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Montana Constitution—State Debt Limit—Submission to the People

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MONTANA CONSTITUTION — STATE DEBT LIMIT — SUBMISSION TO THE PEOPLE—In the 1950 general election the Montana electorate adopted Initiative Measure Number 54[1] which created an honorarium for Montana veterans of World War II from funds to be raised by a twenty-two million dollar bond issue, redeemed by a cigarette tax. The Montana Legislative Assembly in 1957 enacted a law which amended this initiative by providing for payment of an honorarium to Montana Korean War veterans on the same basis,[2] and by authorizing a bond issue of six million dollars to be redeemed by an additional cigarette tax. No provision was made for submitting the amendment to the electorate. An action to determine the constitutionality of the bill was brought by a citizen against the State Board of Examiners on the ground, among others, that it violated Article XIII, Section 2, of the Montana Constitution in creating a debt or liability in excess of $100,000 without having been submitted to the people at a general election.[3] On appeal to the Montana Supreme Court from a judgment sustaining the bill, *held,* affirmed. Only those debts or liabilities which look to *ad valorem* taxes for their retirement must first be presented to the people, and not those secured by excises or licenses. *Cottingham v. State Board of Examiners,* 328 P.2d 907 (Mont. 1958) (Justice Adair dissenting).

That an initiative or referendum may be amended by the legislature seems to be a well established rule in Montana.[4] But such an amendment must still conform to constitutional limitations on legislative powers.[5] The question in the instant case is whether the Korean bonus amendment is within such constitutional limits.

In interpreting similar constitutional debt limitations the courts of other states generally use what could be called the "special fund doctrine." Although not recognized by all courts which follow the doctrine, a special fund generally has two important facets. The debt created must be secured solely by a special fund and not by the general faith and credit of the state, *i.e.,* the bonds must specify that they are to be retired only by the special fund involved. Futhermore, the special fund itself must be created by the imposition of fees, penalties, or excise taxes as distinguished from *ad valorem* or property taxes.[6]

This doctrine, however, was rejected by the Montana Supreme Court in the following specific language in *State ex rel. Diederichs v. State Highway Commission:*[7] "The fact that a special fund is created by the imposition of the license or excise tax on motor fuels with which to pay the

[1]Laws of Montana 1951, at 781.
[2]Laws of Montana 1957, c. 44.
[3]MONT. CONST. art. XIII, § 2 provides in part: "The legislative assembly shall not in any manner create any debt . . . which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of one hundred thousand dollars ($100,000) . . . 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."
[4]See Bottomly v. Ford, 117 Mont. 160, 157 P.2d 108 (1945).
[5]State *ex rel.* Goodman v. Stewart, 57 Mont. 144, 187 Pac. 641 (1920).
[6]Annot., 100 A.L.R. 900 (1936). This annotation indicates that some courts look only to the existence of a special fund, while others look to the character of the impost levied as well.
[7]89 Mont. 205, 296 Pac. 1033 (1931).

debentures is of no importance." The principal argument in the case was that the bill in question did not create a debt, but the court held that it did create a *liability,* which was sufficient to bring the bill within the debt limitation of the Montana Constitution.

Shortly after the *Diederichs* decision Article IX, Section 2, of the Montana Constitution was amended to provide that the names of those voting on any levy, debt, or liability, must appear on the last tax roll of the state.[8] While there has been no change in Article XIII, Section 2, the court in the instant decision construed the two sections together and, relying heavily upon a New Mexico decision,[9] concluded that since only property taxpayers are qualified to vote on such a debt limit question, debts secured by the levy of *other* than property or *ad valorem* taxes need not be submitted to them.[10] The court said that the amendment of Article IX, Section 2, effected an amendment of Article XIII, Section 2, impliedly changing the phrase "debt or liability" to "debt or liability looking to ad valorem taxes for their retirement."[11] Therefore since the bond issue in question involved only a cigarette excise tax it did not require submission to the voters.

Under the rationale of the present case the *original* twenty-two million dollar bond issue need not have been submitted to the people. Indeed, the power of the Montana Legislature to create any debt, no matter how large, is now virtually unlimited so long as that debt is secured by an excise tax.

The dissenting opinion insists that the *Diederichs* case is controlling, and asserts that if revenue from excise sources is diverted from the general fund in this manner, the entire burden of the state's general expenses will eventually fall on the property taxpayer. Consequently, he has a substantial interest as a property taxpayer even in debts secured by excise taxation.

At least one court has taken the position that a debt limit clause is inserted in a constitution simply to establish a maximum indebtedness that might at any time be created by the legislature alone.[12] In spite of the fact that special fund bonds may not look to the state general fund for retirement, the State has a strong moral obligation to back these bonds. If a state were in poor financial condition it might not be altogether desirable to remove this obstacle to increasing state indebtedness. On the other hand, the aggregate debt limitation of $100,000, established at statehood may well be insufficient in light of today's costs, and not at

[8]MONT. CONST. art. IX, § 2, reads today in part as follows: "If the question submitted concerns the creation of any levy, debt, or liability the person, in addition to possessing the qualifications above mentioned, must also be a taxpayer whose name appears upon the last preceding completed assessment roll, in order to entitle him to vote upon such question."

[9]State *ex rel.* Capitol Addition Bldg. Comm'n. v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

[10]Substantially the same reasoning was applied in the New Mexico case, note 9 *supra,* based on the fact that the debt limit was calculated at a percentage of the assessed property valuation of the entire state for the year preceding. Therefore, the court reasoned, the debt limit was applicable only to instances where a property tax was levied to secure the debt.

[11]Instant case at 916.

[12]Bickerdike v. State, 144 Cal. 681, 78 Pac. 270 (1904) (dictum).

all consistent with the needs of a growing and developing state. But this situation could be remedied by amending the Constitution to increase the debt limitation rather than by restricting the safeguards to the people established in the constitutional provisions. Such an amendment would have the virtue of retaining control of major indebtedness in the people while still allowing legislative action in more routine expenditures.

While the desirability of a liberal interpretation of the Montana Constitution is a matter open to debate, the desirability of a *consistent* interpretation is not. That the Montana Supreme Court has not always been consistent in its interpretive approach is illustrated by a comparision of the instant decision with the case of *Morgan v. Murray*,[13] decided seven days later. The bill there in question[14] also involved Article XIII, Section 2. It authorized an education bond issue of ten million dollars, provided for the levy of a property tax, and for referral to the people at the next general election. Two questions were presented by the case: first, whether the bill was a revenue measure; and if so, whether it was unconstitutional since it originated in the Senate instead of the House. The argument in favor of the bill was that the particular provision relating to originating revenue measures in the House was intended to place the responsibility for such measures in that branch of the legislature most directly responsible to the people. The State further urged that since the bill was to be submitted directly to the electorate there was no danger of circumventing the spirit of the Constitution. The Court found the bill to be a revenue measure and, applying a strict construction, held it unconstitutional because it did not originate in the House of Representatives. This narrow construction stands in sharp contrast to the liberal constitutional interpretation applied one week earlier in the decision of the instant case.

Of course, there may well be distinctions between the two cases which would tend to explain their divergent results. But there can be no justification on the basis of the substantive rights involved. On the contrary, the opposite result in the *Morgan* decision involving the education bond issue would have had little effect upon the substantive rights of the people. However, the holding in the *Cottingham* case could have a substantial effect upon such rights by allowing inordinate bond issues secured by excise taxation, without any direct control by the people.

The *Cottingham* decision has set the debt limitation question at rest in Montana by confining it to bond issues involving property taxes. In view of Montana's current need for increased revenue, the principal case could have far-reaching effects upon the activities of the 1959 legislative assembly.

The significant question left unanswered by these two decisions is whether the Court will adopt a liberal or strict approach to problems of constitutional construction.

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[13]328 P.2d 644 (Mont. 1958).
[14]Laws of Montana 1957, c. 197.