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Montana Constitutional Amendment Referendum Requires Approval of Governor before Submission to Electorate

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state. Nonetheless the majority relied on a Colorado case as though it lent support to its position.

It would appear that the majority of the court has invaded the legislative domain in rendering this ultra-liberal decision. The only way the majority could have reached this result, since there can be no dispute that polio is a disease, was to ignore altogether the provisions of a relatively explicit statute. In addition it upheld a finding of causal relation upon showing of a mere possibility.

In direct response to the instant case the 1961 Session of the Montana Legislative Assembly amended R.C.M. 1947, § 92-418, to read as follows:[34]

> "Injury" or "injured" means a tangible happening of a *traumatic nature* from an unexpected cause, resulting in either external or internal physical harm, and such physical condition as a result therefrom and *excluding disease not traceable to injury.* (Emphasis supplied).

This statutory declaration repudiates the instant case and narrows the sweep of the Act, possibly excluding both exposure and exertion cases from coverage. The liberal holding in the instant case, by precipitating this legislative reaction has in the final analysis diminished rather than expanded workmen's rights under the Act.

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MONTANA CONSTITUTIONAL AMENDMENT REFERENDUM REQUIRES APPROVAL OF GOVERNOR BEFORE SUBMISSION TO ELECTORATE.—A proposed constitutional amendment, passed by the Montana Legislative Assembly, would have created a separate Board of Regents for the general control and supervision of the University of Montana. The proposal was not submitted to the governor for his approval. A proceeding was brought in the Supreme Court of Montana to restrain the secretary of state from expending public funds to publish the proposed amendment. A temporary restraining order issued. The Montana Supreme Court, after a hearing on the merits, made the injunction permanent. A proposed constitutional amendment must, under the Montana Constitution, be submitted to the governor for his approval or rejection before it is presented to the people. *State ex rel. Livingstone v. Murray,* 354 P.2d 552 (Mont. 1960) (Justice Angstman concurring specially).

Relator attacked the constitutionality of the proposed amendment on two grounds: first, that it contained two separate and distinct subjects

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course of employment and such disease or infection as may naturally result therefrom); COLO. REV. STAT. 1953, §§ 81-2-1 to -8 (no attempt to define injury); CAL. LAB. CODE ANN. § 3208 (Deering 1953) (injury includes any injury or disease arising out of employment).

[34] Laws of Montana 1961 ch. 162.

which were not separately stated in the title as it was proposed for the official ballot; and second, that a constitutional amendment, proposed by the legislature in the form of a referendum,[1] must be submitted to the governor for his approval or rejection. The court addressed itself primarily to the second ground and held the proposed amendment invalid.

Article V, section 40, of the Montana Constitution directs that

> Every order, resolution or vote, in which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of the business of the two houses, shall be presented to the governor, and before it shall take effect be approved by him, or, being disapproved, be repassed by two-thirds of both houses, as prescribed in the case of a bill.[2]

The provisions of the constitution are expressly made mandatory and prohibitory.[3] Assuming that a constitutional amendment referendum is an "order, resolution or vote," within the meaning of article V, section 40, the court read these two provisions together and declared that the referendum had to be submitted to the governor.

This decision answered in the affirmative a question of first impression in Montana, *i.e.*, whether it is necessary to submit a proposed constitutional amendment, in the form of a referendum, to the governor for his approval or rejection. The court cited authority for a strict and literal interpretation of the constitution to prevent one department of the government from transgressing the responsibilities and prerogatives of another department.[4] It speaks as though the result at which it arrives is inevitable from such a rule of interpretation. In fact, however, the matter is not so easily solved. The assertion, on the one hand, that the constitution provides that the governor must sign all orders, resolutions or votes is balanced by the argument, on the other hand, that the provisions of article XIX, section 9, are just as mandatory and prohibitory. Article XIX, section 9, specifies the steps in amending the constitution and should also be strictly and literally interpreted to prevent one department of the government from transgressing the responsibilities of another department. There is the further consideration that article XIX, section 9, being a special provision controls over general provisions.[5]

Article XIX, section 9, sets out four steps in the amendment process: a proposal by two-thirds of both houses of the legislature; entry on their respective journals; publication of the proposal; and ratification by the people. Nothing is said of approval by the governor.

[1]A referendum is defined as a method of submitting an important legislative measure to a direct vote of the whole people. BLACK, LAW DICTIONARY (4th ed. 1951). The people also have a referendum power by which they may compel a law to be placed on the ballot. This is done by signed petitions of 5 per cent of the voters. MONT. CONST. art. V, § 1. When the word referendum is used herein, it is not used in this latter sense.

[2]The procedure required for the passage of a bill is provided for in article VII, section 12.

[3]MONT. CONST. art. III, § 29.

[4]Instant case at 558.

As a matter of governmental policy there is not the same need for the governor to pass upon a constitutional amendment or legislative matter which is to be submitted to the people by referendum, as there is for him to pass upon a measure which is to become effective as law without reference to the people. There would be nothing wrong with requiring approval by three separate powers—legislature, governor, and people—if that were the intent of the constitution, but neither is there any special advantage in having the matter go through the governor's hands when both the legislature and the people will have considered it.

The supreme courts of California, Colorado and Pennsylvania have held that the governor has no right under their constitutions to interfere with the amendment process.[6] His signature on an amendment proposal is unnecessary. In each of these states the constitutional provision describing the amendment process is similar to article XIX, section 9, of the Montana Constitution, requiring approval by two-thirds of both houses of the legislature; entry on their respective journals; publication; and ratification by the people.[7] Though California lacks it, Colorado and Pennsylvania also have provisions similar to article V, section 40, requiring the governor to sign every order, resolution and vote which must be passed by both houses of the legislature.[8] In spite of this the Montana Supreme Court characterized the Montana Constitution as unique and stated that "decisions from other jurisdictions construing their state constitutions or the federal constitution have little value or weight here."[9] If the Montana Constitution is dissimilar to those of Colorado and Pennsylvania in provisions relevant to the issue here, it is only in its express statement that provisions are to be understood as mandatory or prohibitory unless clearly otherwise. This same rule, however, is a general rule of constitutional interpretation ordinarily held applicable even when not expressly set out.[10] And in any event the rule is just as applicable to article XIX, section 9, limiting the steps in amending the constitution to the four there set out as it is to article V, section 40, establishing the governor's role in the passage of legislation.

If the reference of the court to the uniqueness of the Montana Constitution is taken seriously, the implication is that a slight variation of language in compared provisions will render the decisions of other states construing the similar provisions valueless. This implication is contrary to usual constitutional interpretation and thus unlikely to be followed in the future. It indicates, however, that the court approached the solution of his very important problem of amending the constitution with eyes partly closed.

Although the Montana Constitution has from its beginning required, in article XIX, section 9, that proposed constitutional amendments be

[5] *Ibid.* See 16 C.J.S. *Constitutional law* § 25 (1956).
[6] Hatch v. Stoneman, 66 Cal. 632, 6 Pac. 734 (1885); Nesbit v. People, 19 Colo. 441, 36 Pac. 221 (1894); Commonwealth v. Criest, 196 Pa. 396, 46 Atl. 505 (1900).
[7] *Compare* MONT. CONST. art. XIX, § 9, *with* CALIF. CONST. art. XVIII, § 1 (1879), COLO. CONST. art. XIX, § 2, and PA. CONST. art. XVIII, § 1.
[8] See COLO. CONST. art. V, § 39; PA. CONST. art. III, § 26.
[9] Instant case at 557.
[10] See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 159-164 (8th ed. 1927).

submitted to the people for their approval, the provision for the initiative[11] and referendum of statutory measures now contained in article V, section 1, which expressly excludes any right of the governor to veto such measures, was not added until 1906.[12] Since the governor can not disapprove the measure, presumably his signature is unnecessary or, if necessary, is a mere ministerial step which could be omitted without infringement on any real right of the governor.[13] This provision, article V, section 1, was not cited by the majority, yet it is important in characterizing the referendum process as one not requiring the interposition of the governor.

Ultimately the authority of all three branches of state government comes from the people; it is they who through the constitution have delegated their sovereign power. The Montana Supreme Court has given expression to this:[14]

> When the legislative assembly proposes an amendment to the constitution it "is not in the exercise of its legislative power or any sovereignty of the people" that has been intrusted to it, but is merely acting under a limited power conferred upon it by the people to make such a proposal. . . . The constitution does not prescribe the method which shall be pursued in submitting such a proposal. It may be by bill or by joint resolution, but in either event it is a mere proposal, and does not become effective until ratified by a vote of a majority of the electors at the polls.

When a legislative measure or constitutional amendment proposal is sub-

[11]The initiative is defined as the power of the people to propose bills and laws and to enact or reject them at the polls, independent of the legislative assembly. BLACK, LAW DICTIONARY (4th ed. 1951). The power of the initiative resides only in the people. A measure is initiated by signed petitions of 8 per cent of the voters. MONT. CONST. art. V, § 1. The initiative is legislative in character and performs a positive function because the people are actually proposing a bill for the electorate to pass on, whereas the referendum is executive in character, being a veto power the same as the governor exercises because the people either approve or disapprove of a legislative enactment. Each power is complete within itself.

[12]The term "measure" apparently does not include proposed constitutional amendments. Such proposed amendments are expressly excepted out of the operation of article V, section 1.

It is interesting to note that there has been a seventy year practice in Montana of submitting the proposed constitutional amendment to the governor. Instant case at 557. Although it recognized that this practice was not conclusive upon it, the court felt that the practice was persuasive. Perhaps the reason that this practice was not followed here was because the legislators for the first time feared that the governor might attempt to veto an amendment proposal.

[13]For cases indicating that a substantial compliance with certain provisions of article XIX, section 9, is sufficient, see State *ex rel.* Hay v. Alderson, 49 Mont. 387, 142 Pac. 210 (1914); State v. McKinney, 29 Mont. 375, 74 Pac. 1095 (1904); and Tax Commission Case, 68 Mont. 450, 471, 219 Pac. 817, 822 (1923), which states that "it is a fundamental canon of construction that a Constitution should receive a liberal interpretation, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizens." In State *ex rel.* Hay v. Alderson, the court said that even though article III, section 29, says the provisions of the constitution are mandatory and prohibitory, the provisions of article XIX, section 9, respecting publication of a proposed amendment, is referable to the rule of substantial rather than literal compliance. In the *Hay* case, the publication requirement was met in only two-thirds of the counties. In some of the remaining counties, from ten to twenty-three days intervened between the date of the first publication and the day of the election; in others publication was made only once a week in a daily paper and, in one instance, there was publication only in alternate issues of a semi-weekly paper.

[14]Tax Commission Case, 68 Mont. 450, 465, 219 Pac. 817, 819 (1923).

mitted to the people there can be little concern with the separation of powers. But if there is still concern for the ideal of a system of checks and balances, it inheres in the right of the people,[15] instead of the executive, to reject a proposal of the legislative assembly. The Montana court has stated:[16]

> In express words, section 12 [article VII] provides that "every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it and thereupon it shall become a law." Can it be doubted, then, that by the use of the words in this amendment [article V, section 1], "The veto power of the governor shall not extend to measures referred to the people by the legislative assembly or by initiative referendum petitions," the power so to reject an enactment was intended to be as effectual to annul such Act as veto of it by the governor?

Cooley, in his work, indicates that "a proposed amendment which has duly passed the legislature does not require to be passed upon by the governor before it can be submitted to the people."[17] The result of the instant case is to give the governor a veto power over constitutional amendment proposals even though he has none over a referendum measure to enact or amend statutes. This is contrary to the basic theory of the constitution as to the responsibility and participation of the people in law making and is not required by a fair interpretation of all the relevant provisions of the Montana Constitution.

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WORKMAN'S COMPENSATION CLAIM DENIED FOR FAILURE OF CLAIMANT TO GIVE TIMELY NOTICE OF ACCIDENT TO PROPER PERSON.— A miner wrenched his back loading coal just before going off shift, and required hospitalization for several days. About a week after the accident, while picking up his paycheck, he allegedly told one Clark, who was then working in the employer's office, that he had suffered injury in the mine. Claimant's wife corroborated this testimony, but Clark denied recollection of such conversation. The employer resisted a claim for workmen's compensation on the ground that the claimant had failed to give the employer notice of the accident within thirty days thereof, as required by statute.[1] The Industrial Accident Board denied compensation on the ground that no actual knowledge of accidental injury existed on the part of the employer or any

[15]"The two important, vital elements in any constitutional amendment are the assent of two-thirds of the legislature, and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because by them certainty as to the essentials is secured. But they are not themselves the essentials." *Id.* at 474, 219 Pac. at 823.

[16]State ex rel. Esgar v. District Court, 56 Mont. 464, 470, 471, 185 Pac. 157, 159 (1919).

[17]1 COOLEY, CONSTITUTIONAL LIMITATIONS 87 (8th ed. 1927).

[1]REVISED CODES OF MONTANA, 1947, § 92-807. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.)