

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

FILED

JUL 14 1972

Thomas J. Kearney
CLERK OF SUPREME COURT
STATE OF MONTANA

MEMORANDUM OF AMICUS CURIAE
(COMMON CAUSE)

INTRODUCTION

Common Cause, a non-partisan Montana Organization, as well as a National Organization of concerned citizens (sometimes popularly described as "The Citizens Lobby") through its Counsel of Record and with permission of court respectfully submits, this, its memorandum on the issues presented herein.

Of course, the literal meaning of the term "amicus curiae" is a friend of the court. The undersigned would be no "friend" if there was merely submitted herein a repetition of authorities previously cited on arguments previously advanced.

Therefore what is attempted here by the undersigned, for the aid of the court, is a study of the positions advanced, and the arguments therein, in an effort to aid the Court by taking all of these into consideration and by offering a fair critique of these positions and arguments advanced.

ISSUES

Undersigned would suggest agreement that the issue is correctly stated in the memorandum of William F. Cashmore, in support of application for declaratory judgement as:

(56)

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

Undersigned would also agree with the Statement of the Case as set forth in the Cashmore memorandum and the memorandum of petitioner Burger.

STATEMENT OF FACT

It is believed that the "Statement of Facts" as set forth in the brief of petitioner Burger is also accurate insofar as it goes. However this amicus curiae would also point out an additional and pertinent "fact" that there was in force and effect, at the time of the Constitutional election involved, a Montana statutory provision--Section 23-3606 R.C.M. 1947--which stated in pertinent part as follows:

METHOD OF VOTING. (1) On receipt of his ballot, the elector must immediately retire to one of the booths and prepare his ballot.

(2) He shall prepare his ballot by marking an "X" in the square before the name of the person or persons for whom he intends to vote.

(3) If the ballot contains a constitutional amendment, or other question to be submitted to the vote of the people, he shall mark an "x" in the applicable square indicating his vote either for or against the amendment or question (emphasis supplied).

SUMMARY OF ARGUMENTS PREVIOUSLY ADVANCED

Relators, and those intervening therewith argue that:

1. In this subject constitutional election the requirement of Article XIX Section 8 of the Montana Constitution requiring approval "by a majority of the electors voting at the election" meant a majority of those who signed the poll book at the constitutional election.

2. That by publicity directed at the Montana electors prior to the Constitutional election, the said electors were advised that a failure to vote on an issue would have the

effect of a negative vote and that, therefore (it is argued) proponents of the ratification of the new Constitution are estopped from saying anything else.

The respondent Governor, and respondent's supporters contend that what was required in order to ratify the new Constitution was a favorable majority of those casting valid ballots.

The respondent side of the issue cite and quote the Montana decisions Tinkle v. Griffin (26 M. 426) and Morse v. Granite County, (44 Mont. 78, 19 Pac. 286) in support of that position.

Relators side takes the tack of distinguishing the two cited Montana cases and, also, of distinguishing the language of Section 8 of Article XIX from Section 9.

Both sides quote authority from other jurisdictions in support of their theories, construction and arguments.

STATEMENT OF AMICUS CURIAE

A study, by this writer, of most of the briefs submitted thus far, by both sides makes it incumbent for this Amicus Curiae, in aid to the Court, to respectfully point out to the Court that the Relator's briefs read by writer thus far overlook cogent and persuasive, and probably determinative points.

A reading of Relator's memoranda (and those in support thereof) together with those filed on behalf of Respondent's position lead this writer to conclude, and urge, that the Respondent's side of it must necessarily prevail.

It is to be pointed out that the arguments advanced by Relator (and supporters) continually and consistently beg the question of what is meant by the words "vote" or "voting" as contained in Article ~~IX~~ of the Montana Constitution.

Inherent in all arguments on the side of the Relator is the argument and assumption that "voting" in terms of the subject Constitutional provision means signing of the poll book, and receiving the ballot involved.

1 This is not a correct assumption.

2 It is here contended that as used in Article XIX the
3 word "voting" can only mean the marking and casting of a
4 valid ballot.

5 Section 23-3606, Revised Codes of Montana, in pertinent
6 part states:

7 METHOD OF VOTING. (1) On receipt of his ballot,
8 the elector must immediately retire to one of the booths
9 and prepare his ballot.

10 (2) He shall prepare his ballot by marking an
11 "X" in the square before the name of the person or
12 persons for whom he intends to vote.

13 (3) If the ballot contains a constitutional
14 amendment, or other question to be submitted to the
15 vote of the people, he shall mark and "x" in the
16 applicable square indicating his vote either for
17 or against the amendment or question (emphasis
18 supplied).

19 This section was in force and effect all the time of
20 this Constitutional election, having been enacted in 1969.

21 Prior to 1969, Section 23-1210 stated, in pertinent
22 part as follows:

23 METHOD OF VOTING. On receipt of his ballot the
24 elector must forthwith, without leaving the polling
25 place and within the guardrail provided, and alone,
26 retire to one of the places, booths, or compartments,
27 if such are provided, and prepare his ballot. He shall
28 prepare his ballot by marking an "X" in the square
29 before the name of the person or persons for whom he
30 intends to vote. In case of a ballot containing a
31 constitutional amendment, or other question to be
32 submitted to the vote of the people, by marking
33 an "X" in the square before the answer of the
34 question or amendment submitted.

35 At the time of, and immediately prior to, the adoption
36 of our original Constitutional Convention, the applicable
37 Territorial Statute stated, as to the method of voting--as
38 follows: (Compiled Statutes, Mont. Terr. 1887)

39 Sec. 1017. At all elections to be held under
40 this article, the polls shall be opened at eight
41 o'clock in the forenoon and continue open until
42 six o'clock in the afternoon of the same day, at
43 which time the polls shall be closed, and at the
44 opening of the polls one of the clerks, under the
45 direction of the judges, shall make proclamation
46 of the same, and thirty minutes before the closing
47 of the polls proclamation shall be made in like
48 manner.

1 manner, and the polls shall be closed in a half hour;
2 but the board may, in their discretion, adjourn the
polls at twelve o'clock at noon for one hour,
3 proclamation of the same being made.

4 Sec. 1018. Every elector shall deliver, in full
view of one of (the) judges of election, a single
5 ballot or piece of paper, on which shall be written
or printed the names of the persons voted for, with
6 a pertinent designation of the office which he or
they may be intended to fill. Said ballots may be
open or folded, as the voter may choose.

7 Sec. 1019. The judges to whom any ticket may
8 be delivered shall, upon the receipt thereof,
pronounce with an audible voice, the name of the
9 elector, and if no objections be made to him
and the judges shall be satisfied that the elector
10 is legally entitled to vote, he shall immediately
put the ballot in the box, without inspecting the
11 name thereon. The clerk of the election shall enter
the name of the elector and number in the poll book.

12 Section 23 and 24 of the 1889 Laws of Montana (Territorial)

13 stated (at page 142) as follows: original Constitution

14 Sec. 23. At any election the judges of election
15 shall designate two of said judges whose duty it shall
be to deliver ballots to the qualified electors.
16 Before delivering any ballot to an elector, the
said judges shall print on the back and near the top
17 of the ballot, with the rubber or other stamp provided
for the purpose, the designation, "Official Ballot,"
18 and the other words on the said stamp as provided
for for in section twenty of this act. Each qualified
19 elector shall be entitled to receive from the said
judges one ballot.

20 Sec. 24. On receipt of his ballot, the elector
21 shall forthwith and without leaving the polling place,
retire alone to one of the places, booths, or compartments
22 provided, to prepare his ballot. He shall prepare
his ballot by marking a cross before or after the name
23 of the person or persons for whom he intends to vote.
For example, X; or in case of a ballot containing a
24 constitutional amendment, or other question, to be
submitted to the vote of the people, by crossing out
25 therefrom parts of the ballot in such a manner that
the remaining part shall express his vote upon the
26 question submitted. Or the elector may write in the
blank spaces or paste over another name the name of
27 any person for whom he may wish to vote. In marking
a ballot, any elector shall be a liberty to use
28 or copy any unofficial sample ballot which he may
choose to mark or to have had marked in advance of
29 entering the polling place or booth; but no elector
shall be at liberty to use or bring into the polling
30 place any unofficial sample ballot printed in the
exact style, manner, width or character of paper of
31 the official ballot. After preparing his ballot, the
elector shall fold it so that the face of the ballot
32 will be concealed and so that the endorsement stamped
thereon may be seen. He shall then vote forthwith

1 and before leaving the polling place: Provided, however,
2 That any elector who desires to vote for an entire
3 group may mark a cross as above described against the
4 political designation of such group, and shall then
5 be deemed to have voted for all the persons named
6 in such group whose names shall not have been erased.

7 In 16 Am. Jur 2nd, Constitutional Law 887, it is stated:

8 A constitutional provision must be presumed to
9 have been framed and adopted in the light and under-
10 standing of prior and existing laws and with reference
11 to them¹³ and, like a statute, is properly to be
12 expounded in the light of conditions existing at the
13 time of its adoption,¹⁴ the general spirit of the times,
14 and the prevailing sentiments among the people.¹⁵
15 It has been said that an understanding of the meaning
16 of constitutional language makes appropriate a review
17 of the background and environment of the period in
18 which that constitutional language was fashioned and
19 adopted.¹⁶ Reference may be made to the historical
20 facts relating to the origin of the political
21 institutions of the community¹⁷ and to prior well-known
22 practices and usages.¹⁸

23 Article IX, Section 9 of the original Constitution
24 states as follows:

25 The legislative assembly shall have the power
26 to pass a registration and such other laws as may
27 be necessary to secure the purity of elections
28 and guard against abuses of the elective franchise.

29 The State Legislature, in the absence of constitutional
30 restriction has the right to control elections and to provide
31 for the method of conducting the same. 25 Am. Jur., 2nd,
32 Elections §6.

33 In 26 Am. Jur. 2nd, Elections, §314, it is stated that
34 the general view is that blank, illegal and unintelligible
35 ballots should be rejected in determining the total vote cast.

36 In view of the authority cited above, it is here contended,
37 the following conclusions are inescapable.

38 1. In 1889, the framers of the original constitution
39 provided that new constitutional changes proposed by a
40 Constitutional Convention must be approved "by a majority
41 of the electors voting at the election." The contemporaneous
42 and immediately pre-existing language of the territorial
43 statute describing "voting" must be taken into consideration
44 in construing the meaning of the word "voting" as intended by,

1 and within the thoughts of, the Constitutional framers. As
2 noted above from the 1887 and 1889 Territorial Laws the
3 process of "voting" was contemplated to be the appropriate
4 marking and casting of the ballot. Therefore, it necessarily
5 follows that the subject constitutional language must be held
6 to be properly paraphrased as an approval of "a majority of
7 the electors marking and casting a ballot" at the election.
8 It is apparent that what was in the contemplation of the
9 territorial legislators and the Constitutional framers was
10 that the process of signing of the poll book and the process
11 of voting were separate and distinct procedures and it was
12 the count of the voting which was made determinative--not
13 the count of those who signed the poll book nor of those
14 who received ballots.

15 2. Regardless of the interpretation of non-official
16 pre-election advertising or newspaper publications, the electors
17 who went to the polls in the June, 1972 Constitutional election
18 must be presumed to have known that the proper method of
19 "voting" for or against the constitutional proposals was by
20 proper marking and casting of their ballots as provided
21 for by Section 23-3606 of the Revised Codes of Montana, (Supra).

22 3. It follows from 1 and 2 above that not voting
23 cannot be held to be voting and the Tinkle and Morse cases
24 are proper authority for these propositions.

25 4. The instructions of the Secretary of State to the
26 Clerks and Recorders that "the total number of votes cast"
27 should be taken from the poll book (See Exhibits A, B and C
28 attached hereto) was in error or, at least, was immaterial
29 to the question of how many voted approval or disapproval of
30 the constitutional proposals. It follows that his subsequent
31 certificate of the total number of votes cast at the election,
32 prepared and computed on the basis of such instructions was

likewise in error or immaterial.

5. Further, on the action of the Secretary of State, on June 20, 1972, in making certificate that the total number of electors voting as being "237,600". This also was in error in light of the language of Article ~~XX~~, Section 8 or 9. As noted above the term "voting" must be held to mean (under the Constitutional provision) the marking and casting of the ballot. On the face of the said certificate there could not have been such a number of electors voting in view of the fact that the same certificate speaks eloquently of the fact that maximum number of electors who placed their "x" in the applicable square indicating (their) vote either for or against the amendment or question," (Section 23-3606, R.C.M. 1947) was the 230,298 who voted either for or against the proposed constitution.

6. In light of what is pointed out above, the argument that "the certified total of 237,600 means anything more than 237,600 electors signed the poll book is specious. This is especially so in light of the fact that the Secretary of State specifically told the Clerks and Recorders that total votes cast was to be taken from the poll books and then computed the total based upon the figures submitted in accordance with the instructions.

7. It is clear that the Respondent Governor's action in promulgating the new constitution was correct as was the argument and conclusions advanced in his brief herein.

8. The constitutional proposal was clearly approved by those "voting" on the issues involved--by those appropriately marking their "X".

The proclamation of the Governor of the State of Montana should be sustained and concurred in by the Honorable Court.

CERTIFICATE Respectfully Submitted,

I hereby certify that I am a true and correct copy of the original of
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Clayton R. Herron upon counsel of record by mailing a true copy thereof this date in an envelope with postage prepaid addressed to:

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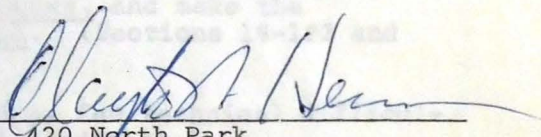
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Dated this 14th day of July, 1972.

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FRANK M. HART
Secretary of State

SAFE DRIVERS MAKE SAFE CHOICES



OFFICE OF THE
SECRETARY OF STATE

FRANK MURRAY
SECRETARY OF STATE

GAIL M. DEWALT
CHIEF DEPUTY

HELENA, MONTANA 59601

June 2, 1972

TO ALL COUNTY CLERK AND RECORDERS:

I have today mailed to you, under separate cover, abstract books for reporting the vote cast in your county for (1) state, national and legislative partisan offices, (2) non partisan judicial offices and (3) the separate election for ratification or rejection of the proposed constitution.

Two copies of each of the books are being sent to you. Some counties will receive a set of state at large, national and legislative books for two different legislative districts. The district numbers are entered on the cover of the book. Upon completion retain one of each for your files, and return the second copy to this office. The State canvass has been set to begin June 15, 1972, so the abstracts should be sent in time to reach this office by that date.

In preparing and sending the abstracts:

- (1) Check all totals against precinct entries.
- (2) See that the certificates on the face of the books are properly signed and sealed.
- (3) Please enter the total number of votes cast taken from your poll book in the space provided on the front cover of the partisan abstract book.
- (4) It is very important that you 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. Please check this figure carefully for accuracy.
- (5) Please be sure to use the mailing envelope which is enclosed with the abstract books, and make the transmittal by certified mail. (Sections 19-122 and 23-4015, R.C.M. 1947).

I look forward to a state canvass with as few technical difficulties as possible, thanks to your usual good help.

Sincerely yours,

Frank Murray
FRANK MURRAY
Secretary of State

FM:wbj

"SAFE DRIVERS MAKE SAFE HIGHWAYS"

Number of Electors Voting

For the County of Cascade

By..... Deputy

this.....day of June, 1972.



County Canvassers of.....
County, State of Montana.

[illegible]