

quired by Section 9, Article XIX of the Constitution, neither was the title of the Bill entered on the House Journal on third reading.

You desire an opinion from this office as to whether or not your department should proceed with the publication of the proposed amendment in view of the fact that the act does not comply with some of the provisions of the Constitution governing the submission of amendments. The bill being of doubtful validity, you desire to avoid the waste of public funds by useless publication, if possible.

It is our opinion that your duty in this instance is purely ministerial and that you have no discretion in the premises and must have the publication made as provided in Section 9, Article XIX of the Constitution. "If the law direct an officer to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then the act is ministerial. . . ." *Roberts v. United States*, 176 U. S. 221; 40 C. J. 1210.

Section 9, Article XIX referred to above directs the publication of proposed amendments. It provides that the Secretary of State **shall cause** such publication to be made, leaving no discretion to such officer. Mandamus will lie to compel a public board or officer to do a ministerial act, (*State v. Board* 42 Mont. 62; *State v. Rotwitt*, 15 Mont. 29; *State v. Moulton*, 57 Mont. 414) and if you refused to make the publication a writ of mandate would no doubt be granted to compel the publication. Furthermore, to determine whether an Act is legal or not is a power vested exclusively in the courts. (*Kadderly v. City of Portland*, 74 Pac. 710; *State v. Hall*, 159 N. W. 281; *Boyd v. Olcott*, 202 Pac. 431.).

The constitutional question involved in Chapter 52 has not been decided by our Supreme Court in a very satisfactory way. In *Durfee v. Harper*, 22 Mont. 354 it was held that an amendment not entered on the Journals of the two Houses was not legally submitted. This decision was by Justice Hunt, concurred in by Chief Justice Brantley and Justice Pigott. In *State v. Alderson*, 49 Mont. 387, it was held that publication of a proposed amendment for less than three months was

Opinion No. 292

Secretary of State—Duties—Proposed Constitutional Amendment, Publication of.

HELD: The Secretary of State may not exercise his discretion but must publish a proposed amendment to the state constitution in accordance with Sec. 9, Art. XIX, even though the bill submitting the proposed amendment be of doubtful validity.

August 7, 1933.

You request advice on the following proposition: The twenty-third Legislative Assembly of Montana passed Senate Bill 30, now Chapter 52. Laws of 1933, providing for the submission to the electorate of a Constitutional Amendment, adding Section 46 to Article V. The amendment purports to provide for a state budget. The journal of the House shows that the bill was not entered in full thereon as re-

not a legal submission. In the Tax Commission case, 68 Mont. 450, three of the five Justices held that an amendment that was entered in full on the Journal of the House but not on the Journal of the Senate was a "substantial compliance" with the law. Justices Galen and Cooper vigorously dissented. Both the majority and minority opinion cited numerous adjudicated cases to support their respective conclusions. Section 9, Article XIX of our Constitution provides that proposed amendments shall be entered in full on the respective Journals of each House. It is difficult to reconcile the majority decision in the Tax Commission case with this plain command of the Constitution, but this case is almost directly in point with the matter you submit, and is the latest expression of our Supreme Court and must govern until modified or overruled.

From any view of the matter, we are therefore of the opinion that you are required to cause publication of the proposed amendment.

(Note: See *Tipton v. Mitchell*, 97 Mont. 420, where Secretary of State was enjoined from publishing because of defects in legislative action in passing the Act.)