

Constitutional Amendments—Publication—Secretary of State.

In view of the requirements of section 9, article XIX of the constitution of Montana that proposed constitutional amendments shall be published "for three months," a publication of such an amendment for a period substantially less than three months cannot be made the basis of a claim against the state.

G. M. Moss, Esq., February 22, 1927.
Chairman, Legislative Investigation Committee,
Helena, Montana.

My dear Mr. Moss:

You have requested my opinion whether the publication of an amendment to the constitution for less than the three months period provided by section 9 of article XIX of the constitution would be considered a valid and legal publication for the purpose of establishing a claim against the state for payment for such publication.

Under the rule announced by our supreme court in *State ex rel. May v. Alderson*, 49 Mont. 387, 413, substantial rather than literal compliance with the constitutional provision above referred to is all that is required. Assuming, then, that the publication of the proposed amendment was so defective in respect to the length of time it was run that it cannot be said to have been in substantial compliance with the requirements of the constitution, it is my opinion that such a publication could not be considered valid or legal for the purpose of establishing a claim against the state for payment of the publishers.

My conclusion is based upon the following principles which have been frequently announced by our supreme court:

1st. A legal claim against the state is one warranted by law. (*State ex rel. Mills v. Dixon*, 66 Mont. 76-99).

2nd. Public officers possess only such powers as are expressly conferred upon them by law or as are necessarily implied from powers expressly granted. (*Stange v. Esval*, 67 Mont. 301, and cases cited therein).

3rd. One who contracts with a municipal corporation is bound to take notice of limitations on its power to contract and also of the power of the particular officer or agency to make the contract. (*Pue v. County*

of Lewis and Clark, 75 Mont. 207, citing 3 McQuillan on Municipal Corporations, section 1166).

It is obvious that while the secretary of state is given discretion by section 9 of article XIX, supra, to publish proposed amendments in more than one paper in a county, if, in his opinion, such publication is desirable, he is not permitted any such discretion with respect to the duration of the publication.

For reasons which they deemed sufficient, the framers of the constitution specifically provided that proposed amendments to that document shall be published "for three months." That requirement of the constitution must be complied with; the secretary of state cannot waive it, and if he does so, the publication is illegal, and under the principles above noted the conclusion necessarily follows that any claim for payment, if resisted, cannot be successfully asserted against the state.

In this connection see also the case of Endion Imp. Co. v. Evening Telegram Co. (Wis.) 89 N. W. 732. In that case a county clerk by direction of the secretary of state published a proposed banking law before an election. The court determined that there was no authority for the publication of such law and that therefore the county was not bound for the cost of the publication nor was it bound to recognize the contract made with the publishers by the county clerk.

However much the conclusion above announced may seem to do violence to the principles of business ethics, suffice it to say that legislatures and courts have seen fit to impose the above restrictions upon the power of public officers to make valid contracts and to incur liability for the expenditure of the public's money.

Very truly yours,

L. A. FOOT,
Attorney General.