12309

NO. [redacted]

IN THE SUPREME COURT OF THE STATE OF MONTANA

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

Petitioner,

-vs-

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

Respondent.

BRIEF OF AMICUS CURIAE

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STATE OF MONTANA

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BRIEF OF AMICUS CURIAE

MONTANA FARMERS UNION

INTRODUCTION

The purpose of the matter at bar is to determine whether the people of Montana have rejected or approved a new Constitution. The question submitted to this Court is whether a, "* * * majority of the electors voting at the election * * *" approved of the new Constitution. Article XIX, Section 8, Montana Constitution, 1889. Your Amicus Curiae, Montana Farmers Union, respectfully submits that the answer to this question must be "Yes". The Constitution has been approved by a majority of the electors voting at the election.

No question of like importance, of such breadth and magnitude, has ever been submitted to this Court in its existence. If the question is decided in the affirmative, the State of Montana shall finally be streamlined to meet the needs of the Twentieth Century rather than be saddled with a document of a previous era. The issue demands careful deliberation and considerate judgment.

The 1889 Constitution must be viewed in the context in which it was written: the great upheaval following the Civil War; the emergence of a new State and all the attendant social pressures brought on by the increased migration. The new Constitution deserves a scrutiny which is as fair: Modern problems demand modern techniques for their solutions.

We all know of the difficulty our Legislature has in coping with these modern problems, being hampered by a document that foresaw neither the scope nor the variety of issues of nearly a century later. What Montana needs is not necessarily more law, but more fundamental change.

The reasons that the Montana Farmers Union supports this new Constitution have been ably expressed by its President, Clyde Jarvis, in a letter dated May 15, 1972, to Montana Farmers Union members, a copy of which is attached hereto as Exhibit "A" and by reference incorporated herein.

ARGUMENT

The fundamental attack on the new Constitution by its opponents hinges on a technical and erroneous interpretation of the will of the people. Their interpretation is tantamount to supplanting their own desires on the proposition

for the feelings of those people who apparently abstained from voicing a preference between the old and the new Constitution. The opponents of the new Constitution would weight their own position - ex post facto - by telling this Court, and the people of this State, what the 7,000 or more abstainers really meant while in the privacy of the ballot booth.

Opponents of the new Constitution would have this Court believe that Article XIX, Section 8, Montana Constitution, means something other than " * * *a majority of the electors voting upon the proposition." They would emphasize a strict-letter interpretation of that provision which would be narrow in scope and uncertain in nature. In order to support their view, the opponents of the new Constitution would advocate that Article XIX, Section 8, means a majority of ALL the electors voting at the election, whether or not they cast a valid ballot on the proposition. We suggest that such an interpretation and amendment to Article XIX, Section 8, are neither what the Constitutional Fathers in 1889 desired or intended. Such interpretation would utterly defeat the aims and objectives of good government.

It has been traditionally held that he who is silent is considered as assenting, when his interest is at stake. Qui tacet consentire videtur, ubi tractatur de ejus commodo. (Black's Law Dictionary, 4th Edition)

However, these opponents contend that the electors who for some reason did not cast a vote for or against the Constitution must now be considered in determining the fate of the doctrine. And the emphasis they would urge in this regard is that "He who did not vote must be construed as voting against the proposition."

To this we say "No." Why should these electors be counted as having voted in the negative? The 1889 Constitution does not require it. These electors must be considered either to have no opinion on the subject or to have none which they care to express. Why should they be counted as having voted in the negative?

Some 7,000 or more electors would seem to have been entirely indifferent upon the question of the adoption of the Constitution, even though prior to the election much information was available, publicized and disseminated, advising them of the importance of the question. Should this indifference be taken as conclusive of their opposition to the new Constitution? Upon what basis can this honestly be claimed? Is it reasonable to say that in a matter about which they manifested such indifference, their silence should be taken as a repudiation? We think not. Rather, it is more reasonable that their silence, if to be counted at all, should be taken as an assent. Green v. State Board of Canvassers, (Ida.) 47 Pac. 259 (1896).

It is a fundamental tenet of democracy that laws are enacted and Constitutions framed by those people, and those people only, who actually vote. Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859 (1902); Morse v. Granite County, 44 Mont. 78, 119 Pac. 286 (1911).

In reviewing and researching the issue as it applied to other jurisdictions, it is clear that this Court will be inundated today with numerous citations on the subject. There will be authority for the proposition and, of course, there will be

those cases against the proposition. We contend that the touchstone of this Court's deliberations should be the fundamental policy and philosophy surrounding the issue. And that policy has been enunciated by this Court in Martien v. Porter, 68 Mont. 450, 219 Pac. 817 (1923). The question should be resolved in the context of not whether it is possible to condemn the new Constitution, but whether it is possible to uphold that Constitution. The Court, in the Martien case, supra, ruling on the validity of a constitutional amendment, clearly stated that the presumption is in favor of constitutionality, and the burden of proof is on the one asserting it is unconstitutional. Consequently, the burden must fail unless it appears beyond a reasonable doubt that the document has not been constitutionally adopted.

SUMMARY

Article XIX, Section 8 of the old Constitution, should not be interpreted to mean that a majority of ALL the electors must pass on the issue; rather, that provision demands only a majority of those actually voting on the issue. Those who do not vote upon the question either assent to the will of the majority who do vote on the question, or they manifest either having no opinion on the subject or none which they care to express. Not having voted on either side of the issue, at the very least these electors should not be counted on either side.

It is fundamental and axiomatic that those who seek an extraordinary writ from this Court must disclose that they are clearly entitled to such a writ.

The opponents of the new Constitution have not shown that the Constitution did not receive a vote equal to a majority of the electors voting at the election. Having so failed to meet this burden, the relief asked for must fail.

The interpretation Amicus Curiae gives to this question is an endorsement for the need of a simple and understandable application of Article XIX, Section 8, Montana Constitution of 1889, to the question at bar. This interpretation will assure accuracy and certainty. It gives to those electors who have taken the initiative and their responsibility at heart and who have exercised their franchise, the right and the power of determining the destiny of Montana.

For the foregoing reasons, it is respectfully submitted that the proposed Constitution was adopted by the people of Montana, and the ruling of this Court should uphold that position.

Dated This 24 Day of July, 1972.

Respectfully submitted,

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CERTIFICATE OF MAILING

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