved by a "majority of the electors voting at the election," means that it must be approved, not by a majority of those who vote for or against it, but by a majority of those who vote for or against the constitution, plus those electors who decline to vote for or against the proposed constitution but vote on some other issue in the election. Do the decisions of our Supreme Court support the Relators? Again, the answer is in the negative. The leading case is Tinkel v. Griffin, et al., 26 Mont. 426, 68 Pac. 859. In the Tinkel case this Court was called upon to interpret language in Article XIII, Section 5, of the present constitution, which is essentially identical to the language in Article XIX, Section 8, now under consideration. Article XIII, Section 5, provides in part as follows:

> "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." (Emphasis supplied.)

The Court interpreted the phrase "a majority of the electors thereof, voting at an election," as follows:

> "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.

* * *

"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.

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

This Court at that time recognized there were cases from other jurisdictions holding contrary to their

decision in Tinkel, but nevertheless adopted the fundamental principle that a majority of those expressing their opinion on an issue should prevail. This principle, the Court stated, gave effect to the clear intention of the Montana constitution. This should be emphasized, that the Court did not confine this decision to the section of the constitution in question, but specifically stated the principle advanced gave effect to the constitution. The very fact that the Court found this principle to be fundamental would by itself lead to the conclusion it should be applied throughout the constitution, even if the Court had not stated it to be expressive of the clear intent of our fundamental document.

> "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." Tinkel v. Griffin, et al., supra, page 432.

This Court reaffirmed its decision in Morse v. Granite County, 44 Mont. 78, 95, 119 Pac. 286, noting that the language employed by the constitutional convention of 1889 indicated that it had adopted the fundamental principle of Tinkel v. Griffin, et al., supra.

> "This conclusion was reached because the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in them to give expression of their views at the ballot box."

It should be pointed out that this Court, over the years, has never deviated from the decision of the Tinkel case. The reason, no doubt, is because the basic principle of majority rule, espoused in Tinkel, is a fundamental

tenet of democracy. It should also be noted that the general view in this country, as stated in 26 Am.Jur.(2d), Elections, Section 314, appears to support the Tinkel case. It is as follows:

> ". . . The general view is that a qualified voter who succeeds in getting his name on the poll list and a ballot in the ballot box is not a voter unless his ballot is such as is prescribed by law, and that blank, illegal, and unintelligible ballots should be rejected in computing the number of votes."

Having examined both the Montana statutes and the decisions of the Montana Supreme Court concerned with the question before this Court, and presuming that cases will be cited to this Court in other briefs from many of the other 49 states advancing theories contrary to the principle of the Tinkel, case presents the question as to which precedents, if any, should the Supreme Court of this state base a decision. Should it follow the principle of Tinkel and other Montana precedents or should it rely on the precedents from one or more of our sister states? Do the people of the state of Montana have any right to expect their Supreme Court to follow its previous decisions? Are there any existing guidelines for the Court to follow?

This Court appears to have already answered all the above questions. In the recent case of State ex rel. Peery v. District Court, 145 Mont. 287, 400 P.(2d) 648 (1965), it discussed the doctrine of stare decisis as it applies to the interpretation of a constitution, and stated:

> "As we said in State ex rel. Kain v. Fischl, 94 Mont. 92, 20 P.2d 1057:
>
> "'The general rule is that when the highest court of a state has construed a constitutional provision, the rule of stare decisis--that a question once deliberately examined and decided should be considered as settled--

> applies, unless it is demonstrably made to appear that the construction manifestly is wrong. Decisions construing the Constitution should be followed, in the absence of cogent reasons to the contrary, as it is of the utmost importance that our organic law be of certain meaning and fixed in interpretation. 7 R.C.L. 1002; Cooley's Constitutional Limitations (8th Ed.) 123.'
>
> "Then in State ex rel. Sparling v. Hitsman, 99 Mont. 521, 44 P.2d 747, this appears:
>
> "'We realize the force and the wisdom of the rule of stare decisis. We are not unmindful of the fact that principles of law should be positively and definitely settled in order that courts, lawyers, and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day, with the resultant disorders that of necessity must accrue from such changes. . . . The rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon the constitutional provision in the former decision is manifestly wrong. State ex rel. Kain v. Fischl, supra.'" (State ex rel. Peery v. Dist. Ct., supra, pages 310 and 311.)

The rule of stare decisis, as stated above, would require the Relators to establish to this Court that the fundamental principle set forth in the Tinkel case is manifestly wrong before the principle of that case can be overturned. The wisdom of the rule of stare decisis is self-evident. It permits the people of this state to commit themselves to established procedures of constitutional law, knowing they will not be changed without a compelling reason. It would permit holding an election under the constitution in accordance with the case law interpreting that constitution unless a compelling reason to change the law is advanced.

Assuming the Court finds a cogent reason to overturn the Tinkel case, should the effect of such decision be prospective only, or should it operate to defeat the

passage of the proposed constitution? This Court, in its opinion on a motion for rehearing in the case of Continental Supply Co. v. Abell, et al., 95 Mont. 148, 171, 24 P.(2d) 133, noted that a change in the judicial view of the law by a subsequent decision could not amount to more than a change in the law by legislation, and could act prospectively only. Although Continental Supply v. Abell, et al., supra, did not involve the interpretation of a constitutional provision, the logic and wisdom of that decision regarding the effect of a change in the law by judicial decision is certainly desirable. Again, when an election must be held or some other act of government performed under the provisions of a constitution, those who have carried out such governmental functions and citizens who have participated therein should not have the results voided if they complied with the existing law at the time of performance. Thus, if the Court in this case finds it necessary to deviate from the principle set forth in Tinkel, the application of such decision should be prospective only and not change the result of the June 6, 1972, constitutional election.

Although we believe the issue presented is controlled by the Montana decision previously discussed, we submit also for the Court's consideration the following discussion of decisions from other states because they support Tinkel v. Griffin, et al., and the fundamental principle stated therein as basic to democratic government.

In State v. Blaisdell (.N.D.), 119 N.W. Rep., at page 364, the Supreme Court of North Dakota clearly stated this fundamental principle or doctrine of American elections, saying:

"According to the American doctrine the

> majority is entitled to rule--the preference of a majority on any question is expressed by the vote of those who actually vote, unless a different intention is clearly expressed. The choice of the voter is expressed by the vote he actually casts for or against a proposition. To adopt the relator's theory in this proceeding would be to give as great weight to a vote which was not cast as to one which was cast, and in effect would be to count the electors who voted for governor, and did not vote on the county division question, as voting against the division. It ought to require the plainest language, and that it be so expressed as to leave absolutely no doubt in the mind of the intelligent reader of its meaning to justify a court in holding that no vote counts precisely the same as though the vote had been cast against the proposition. The correct principle applicable in cases where the meaning is ambiguous, or is not so expressed as to clearly indicate that an elector who does not vote shall be held as voting 'No,' is that electors who do not participate in an election, or are not interested enough in public affairs to attend the polls and cast their vote and express a choice, acquiesce in the result of the votes cast by those who do vote, whatever such result may be. It is equally plain that if an elector enters the booth and votes for some candidates and not for others, or votes for all candidates, but fails to express his choice on a question submitted he delegates to those who do vote his rights as an elector and acquiesces in the result, be it one way or the other. See Marion v. Winkley, 29 Kan. 36; Walker v. Oswald, 68 Md. 146, 11 Atl. 711; Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859; Miller v. School Dist. 5 Wyo. 217, 39 Pac. 879; People v. Chute, 50 N.Y. 451, 10 Am. Rep. 508; Montgomery Co. Fiscal Court v. Trimble, 104 Ky. 629, 47 S.W. 773, 42 L.R.A. 738; Cass County v. Johnston, 95 U.S. 360, 24 L.Ed. 416. Also 9 Notes on United States Reports, page 269, and cases there cited." (Emp. sup.)

In Green v. State Board of Canvass, (Idaho), 47 Pac. 262, the Supreme Court of Idaho considered whether the women's suffrage amendment had been adopted under a constitutional provision requiring approval by a "majority of all of the electors voting at said election." The court put the facts, the issue and its answer as follows:

"In Senate Joint Resolution No. 2, approved January 21, 1895, the same legislature provided that the following question shall be submitted to the electors of the state; 'Shall section 2 of article 6 of the constitution be so amended as to extend to women the equal right of suffrage?' In accordance with the constitution and the statute, the question was submitted with words 'Yes' and 'No' printed in separate spaces, with a circle of the required size opposite each, in one of which each voter who desired to express an opinion on the question was required to make a cross. Why should the constitution and two different legislatures provide that those who desired to vote against the proposition should make a cross opposite the word 'No' if these votes were not to be counted, and why should they be counted if all those who did not vote at all were to be counted as having voted 'No'? There is no answer. The constitution and the statutes say: 'All you electors who believe that equal right of suffrage should be extended to women stand up, and be counted.' 12,126 voters stand up, and are counted in the affirmative. The constitution and statutes say with equal distinctness: 'All you qualified electors who believe that the equal right of suffrage should not be extended to women stand up and be counted.' 6,282 stand up and are counted. 18,408 votes in all cast upon the question. But, say the defendants, there were about 10,000 qualified voters in the state who did not vote at all on the question, that should be counted as having voted 'No.' Why should they be counted in the negative? The constitution does not require it, neither do the statutes. These electors either have no opinion on the subject, or they have none that they care to express. Why should they be counted as having voted in the negative, when they did not vote at all on the subject? There is absolutely no reason, unless the constitution or the statutes require it, and we have seen they do not."

In Spickermon v. Goddard (Indiana), 107 N.E.(2d), the question arose as to whether in a local option election in the city of Muncie, a majority of the legal votes cast favored prohibition of the sale of intoxicating liquors in the city. The voting was on voting machines and 3,393 voted "Yes" and 2,931 voted "No." The names of 6,821 voters were entered on the poll list, making a difference

of 497 between the poll list number and the number of votes cast.

The court first concluded "the only rational inference to be drawn from the evidence here is that 497 voters intentionally refrained from voting, or through ignorance of the working of the machines failed to so adjust the voting key as to register their intentions."

The appellants contended that in determining the vote basis, the 497 "unaccounted" voters must be considered, in which event the 3,393 "Yes" votes did not constitute a majority.

The Indiana courts rejected the appellants' contention, holding:

> "In our judgment, by the greater weight of American authority, under statutes of the character indicated, blank and illegal ballots must be rejected in fixing the basis."

The Court added significantly:

> "Had the election been held by paper ballots instead of machines, it is manifest that a blank ballot cast could not be deemed a legal vote. If the voter honestly, but through ignorance or carelessness, failed to mark his ballot in substantial compliance with the provisions of section 4 of the act, the ballot deposited could not constitute a legal vote. And so with voting on the machine. One who, through ignorance or carelessness, failed to so adjust the voting key as to register his choice, cannot be held to have cast a legal vote."

Other cases also holding that a blank ballot may not be counted for any purpose are Dickinson County Memorial Hospital Corp. v. Johnson (Iowa), 80 N.W.(2d) 756, where the court held:

> "Obviously, a blank ballot is not a vote for or against a proposition and should not be counted on either side. Nor may a ballot be counted which is denied recognition because it is found to be invalid as not properly marked, or for some other

reason."

In Kellams v. Compton (Mo.), 206 S.W.(2d) 498, 499, 4 A.L.R.(2d) 612, 614, the Supreme Court of Kentucky said:

> "Votes cast on the proposition and voting thereon are to be construed in their ordinary and usual sense and they mean 'expressing the will, mind or preference; casting or giving a vote.' They do not include votes or ballots that do not cast a vote on the proposition. Illegal or void votes may not be counted, either for or against the proposition submitted, even though they may have been received, placed in the ballot box and constitute some of the total number of ballots."

In Wooley v. Sterrett (Tex. Civ.App.), the Supreme Court of Texas succinctly said:

> "We do not believe that it is, or should be, the law in Texas that blank ballots, or ballots that do not legally register the will of the voter, should be computed in determining a majority."

In the brief of Amicus Curiae, Joseph P. Monaghan, supporting Relators' position in the case at bar, much reliance is placed on the early decision of the Indiana court in the case of In re Denny, 59 N.E. 359, which held that approval of a constitutional amendment required a majority vote of all electors of the state. But, in the subsequent case of In re Todd (Ind.), 193 N.E.(2d) 875, the same court, in an exhaustive and critical analysis of the majority opinion in In re Denny, supra, refused to follow it and concluded, "Our conclusion is that under the submission provision of sections 1 and 2 a proposed amendment becomes a part of the Constitution if it receives a majority of the votes cast for and against its adoption, and that is true whether such amendment is submitted at a special election or at the time of a general election."

Referring to the dissenting opinion of In re Denny,

the court in In re Todd adopted it, saying:

> "We believe the following general observations of Jordan, J. are sound and applicable to the construction of article 16: 'It is a fundamental principle under our government, as the authorities assert, which must have been understood by the framers and ratifiers of our constitution, that a majority of those who exercise the right of suffrage shall control in its affairs. It must be further presumed that they also knew and understood that the usual and ordinary mode of ascertaining or evidencing such majority is by giving all legally entitled to vote on a proposition an opportunity to do so, and then counting such persons as choose to exercise the right of suffrage by casting an affirmative and negative vote on the given proposition; the difference between the two votes constituting the majority essential to its adoption or approval. I may also indulge in the presumption that the men who framed the constitution, and the people who ratified their work, must have understood that the great body of electors of the state is composed of a changing, uncertain, or indefinite number, which it is difficult at any given time to actually ascertain. They also presumably knew that there are thousands comprising that body who, by reason or religious or conscientious views or indifference, or from other reasons, decline, when the opportunity is presented, to exercise the right of suffrage; that, while many do not vote at all, others will vote only for some particular proposition or officer, and will fail or decline to vote for others; and that therefore the most feasible and simplest method was the one universally recognized in the eye of the law long before the adoption of our constitution, namely, to give all entitled to vote an opportunity to exercise this privilege, and then combine or aggregate the whole number of votes upon a given proposition or measure submitted to the electors of a district or locality, -- such combined vote to be taken or accepted upon any given proposition, for all practicable purposes, as comprising the whole number of the electors of the particular district or locality. This method of measuring the whole number is the one, as the authorities disclose, generally adopted, except where a different one is expressly prescribed. In such cases the nonvoting must be counted as willing to be bound by the action of the majority who did vote upon the particular proposition, or, in other words, they may be considered as tacitly assenting to the result of those voting; and in this manner

or by this method all of the electors of the district or state, as the case may be, are taken into account."

VARYING LANGUAGE IS USED THROUGHOUT THE CONSTITUTION REGARDING ELECTIONS TO EXPRESS THE SAME PRINCIPLE

The attempt may be made to cite the various provisions of the 1889 Constitution relative to submission of issues to the electorate to show a different intent must follow from the use of different language. This approach is of questionable validity unless the language employed is measured by the evident purpose sought to be achieved. We all know that the same idea can be expressed in varying ways and it is seldom that man uses identical language to express the same idea. However, we submit that an analysis of various provisions of the consitittion demonstrates a public policy that a majority of those voting (expressing a position pro or con) control the resolution of issues. An analysis, section by section, follows:

Article X, Section 2, on the permanent location of the seat of government, provides as follows:

"Sec. 2. At the general election in the year one thousand eight hundred and ninety-two, the question of permanent location of the seat of government is hereby provided to be submitted to the qualified electors of the state, and the majority of all the votes upon said question shall determine the location thereof. In case there shall be no choice of location at said election, the question of choice between the two places for which the highest number of votes shall have been cast shall be, and is hereby, submitted in like manner to the qualified electors at the next general election thereafter; provided, that until the seat of government shall have been permanently located the temporary seat of government shall be and remain at the city of Helena."

Here it can be seen that the framers contemplated

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"a majority of all votes upon the question" was required. So, if more than two locations were submitted, a plurality but less than a majority would not settle the issue, but rather, a run-off between the two highest locations would be required. Care was used to delineate the "majority" required, but it is to be noted that it was a majority of all the "votes," and the nonvoters were not to be considered.

Article X, Section 3, regarding the change of the seat of government, once established, provides:

> "Sec. 3. When the seat of government shall have been located as herein provided the location thereof shall not thereafter be changed, except by a vote of two-thirds of all the qualified electors of the state voting on that question at a general election at which the question of the location of the seat of government shall have been submitted by the legislative assembly."

Here again we see the reference to the "qualified electors of the state voting on that question." However, a greater majority than a simple one was required, obviously to prevent harassing elections by contending cities for the honor and other emoluments of being the capitol site. No doubt it was contemplated that once a decision on a capitol site was reached, that it would not be easily changed, but nonetheless the contingency was provided for if a two-thirds majority desired a change. Significantly, the requirement is two-thirds of those "voting." Again, the nonvoters are not counted.

Article XII, Section 9, relative to when the two mill property levy for state purposes may be raised, provided:

> "Sec. 9. The rate of taxation on real and personal property for state purposes, except as hereinafter provided, shall never exceed two and one-half miles on each dollar of valuation; and whenever the taxable property of the state shall amount to six hundred million dollars ($600,000,000.00) the rate shall never exceed two (2) mills on each

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> dollar of valuation, unless the proposition to increase such rate, specifying the rate proposed and the time during which the rate shall be levied shall have been submitted to the people at the general election and shall have received a majority of all votes cast for and against it at such election; provided, that in addition to the levy for state purposes above provided for, a special levy in addition may be made on live stock for the purpose of paying bounties on wild animals and for stock inspection, protection and indemnity purposes, as may be prescribed by law, and such special levy shall be made and levied annually in amount not exceeding four mills on the dollar by the state board of equalization, as may be provided by law."

Here we see the requirement of "a majority of all votes cast for and against it." Under this section a single issue was to be submitted specifying the rate and time during which the rate was to be levied. Again we see the public policy that those voting (expressing an opinion for or against) were to be counted, not the non-voters who expressed no opinion.

Article XIII, Section 2, relative to increasing the state debt over $100,000, provided:

> "Sec. 2. The legislative assembly shall not in any manner create any debt except by law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof; but no debt of liability shall be created which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of one hundred thousand dollars ($100,000) except in case of war, to repel invasion or suppress insurrection, unless the law authorizing the same shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it at such election."

Again we see it is a majority of the votes cast for and against the issue. Again we see the nonvoters are

not counted. The consistent public policy that the majority of those who take a position control the resolution of issue is reiterated.

Article XIII, Section 5, relative to incurring county debt in excess of $10,000, provided:

> "Sec. 5. No county shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five (5) per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such county shall be void. 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."

Here we have the requirement of "the approval of a majority of the electors thereof voting at an election to be provided by law." The word "thereof" refers to the electors of the county involved. This language is identical to the section under consideration in this case, Article XIX, Section 8. As previously noted in this brief, this Court has construed this language favorable to the respondent's position (Tinkel v. Griffin, supra). We simply note here the same public policy that those voting (expressing an opinion on the question at issue) control, not the nonvoters.

Article XVI, Section 2, regarding moving a county seat, provided:

> "Sec. 2. The legislative assembly shall have no power to remove the county seat of any county, but the same shall be provided for by general law; and no county seat shall be removed unless a majority of the qualified electors of the county, at a general election on a proposition to remove the county seat, shall vote therefor; but no such proposition shall be

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submitted oftener than once in four years."

Here we see the requirement "unless a majority of the qualified electors of the county * * * shall vote therefore; * * *" Here the argument could be made that the majority is of the qualified electors (those registered) and not a majority of those voting at the election if the language were to be given a literal interpretation. In the only case involving this section, Poe v. Sheridan County, 52 Mont. 279, 157 Pac. 185, this issue was not raised. The statement of the facts in the case indicate that a simple majority of those voting was assumed by the Court and the parties to be controlling, as Plentywood prevailed over Medicine Lake by a "majority of 46 votes." We submit that the reasonable common sense construction of this section would also be a simple majority of those voting was contemplated by the framers in view of the consistent public policy enunciated in the other sections. The word "qualified" no doubt was used to denote who could vote and not to require an abnormal majority. To hold otherwise is to disregard the injunction that "the word killeth but the spirit giveth life." Yet the Relators herein seem bent on that course.

Article XVI, Section 8, regarding the abandonment and consolidation of counties, provides:

> "Sec. 8. Any county or counties in existence on the first day of January, 1935, under the laws of the state of Montana or which may thereafter be created or established thereunder shall not be abandoned, abolished and/or consolidated either in whole or in part or at all with any other county or counties except by a majority vote of the duly qualified electors in each county proposed to be abandoned, abolished and/or consolidated with any other county or counties expressed at a general or special election held under the laws of said state."

Here the language used is a "majority vote of the duly qualified electors." Again, a literal emphasis on the word "qualified" could lead to the absurd requirement of a super majority, but we submit such is not the necessary or sensible construction that should be placed on the language. In the absence of some controlling public policy requiring the greater majority, such intention should not be imputed, especially where the framers increased the numerical majority of two-thirds when a greater majority was thought desirable in the case of removing an established capitol site.

Article XVI, Section 7, an amendment to the original constitution, regarding changing forms of government for counties and cities, provides:

> "Sec. 7. The legislative assembly may, by general or special law, provide any plan, kind, manner or form of municipal government for counties, or counties and cities and towns, or cities and towns, and whenever deemed necessary or advisable, may abolish city or town government and unite, consolidate or merge cities and towns and county under one municipal government, and any limitations in this constitution notwithstanding, may designate the name, fix and prescribe the number, designation, terms, qualifications, method of appointment, election or removal of the officers thereof, define their duties and fix penalties for the biolation thereof, and fix and define boundaries of the territory so governed, and may provide for the discontinuance of such form of government when deemed advisable; provided, however, that no form of government permitted in this section shall be adopted or discontinued until after it is submitted to the qualified electors in the territory affected and by them approved."

This section uses loose language in that it requires submission to the qualified electors and by them approved. No mention is made of the word "majority." Again the word "qualified" is used. Surely the section means approved by a majority of those voting. Any other

construction would be absurd. No method has been found to compel, nor has any election ever been held, where all the qualified electors actually voted. What public policy is served, other than to subvert the function of a free democratic society, by assuming the nonvoters are "no" voters, when the opportunity is afforded to register that "no" vote and it is not exercised?

Article XIX, Section 9, regarding the submission by the legislature of constitutional amendments, provided:

> "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.

Here we have the requirement of a majority of those voting thereon. Again, only a majority of those voting on the issue is required and nonvoters are not counted.

Finally, Article XIX, Section 8, when analyzed carefully, its intent is consistent with the other provisions of the constitution dealing with elections and examined above:

> "Sec. 8 . . . such revisions, alterations or amendments . . . shall be submitted to the electors for their ratification or

> rejection at an election appointed by the convention . . .; and unless . . . approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect." (Emphasis supplied.)

The words "at the election" refer back to the words "at an election appointed by the convention." They describe when the elector votes. If the drafters intended an extra majority, it appears they would have specifically required it, as they did in Article X, Section 2, by requiring a vote of two-thirds of the qualified voters, or as they did in Article XIX, Section 8, itself, by requiring a vote of two-thirds of the members of each house of the legislature to submit the question of whether there shall be a constitutional convention.

If the drafters of our present constitution really intended the construction argued for by Relators, then a convention which submitted major and complete revisions to the constitution in one package could obtain passage by a mere majority, and a convention which submitted two or more minor amendments, and a number of voters voted on some but not all, such minor amendments would have to pass by an extra majority. Certainly such results were not intended. Rather, if the drafters of our fundamental law had intended an extra majority to pass revisions submitted by a convention, they would have used the words "three-fifths," two-thirds," three-fourths," or some other definite and precise language. Such language is used in all sections of the constitution which require an extra majority vote.

Why would the drafters assign a negative vote to a nonvoter in this section but in no other section of the constitution?

Perhaps the drafters anticipated that any revisions by a convention would be submitted as the original constitution was submitted, namely, in one package, and therefore only contemplated approval of a single issue by a majority of those voting at the election. However, in 42nd Leg. Assembly v. Lennon, 196 Mont. 416, 481 P.(2d) 330, this Court held that the convention need not submit its proposals in one package.

We think it more likely that the drafters contemplated that more than one revision would be submitted for approval or rejection because they used the plural "revisions, alterations or amendments." Yet they must also have contemplated that not all the proposed revisions might be approved because they provided in the singular that the revision, the alteration, the amendment which received approval of a majority of those voting at the election would become part of the fundamental law. Is this not a logical, gramatical, common sense construction of Article XIX, Section 8?

Why put special emphasis on the words "at the election," so as to require an extraordinary majority? These words clearly refer only to when the voters would express their approval or rejection, namely, at the election provided for by the convention. Would anyone reading this section aloud naturally inflect his voice when he came to the words, "voting at the election"? Only if he was a poor reader, we submit.

Is it not more plausible to impute to the framers the fundamental belief on which our democratic institutions are founded, that the majority rules? Why not impute to them the belief that if experience dictates today's majority is in error, tomorrow's majority will

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change these errors. Providing for the process of revision itself and the method for its accomplishment manifests their belief that revision of their handiwork might be desirable in the future.

The narrowness of the majority can be interpreted as less than overwhelming support for the new constitution. Yet, given the propensity of all of us to be negative, realizing the virtual mathematical impossibility of unanimity and the complexity of constitutional law, it is an amazing credit to the majority of those who voted on the issue that they were willing to chart a new course and attempt different methods of solving old and new problems.

Should this majority be denied by playing on words? Should those who do not express their preference be counted as negative voters? If such were the law of the land, neither Presidents Kennedy nor Nixon, in recent times, would have been elected. Yet the nation accepts the results of narrow elections and goes on. This is the genius of the American system of government.

In passing, we observe that in the official canvass 238,215 were reported to have voted in the primary election. Yet only 224,098 voted for the various candidates for governor and only 209,796 voted for the various candidates for U.S. Senator. Thus, we have a graphic illustration, if one is needed, to prove the obvious, that the vagaries of the voters are such that for some reason not all voters vote on every issue. Yet all elections are deemed won by the person receiving the highest number of votes. The nonvoters are not arbitrarily assigned to an incumbent. Such a rule of law would bring on revolution. Why, therefore, should nonvoters be arbitrarily deemed to have voted "no" when the question submitted is an issue

not a choice of candidates? The public policy underlying both situations should be the same, and the burden should be on those who urge the contrary to show that there is some reasonable public policy to thwart the expressed will of the majority.

Finally we note, Congress, by Section 8 of the Enabling Act, required approval of our present constitution by a majority vote for and against the proposed constitution, and approval of any article or proposition submitted separately by a majority voting for and against such article or proposition.

THE COUNTING OF THOSE WHO FAIL TO VOTE ON AN ISSUE IN AN ELECTION AS HAVING VOTED NEGATIVELY ON THAT ISSUE VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The right to vote is now, and always has been, fundamental. It is a right that cannot be denied or diluted. The right to vote freely is of the essence of a democratic society. Any restriction on that right strikes at the heart of representative government. The right to vote can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting free exercise of suffrage (Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.(2d) 506, 523, 84 S.C. 1362). Relators' position would allow those voting against the proposed constitution to add to their total all persons who participated in the constitutional election but chose not to vote for or against the proposed constitution. They would express a negative preference for those who specifically chose to express no preference. By adding to the total vote against the constitution the total of all nonvoters who participated in the election, a person's vote who voted for the constitution

is no longer equal to the vote of a person who voted against it.

In Hunter v. Erickson, 393 U.S. 385, at page 393, the court stated that "the state may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." This would appear to be especially true when dealing with fundamental law. Is a democratic government where fundamental law is determined by other than a majority of those expressing a preference for that law really a democratic government?

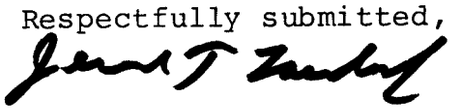
The above cited federal cases are recent and are based on the equal protection clause of the Fourteenth Amendment. It is interesting to observe that our Supreme Court, prior to these federal decision, had discussed approvingly the idea that an elector's vote counted just "one" and it could only be offset by the vote of another elector, and his vote counted just "one." The court in that case, in discussing the purpose of elections, went on to say:

> "And all through the provisions of our Code for the election of public officers the only kind of votes that are spoken of are votes cast for some person.
>
> "And this court has held that the only way in which an elector may have his vote counted is by voting for someone.
>
> "In a Minnesota case the court, construing the provision of the Constitution of that State, which is similar to ours, said: 'When the Constitution was framed, and as used in it, the word "vote" meant a choice for a candidate by one constitutionally qualified to exercise a choice.' And further: 'The quotations made from the different cases are not chance expressions. They are indicative of the idea, which permeates all legal thought, that when a voter votes for the candidate of his choice,

> his vote must be counted one, and it cannot be defeated or its effect lessened, except by the vote of another elector voting for one.' (Brown v. Smallwood, 130 Minn. 492, 153 N.W. 953, 956, 957, Ann. Cas. 1917C, 474, L.R.A. 1916B, 931.)" (Emphasis supplied. State ex rel. Wolff, et al., supra, page 427.

Although the Montana Court did not mention the Fourteenth Amendment, the language quoted indicates the Court's concern was one for fundamental fairness, and this is really what the equal protection clause is all about. We submit that this Court need only consider its own decision (State ex rel. Geurkink, et al., supra) in order to reject the proposition that nonvoters be counted in determining election results.

Respectfully submitted,



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CERTIFICATE OF MAILING

I, JEROME T. LOENDORF, one of the attorneys for the Intervenors, Leo Graybill, Jr., et al., in the above entitled matter, hereby certify that on this 13th day of July, 1972, I served the foregoing BRIEF OF INTERVENORS, LEO GRAYBILL, JR., ET AL., upon all parties of record, by depositing a full, true and correct copy thereof in the United States mail, first class postage prepaid, addressed to their attorneys of record at their respective addresses.

/s/ Jerome T. Loendorf

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