No. 12309

12309

IN THE SUPREME COURT

of the

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.

AMICUS CURIAE BRIEF

of

MONTANA STUDENT PRESIDENTS' ASSOCIATION

Submitted by:

Laurence Eck
Ronald B. MacDonald
310 N. Higgins, P. O. Box 1281
Missoula, Montana 59801

Filed: July ____, 1972

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Clerk

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ARGUMENT

The 1969 Montana Legislature recognized the need for updating our 1889 Constitution and placed the question of a Constitutional Convention on the November 1970 election ballot. The people of Montana concurred in this need, and the issue was passed by an overwhelming majority of 133,482 to 71,643. The 1971 Legislature then passed the enabling Act establishing the Constitutional Convention and 100 delegates were elected on November 7, 1971. It is clear that both the Legislature and the people of this state recognize the many deficiencies in the 1889 Constitution and the need for a new document to meet the demands of a modern Montana.

The Montana Student Presidents Association has unanimously resolved that "the Montana Constitution framed in 1889 impairs effective state and local government; that there was need for substantial revision and improvement of the Montana Constitution; and that the changes needed in the Montana Constitution could not be accomplished adequately through the present amendment process". After studying the proposed Constitution, the people of Montana voted on the new document in the June 6, 1972 special election with 116,415 voting for the approval thereof and 113,883 voting against.

Eric Hoffer, in his treatise The Ordeal of Change, predicted this action when he stated:

> "It is my impression that no one really likes the new. We are afraid of it. It is not only as Dostoyevsky put it that 'taking a new step, uttering a new word is what people fear most.' Even in slight things the experience of the new is rarely without some stirring of foreboding."

The question before this court is whether the proposed Constitution was "approved by a majority of the electors voting at the election" as required by Section 8, Article XIX of the present Montana Constitution. It is undisputed that more electors voted in favor of the new document than against it. The Relators argue, however, that the official figures of the State Board of Canvassers show that 237,688 electors voted at the election on June 6, 1972, and, because only 116,415 electors voted in favor of the Constitution, the new document failed to receive the approval required in Article XIX, Section 8, of the 1889 Constitution.

It is submitted that the Relators' contention is untenable either on the grounds of existing case authority or principles of sound logic. As judicial decisions in other states of the Union constitute secondary authority, this court should first turn to precedents in Montana.

Article XIII, Section 5, of the 1889 Montana Constitution contains legally identical language to that at issue in the present case. The additional word "thereof" found in that

section is of no interpretative significance. The Montana Supreme Court in construction of that language in Tinkle v. Griffin, 26 Mont. 426, 68 Pac. 859, 861, decided in 1902, only 12 years after the adoption of the Constitution, examines the 1889 document for its interpretation of the same language dealing with bond issues and in reviewing the drafters' intent, the Court stated:

> "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 'the majority of the electors thereon 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 on any other issue at the same or some other time."

This was affirmed in Morse v. Granite County, 44 Mont. 78, 119 Pac. 286, 291, which stated:

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

Prior decisions of this Court also support the adoption of the new Constitution in holding that it is a majority of those who express their opinions at the election who determine its result and that those who do not feel qualified should not be the ones to determine its outcome. In State ex rel Wolff v. Guerkirk, 111 Mont. 417, 427, 109 P.2d 1094, the Montana Supreme Court states:

> "It is our opinion that a voter at the polls, unless he vote for some person (or on some issue), is not voting at all. The ballot cast, which does not express the preference of the voter for some person (or on some issue) to the office is a nullity, can not be counted and can not be given any effect in determining the result of the election as to that office (or issue)." (Parentheses added)

This reasoning is in keeping with the admonition of Theodore Roosevelt, as given when he spoke to the framers of a new Ohio Constitution in 1912, wherein he stated:

> "We have no higher duty than to promote the efficiency of the individual."

Further in that speech, Roosevelt stated:

> "I no less emphatically protest against any theory that would make the constitution a means of thwarting instead of securing the absolute right of the people to rule themselves and to provide for their social and industrial well being."

The Montana Student Presidents Association feels that the sound reasoning expressed in the Tinkle case should

control an issue of this importance to all of the people of Montana. In that case, it is stated:

> "It is the theory of our Government that those electors control public affairs who take a sufficient interest therein to give expression to those views. Those who refrain from such expression are deemed to yield acquiescence." Tinkle at 431.

In favorably citing a Kentucky case, the Court continued:

> "It has not been a 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 the 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 voters who are silent and expressed 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."

Thus holding, the Montana Supreme Court adopted the rule that a majority of those electors voting meant a majority of those who express an opinion and thus support the adoption of the new Constitution. It should be emphasized that the language interpreted in these cases was legally in point with that at issue in the present case. We submit that this

primary authority from the highest court of Montana should be followed in the controversy at hand. As Justice Parke wrote in Mirehouse v. Rennell, 1 Cl. & F. 527, 546 (1883):

> "Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."

Moreover, the fundamental doctrine set forth in the Tinkle and Morse decisions is emphasized by R.C.M., 1947, §49-119, which states that: "The law helps the vigilant, before those who sleep in their rights." To count those individuals who signed the poll book as voting against the proposed constitution would not be to help the vigilant, but to aid those who were so passive as not to exercise their right to vote one way or the other on this important issue before the electorate.

As Chief Justice Marshal remarked in Cohens v. Virginia, 6 Wheat 264, 389, 5 L ed 257, 287:

> "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will."

We submit that the holdings of this Court in Tinkle and Morse should be followed in the present case for the following reasons. First, at the time Tinkle v. Griffin was decided, the 1889 Constitution was only twelve years old and the Supreme Court justices were familiar with the original convention and the intention of the framers. Secondly, the Court in Tinkle was well aware that the decided cases were in conflict, but felt that their holding gave "effect to the clear intention of the Constitution." Third, the decision was based on the sound fundamental policy that the affairs of government should not be left to those who are so indifferent or negligent that they do not affirmatively express themselves on important public issues and that those who do not participate "are deemed to yield acquiescence." It is unfair to those who do express their opinions positively to be controlled by those who do not. Fourth, the original decision by this Court in 1902 has not only been followed in subsequent cases, but has been relied upon for the last 70 years by the people of this state. Consistency of interpretation, particularly of a Constitution, provides the stability which is so essential to sound government. We submit that provisions in a constitution should not be held to mean one thing at one time and something different at a later time, unless the previous interpretation was necessarily absurd or unjust. In 1902,

the Court found no ambiguity in the language and found the intention of the framers perfectly clear. There is nothing which has transpired since that time which would draw into question the logic of the court's reasoning. It would seem somewhat paradoxical if this same language is interpreted more restrictively in 1972 than it was some 70 years earlier.

In addition, the figure of 237,688 who allegedly were "voting at the election" only represents the number of electors signing a poll register. This figure does not take into account unmarked or voided vallots. There is considerable evidence that many people were not allowed to enter the polling booth without signing the poll book, yet these people may have been interested in only a legislative candidate, a bond issue, or some other side issue put before the people. We feel that those individuals signing the poll book, but not voting on the main issue concerning passage of the constitution itself, fall into two categories:

1. Those who simply signed the book because they were told to do so, or asked if they wanted to and yet did not vote one way or the other on the main issue or any of the side issues. These individuals clearly fall within the language of Tinkle in terms of being "deemed to yield acquiescence."

2. Those individuals who signed the poll book and voted on one of the side issues included on the constitutional convention ballot, but yet neglecting to vote on the main

issue. These individuals might also be deemed to acquiescence, but more than that. To give effect to their expression on the side issues, on which they have some feeling, the constitution would have to be declared as passed.

In his opening address to the Constitutional Convention in November 1971, Governor Anderson pointed out that a new document was needed to approach modern problems in Montana and that we should work toward reversing the outward flow of young people whom we educate, train and then who are forced to seek employment in other states. In his opening remarks in January, President Leo Graybill stated that the young people of Montana were the state's greatest resource and that by the adoption of a new Constitution we could preserve and promote the participation of young people in Montana's government.

During the first weeks of the Constitutional Convention, delegate James C. Garlington asked fellow delegates to join the young in seeking new approaches to old problems and not to resist change for resistance's sake. In the closing days he concluded that the Convention did achieve the goals he had outlined and called the new Constitution the gift to the young that it is in our power to give.

The Montana Student Presidents Association, through a resolution unanimously adopted on May 20, 1972, unanimously

endorsed the propsed Montana Constitution as "highly superior to our present antiquated document". The full text of this resolution is attached hereto as Exhibit A. The Montana Student Presidents Association represents over 30,000 young people throughout the state who are actively participating in improving Montana government and who feel that the adoption of the new Constitution is proper under the above cited Montana Supreme Court decisions and the reasoning contained therein. We submit that a decision upholding the proposed Montana Constitution is consistent with the modern trend of encouraging positive participating in governmental affairs by those who have affirmative opinions to express. This modern trend of broadening the political base is manifested by the recent lowering of the voting age to 18 years. The election of Constitutional Convention delegates provided the first opportunity for 18-year-old citizens to express their opinions on issues of public importance. It would be frustrating for young people to see that those who affirmatively express their opinions on a matter of grave public concern can be thwarted by those who are so passive as to remain silent. This would appear to be an undemocratic disenfranchisement for those who clearly expressed their approval of the new document.

The Montana voters who expressed their opinion on the new document clearly favored it, and it is submitted that all of Montana would benefit from the adoption of the new Constitution.

It might be said of the participation of the Montana Student Presidents Association that the duty to state and to defend what we conceive to be the true principles of the Constitution under which we are here assembled should have fallen into other and abler hands. We could have wished that it should have been executed by those whose character and experience give weight and influence to their opinions, such as cannot possibly belong to us. But, Sirs, we have met the occasion, not sought it, and have proceeded with studied plainness and as much precision as possible. (Daniel Webster's introduction to his refutation of John C. Calhoun's doctrine of nullification.)

THEREFORE, we ask this Court to deny the application and alternative writs sought and dismiss this cause.

Respectfully submitted,

Laurence Eck

Ronald B. MacDonald

Ronald B. MacDonald
Counsel for Montana Student
Presidents Association

EXHIBIT A

MONTANA STUDENT PRESIDENTS' ASSOCIATION RESOLUTION

RE: ENDORSEMENT OF PROPOSED MONTANA CONSTITUTION

WHEREAS, the Montana Student Presidents' Association concluded that the Montana Constitution framed in 1889 impairs effective state and local government; that there was need for substantial revision and improvement of the Montana Constitution; and that the changes needed in the Montana Constitution could not be accomplished adequately through the present amendment process, and

WHEREAS, the Montana Student Presidents' Association concluded that the called Constitutional Convention afforded the most feasible and desirable method of accomplishing comprehensive revision, and

WHEREAS, our activities in state and local government have convinced us that the 1889 document presents obstacles to effective governmen t in the 20th Century, and

WHEREAS, our organization feels that the Constitutional Convention drafted a proposed Constitution that is highly superior to our present antiquated document;

NOW, THEREFORE, BE IT RESOLVED BY THE MONTANA STUDENT PRESIDENTS' ASSOCIATION:

That it go on record as endorsing the proposed Constitution to be voted upon on June 6, and

BE IT FURTHER RESOLVED, that the members of the Montana Student Presidents' Association take an active part in promoting the proposed Constitution by urging the students in the state of Montana to vote favorably on June 6, 1972 for the proposed Montana Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served the foregoing Amicus Curiae Brief for the Montana Student Presidents' Association this date pursuant to the order of this Court.

Dated this 11th day of July, 1972.

Laurence Zot