

rection, defend the state, or assist in defending the United States in time of war, the determination thereof being wholly with the legislature.

January 5, 1945.

Mr. George W. O'Connor
Speaker of House of Representatives
State Capitol
Helena, Montana

Dear Mr. O'Connor:

You have submitted to me and requested my opinion on the following questions:

(1) Does Section 12 of Article XII of the Montana Constitution prohibit the legislature from appropriating more than the income for that year?

(2) May the legislature appropriate any surplus for post-war work which would aid returning veterans during any war period?

(3) May the legislature for any biennium appropriate an amount in excess of amounts to be raised by taxation but not in excess of such amounts plus the surplus in the general fund of the state?

In answering your inquiry, I believe the determination of your question (1) will automatically answer the other two questions.

Your questions all pertain to Section 12 of Article XII of our State Constitution, which reads:

"No appropriation shall be made nor any expenditures authorized by the legislative assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislative assembly making such appropriation shall provide for levying a sufficient tax, not exceeding the rate allowed in section nine (9) of this article, to pay such appropriations or expenditures within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war. No appropriation of public moneys shall be made for a longer term than two years."

Opinion No. 3.

Legislature—General Fund—Expenditures—Taxes—Appropriations—Income—United States War Bonds—Surplus of Revenue—Revenue.

Held: The legislature may not appropriate or authorize expenditures whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law and applicable to such expenditure unless the Legislative Assembly making such appropriation provides for the levying of a tax, not to exceed the two-mill levy provided for in Section 9 of Article XII of the Montana Constitution, to pay such appropriation or expenditure within such fiscal year. The legislature is not restricted in making appropriations or authorizations for expenditures to suppress insur-

Is the foregoing section uncertain or ambiguous? I think not; it appears to me the language used is neither complicated nor doubtful; and I think it is plain what is meant is exactly what is said—no more, no less.

It is a well settled rule of constitutional construction that, in construing a section, it is presumed no superfluous words were used; meaning must be given to every word used; and, if possible, it must be so construed as to make every word significant of something so as, if possible, to make every word operative.

A state constitution is not a grant but a limitation on the inherent legislative power; the legislature has unlimited authority except as limited, restricted or prohibited by the constitution.

Section 29 of Article III of our Constitution reads:

"The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Our Supreme Court has held:

"The provisions of the Constitution being mandatory and prohibitory, its declarations with reference to the subjects upon which it speaks are conclusive upon the legislature." State v. Gowdy, 62 Mont. 119, 203 Pac. 1115.

In analyzing Section 12 of Article XII, it is readily apparent the founding fathers used very definite, plain and simple words in limiting the authority of the legislature in making appropriations and the authorizing of expenditures on behalf of the state.

They had stated no appropriation shall be made or any expenditures authorized by the legislative assembly whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided by law; and applicable to such appropriation or expenditure, as reasonable men, is there any obscure or hidden meaning in the foregoing prohibition? I think not. Then it is provided that, if the legislature does make appropriations in excess of the total tax then provided by law, the legislative assembly making such excess appropriation or authorizing such excess expenditure shall provide for levying a sufficient tax, not

exceeding the rate allowed in Section 9 of this Article (that is, the 2½ mills) to pay such appropriations or expenditures within such fiscal year.

It may be argued, and perhaps with good grace, that the founding fathers never expected, thought of, or anticipated a time when there would be a huge surplus in the "general fund."

"The meaning of the Constitution is fixed when adopted, and cannot be subsequently changed by judicial construction to meet changed circumstances, as may be done in case of principles of common law."

State v. Moody, 71 Mont. 473, 230 Pac. 575.

All questions of flexibility and adjustability to meet the necessities of the people must be regarded as having been fully considered and conclusively determined by the adoption of the Constitution. One is not justified in resorting to strained construction or astute interpretation to avoid the clear intent and language used by the framers of the Constitution.

It is the duty of this office, to the best of our ability, and under the oath each state officer takes, to honestly construe this section.

In adopting this section, the convention was proceeding to a large extent as other states, and it might be our convention took this section from the Constitution of Colorado which had adopted almost an identical section. Section 16 of Article X of the Constitution of Colorado is as follows:

"Appropriations not to exceed tax—exceptions. No appropriation shall be made, nor any expenditure authorized by the general assembly, whereby the expenditures of the state, during any fiscal year, shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the general assembly making such appropriation provide for levying a sufficient tax, not exceeding the rates allowed in section eleven of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrections, defend the state, or assist in defending the United States in time of war."

This is a section similar to ours to all intents and purposes; and the Supreme Court of Colorado in interpreting this section, in a decision rendered in 1889, laid down its interpretation, which decision is cited and followed in several Colorado decisions.

It was held:

"By section 16, art. 10, Const., appropriations and expenditures which may be made or authorized by the general assembly are of two general classes: First, ordinary, which includes all kinds of appropriations and expenditures necessary and proper for the support of the government and its institutions in time of peace; second, extraordinary, or such as are necessary 'to suppress insurrection, defend the state, or assist in defending the United States in time of war.' In this opinion we have only to consider such as belong to the former or ordinary class. By said section 16, each and every general assembly is inhibited, in absolute and unqualified terms, from making appropriations or authorizing expenditures of the former class in excess of the total tax then provided by law, and applicable for such appropriation or expenditure, unless such general assembly shall provide for levying a sufficient tax, within constitutional limits, to pay the same within such fiscal year. This language needs no construction. It is plain, simple, and unambiguous. It need not be misunderstood. It cannot be evaded. It means that the state cannot be plunged into debt by unauthorized legislation. If the general assembly pass acts making such appropriations or authorizing expenditures in excess of constitutional limits, such acts are void. They create no indebtedness against the state, and entail no obligation, legal or moral, upon the people, or upon any future general assembly. In the language of Mr. Justice Allen, of the New York court of appeals, cited below: 'Neither the legislature nor the officers and agents of the state, nor all combined, can create a debt or incur an obligation for or in behalf of the state, except as to the amount and in the manner provided for in the constitution.' Cooley, Const. Lim. 69, 70; People v. May, 9 Colo. 85, 10 Pac. Rep. 641;

Lake Co. v. Rollins, 9 Sup. Ct. Rep. 652; People v. Johnson, 6 Cal. 499; People v. Supervisors, 52 N. Y. 563.

"Hence, while the general assembly must exercise their own judgment in the first instance, yet, if by reason of error of judgment, or for any other cause, they exceed the constitutional limit in making appropriations or in authorizing expenditures, such excessive acts are mere nullities. People v. Supervisors, supra; Williams v. Louisiana, 103 U. S. 645; People v. May, 9 Colo. 412, 12 Pac. Rep. 839. . . .

"No appropriation or expenditure in excess of the constitutional limit, as above explained, can be thus provided for. A casual deficiency of the revenue is one that happens by chance or accident, and without design or intention to evade the constitutional inhibition. Hovey v. Foster, (Ind.) 21 N. E. Rep. 41.

"What we have said of the legislative department in respect to making appropriations or authorizing expenditures in excess of constitutional authority, applies with equal force to the executive department in recognizing or dealing with legislation affecting the public revenue. If legislative acts making appropriations in excess of constitutional limits have unfortunately received the governor's signature, instead of his veto, he should nevertheless withhold his approval from any and all vouchers relating to such unconstitutional appropriations. So, also, the auditor should refuse to draw any warrant therefor, and the treasurer should decline to make payment thereon. In reference to matters arising under enactments clearly unconstitutional, the unauthorized act of one government official is no justification or excuse for a similar act by another. The character and scope of the interrogatories submitted compel us to speak thus plainly upon these points . . .

"It would be trifling with a serious provision of the constitution to hold that the obligation to provide a tax for a given purpose is imperative, but that the appropriation of the fund arising from such tax is optional." In re Appropriations by General Assembly (Supreme Court of Colorado,

Oct. 25, 1889), 13 Colo. 316, 22 Pac. 464, 466, 467, 468; In re Priority of Legislative Appropriations, 19 Colo. 34 Pac. 277, inadvertently citing Section 6 of Article X; but construing Section 16 of Article X; Parks, Auditor v. Commissioners of Soldiers and Sailors Home, 22 Colo. 86, 3 Pac. 542; A. L. R. 637; In re State Board of Equalization, 24 Colo. 446, 51 Pac. 493.

Our Supreme Court in State ex rel. Journal Publishing Company v. Kenney, Auditor, adopted part of the reasoning in the In re Appropriations by General Assembly, supra, in 10 Mont. 488, 491.

The second part of said section provides, "This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war," and therefore takes any such appropriations or expenditures out of the prohibition. Our Supreme Court has held:

"If this very clear language has any meannig, it is that, whereas the legislative power over appropriations and expenditures, unlimited save as restricted by the constitution, is in fact restricted as above set forth, such restriction does not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war; and therefore, for such purposes, the power of the legislature stands without limit or restriction. . . .

"The United States is at war, and to assist the United States in war is expressly recognized by the Constitution as a proper occasion for the use of state funds (Const., Art. XII, Sec. 12). Moreover, this state, as one of the United States, is at war; when aiding the United States, this state but defends itself, and thus exercises the highest attribute, as it observes the most solemn duty, of sovereignty. That in pursuing the public purpose, the state, through its legislature, may adopt or prescribe any mode or means reasonably adapted to accomplish such purpose is too well settled for debate." (Emphasis mine.) State ex rel. Campbell v. Stewart, 54 Mont. 504, 510, 171 Pac. 755; In re State Board of Equaliza-

tion, 24 Colo. 446, 51 Pac. 493; State v. Cook, 17 Mont. 529, 535.

Therefore, there would be no restriction of the legislature if it determined, for example, to appropriate or authorize these excess funds to be invested in United States war bonds, or for any other purpose authorized by the exception, and as our Governor stated in his message:

"1. We should continue to exert the full weight of our material power, our manpower and the loyalty of our citizens for the winning of the war" (Emphasis mine.)

It may be deemed expedient and for the best interests of the state to appropriate or to authorize expenditures of such excess funds; however, expediency is not an admissible argument nor does such doctrine enter into the construction of statutes and more especially with constitutional prohibitions.

In my opinion, these surplus funds, accruing from tax and other revenue measures which have come into the hands of the state in excess of the needs of the state government, are impressed with a trust. This surplus money belongs to the sovereign people of this state. Since the legislature is prohibited from appropriating or authorizing its expenditure for state business, the sovereign people of the state should, by amendment of our Constitution, direct its disposition.

The whole theory of taxation and income for a state or a political subdivision thereof is that only such tax shall be levied or income received as is necessary for the expense of government.

Where a large surplus of revenue is returned from the people of the state over and above all costs of government, it should, in good conscience and equity, not be appropriated without the approval of the taxpayers themselves. It has been held the power to tax is the power to destroy; any other holding would take from the people the protection now afforded them from excessive impositions of excessive revenue measures when not needed for state government.

Therefore, it is my opinion—under the said section—the legislature may not appropriate or authorize expendi-

tures whereby the expenditures of the state during any fiscal year shall exceed the total tax then provided for by law and applicable to such expenditure, unless the legislative assembly making such appropriation provides for the levying of a tax, not to exceed the two-mill levy provided for in Section 9 of Article XII of the Montana Constitution, to pay such appropriation or expenditure within such fiscal year.

However, the legislature is not restricted in making appropriations or authorizations for expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war, the determination thereof being wholly with the legislature. The legislature for such purpose may appropriate moneys available or authorize any expenditure it may deem advisable.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General