Opinion No. 7

Bond Issue—Statutory Construction—Constitutional Law—Referendum—Board of Examiners.

Held: (1) That Referendum measure No. 52 providing for a five million dollar ($5,000,000.00) bond issue requires enactment by a subsequent legislature to create the debt, and to levy the tax; that control over issuance of the bonds and the disposition of the funds is placed in the discretion of the State Board of Examiners and that subsequent Legislatures do not have the power to substantially amend such a referendum.

January 28, 1949.

W. L. Fitzsimmons, Clerk
State Board of Examiners
State Capitol Building
Helena, Montana

Dear Mr. Fitzsimmons:

You have requested my opinion regarding the matter of the Greater University Bond issue, recently voted at the General Election. In this request you have compounded the following three questions:

1: Does the referendum measure vest the determination of allocation of the funds in the State Board of Examiners?

2. May the Legislature now undertake to provide, by Legislation, for the distribution of the proceeds of the bond issue?

3. What additional Legislation, if any, is called for?

Since your third question is general and an answer to it casts light upon and in effect answers the first two questions, I will take up these three questions in reverse order.

The referendum measure submitted to the voters at the General Election of 1948, and at that election approved by the voters, authorized and empowered the Legislative Assembly to direct the State Board of Examiners to issue bonds in the name of the State of Montana, in a sum not exceeding five million dollars ($5,000,000.00), in excess of the constitutional limitation of indebtedness. (Chapter 249, Section 1, Session Laws of 1947. The measure adopted also provided for an annual levy upon all property in the state subject to taxation of an advalorem tax, said tax not to exceed two and one half mills per annum. (Chapter 249, Section 6, Session Laws of 1947). The measure further provided that it should be in full force and effect from and after its passage and **approval.** (Chapter 249, Section II, Session Laws of 1947).

Thus, a close reading of the act clearly discloses that some action must be taken by the Legislature to fulfill the requirements of the measure. The Act authorizes the legislative Assembly to direct the State Board of Examiners to issue bonds under the conditions set forth in the other portions of the act. While it is entirely possible that the act might be held to be self-executing (Bonner v. Dixon, 59 Mont. 58, 195 Pac. 841, see quote, infra) by virtue of that portion of Section 4, which states "The State Board of Examiners of the State of Montana is hereby authorized

and directed to issue and sell such bonds. . .", I believe it is more in keeping with the intention of the act as an entirety to accept the opening sentence of Section 1, as expressive of the controlling legislative intent. Moreover, since the Legislature did not have that authority it could not delegate it. The authority was derived from the people of the State of Montana, and until the people authorized the Legislature so to do, the Legislature was unable to make any such delegation. The portion of Section 4, above quoted, then, is a fortiori indicative of the Legislative intention to place the actual issuance of the bonds under the authority of the Board of Examiners, see infra. It is therefore my opinion that the present Legislative Assembly must pass some legislation directory to the State Board of Examiners before any bonds may be issued by the latter body. It is further my opinion that the Legislative Assembly, in receiving the authorization and the power to so direct The Board of Examiners also received therewith a mandate from the people compelling them so to act. Furthermore, since the act itself does not levy a tax, but calls for an annual levy, there is here need for Legislative action.

Having determined that some Legislation is called for by Chapter 249, Session Laws of 1947, as approved by the people, the question becomes now, how much power and authority to control the issuance and expenditures of the bond money is retained by the Legislature after the directory act is passed.

First as to the issuance of the bonds:

Section 2, of Chapter 249, as approved by the people in referendum measure No. 52, reads in part as follows:

> "Such bonds shall be issued from time to time by the State Board of Examiners at such times and in such amounts as may appear to said State Board of Examiners of the State of Montana in the exercise of its judgment and discretion to be for the best interests of the State and necessary for the construction and equipping of necessary buildings, other permanent improvements, acquisition of necessary grounds therefor in and about the University of Montana. . . ."

Section 3, of Chapter 249, reads in part as follows:

> "Each series of bonds provided for in this act shall be issued in such denominations as may be determined by the state board of examiners at the time the same are authorized to be issued under the provisions of this act. . . ."

Section 4 of Chapter 249, reads in part as follows:

> "The board of examiners shall prescribe the form of such bonds, and bonds of each series shall bear upon their face the words: 'University of Montana building bonds of the State of Montana'. . . ."

Section 4 states further:

"The state board of examiners of the State of Montana is hereby authorized and directed to issue and sell such bonds as provided for in this act in such manner as they shall deem for the best interests of the State and the carrying out of the provisions of this act at such times within a period of twenty (20) years from and after the approval of this act and in such amounts as the said state board of examiners shall from time to time determine necessary for the purposes herein provided."

The above quoted portions of Chapter 249, clearly evince the intention on the part of the Legislature and the people to leave in the judgment and discretion of the State Board of Examiners all authority and power to issue said bonds. By Section 2, the amount and time is clearly left to the judgment and discretion of the Board of Examiners. Again in Section 3, each series of bonds is to be issued in such denominations as may be determined by the State Board of Examiners. The only limitation found in Section 3, is as follows: "at the time the same are authorized to be issued under the provisions of this act. . ." In Section 4, the State Board of Examiners is authorized and directed to **issue** and sell the bonds in such manner as they deem for the best interests of the State, "at such times within a period of twenty (20) years from and after the approval of this act and in such amounts as the said State Board of Examiners **shall from time to time determine necessary for the purposes herein provided".** (emphasis supplied)

The people of the State of Montana voted on this act and approved it, as written. Certainly there can be no question as to the plain meaning of these sections quoted. It must be ever borne in mind that this is the people's mandate and not an ordinary Legislative enactment.

If further indication of the legislative intention is necessary, such is furnished by a comparison of Chapter 249 with Chapter 168, Session Laws of 1939. Chapter 168 was a provision for a referendum to authorize issuance of bonds for construction at the State Insane Hospital. Chapter 249 is almost identical with the 1939 measure in many respects. However Section 2 of Chapter 168, Session Laws of 1939 reads as follows:

"Such bonds shall be issued in series from time to time by the State Board of Examiners upon the direction of the Legislative Assembly of the State of Montana and at such times and in such amounts as may appear to the Legislative Assembly of the State of Montana in the exercise of its judgment and discretion to be for the best interest of the state. . . ."

This language is identical with the language of the equivalent section of the instant referendum measure, except for the substitution of the State Board of Examiners for the Legislative Assembly.

Next to the plain import of the language, this obvious substitution of the Board of Examiners for the Legislative Assembly is the clearest indication that the Legislature intended that the people should authorize

the Board of Examiners to exercise its discretion in the issuance of the bonds, rather than subsequent Legislatures.

It is therefore my opinion that by the passage of Chapter 249 the Legislature plainly intended, and the people of the State of Montana approved, a complete delegation of the responsibility for the issuance of the bonds to the State Board of Examiners, along with the responsibility of exercising judgment and discretion in the issuance for the "best interests of the State".

Second, as to the expenditure of the funds:

On the question of the resonsibility for the allocation and expenditure of the funds, I call your attention to Section 5 of Chapter 249, the material portion of which is as follows:

> "All moneys derived from the issuance and sale of the bonds authorized by this act shall be paid into the state treasury and shall constitute a special fund for the construction and equipping of necessary buildings, other permanent improvements, acquisition of necessary grounds therefore, in and about the University of Montana, ... **as in the opinion of the board of examiners is necessary for the proper maintenance and support of the said institutions."** (emphasis sunpplied)

Section 5 further states:

> "Such moneys shall be expended only for the purposes herein expressly provided for and shall be disbursed by the state treasurer on warrants properly drawn against such fund by the state auditor **pursuant to the orders of the State Board of Examiners."** (emphasis supplied)

An additional question, not specifically raised by you, but which was raised under a similar act allotting such discretion to the State Board of Examiners, can be best answered by reference to the case of Bonner v. Dixon, 59 Mont. 58 195 Pac. 841 (1921).

At the general elecion on November 2, 1920, the people passed Initiative Measure No. 19, which authorized the Board of Examiners to issue bonds up to the amount of five million dollars ($5,000,000.00) in the name of the the state the proceeds to be placed in a fund and used for the construction, repair and equipment of necessary buildings for various named institutions all under the control of the State Board of Education. A suit to enjoin the sale of the bonds was brought, and one of the primary grounds for suit was the contention that the initiative was a law relating to appropriations of money, and therefore not a subject for initiative.

Concluding an extensive and learned discussion of the question the court held, at page 81:

> "The Act in question is self-executing, the money derived from the bonds is to be placed in a specific fund designated as the

'State Educational Bond Sinking and Interest Fund' and no appropriation of such fund is requisite as a condition precedent to its being paid out on warrant.

We are of the opinion that there is no merit in the first contention made by the plaintiff, as it would necessitate a distorted construction of language to hold that money raised by a bond issue constitutes an 'appropriation' within the meaning of this constitutional provision, although the measure places limitation upon the amount which may be expended for any specific purpose. Were this objection not so seriously argued by counsel, it would be by us dismissed with for less extended consideration."

A comparison of the provisions of the 1920 Act with the instant one concerning the expenditure of the moneys emphasizes the conclusion made apparent by the plain language of Section 5, Chapter 249, Laws of 1947.

Initiative Measure No. 19, 1920, is set forth in the Session Laws of 1921, at page 701. Section 6 of said Measure related to the expenditure of the funds received from the bond issue. This section limited the allocations to be made to various sets of institutions and provided that the State Board of Education should make the determination of necessity, and that the funds were to be issued on the order of the State Board of Examiners. In Section 1 the State Board of Examiners was empowered to issue the bonds, and in Section 2, the State Board of Examiners was granted discretion to issue the bonds in series as necessary. But the discretion to be exercised, was specifically granted to the State Board of Education.

Again the explicit difference lends emphasis to the obvious grammatical conclusion.

It is therefore my opinion that by Chapter 249 the determination of the need and the computation of the amount needed is made the sole responsibility of the State Board of Examiners. That is what the Act says, and that is what the people voted at the General Election.

The final question, then, is whether or not the Legislature can by amendment of Chapter 249 take unto itself some of the discretion granted by said Chapter to the Board of Examiners. From the foregoing it is clear that any attempt by the Legislature to provide for the distribution of the funds derived from the bond issue would necessarily require amendment of Chapter 249. Under Section 2 of said Chapter the time and amount of the issuance of the bonds is fixed in the judgment and discretion of the State Board of Examiners, conditioned solely by the provision that such action be taken for construction and equipment of necessary buildings, etc. Compared with previous similar acts, the Board of Education and the Legislature are conspicuous by nonmention. It is the responsibility of the Board of Examiners. Under Section 5, the moneys are to be paid into a separate fund for stated purposes as in the opinion of the Board of Examiners is necessary for the proper maintenance and support of the institutions to be benefited.

Since Chapter 249 so clearly places in the discretion and judgment of the Board of Examiners the responsibiilty for the serial issuance of the bonds and the disposition of the funds any attempt on the part of the Legislature to control that responsibility would require an amendment, which would in effect repeal portions of the Chapter.

Any such action on the part of the Legislature would be unconstitutional by virtue of Article XIII of the Constitution of Montana, which begins as follows:

> "The Legislative Assembly shall not in any manner create any debt except by law which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged."

Section 3 of Article XIII provides as follows:

> "All moneys borrowed by or on behalf of the State or any county, city, town, municipality or other subdivision of the state, shall be used only for the purpose specified in the law authorizing the loan."

A recent case from another state with respect to a similar constitutional provision is Routt vs. Barrett, 396 III. 322, 71 N.E.2d 660. In that case the court found it necessary to pass upon the question of whether all of the provisions of a referendum measure designed to provide funds for the payment of a soldiers' bonus were irrepealable and not subject to amendments of substance after the people had approved the measure. When the law was first passed by the legislative assembly of Illinois there was inserted in it an express provision that the entire law, and not merely the portion thereof levying the tax, should be irrepealable. It was asserted that the insertion of this provision invalidated the Act, it being contended that the earlier legislature could not thus bind its successors. Holding that in any event, and without regard to whether such a clause were or were not inserted in the Act, it would become irrepealable and not subject to amendments of substance, the Illinois court said at page 668 of 71 N. E. 2d:

> "When the General Assembly enacted the Bonus Act it exercised all the power it possessed under the constitution to create the debt, but the law authorizing the debt was ineffective until it had approval of the people. If the General Assembly did not have the power to make the statute effective as a law, then how can it have the power to repeal the law which the people have made effective by their vote? There is no theory under our form of government where a legislature can override the voice of the pople on such a matter. The law thus approved by the vote of the electorate is not the same as a constitutional amendment approved by the people, but it must be said it bears some of the same earmarks of sanctity as far as irrepealablity by the General Assembly is concerned.

"The question here is limited as to the power of the General Assembly to repeal the provisions of the law in reference to the debt, and if, as we hold, it has no power to repeal such a law, then the inclusion of the irrepealability provision of the Bonus Act was merely a statement of a pre-existing limitation on the power of the General Assembly. We are not concerned at this time with the power which a General Assembly may exercise to amend or add to a law which has been adopted by the people authorizing a debt, which amendments are limited to the supplying of deficiencies in the application of the law to the purpose for which it was enacted. No future General Assembly has the power to repeal the law so as to destroy the policy enacted in the Bonus Act for the payment of compensation to veterans. It cannot repudiate the debt or do anything which jeopardizes the good faith the electorate has pledged by approving the law to create the debt. The purchaser of the bond is entitled to rely on such expression of faith."

It should be noted that the only permissible amendments, according to the language just quoted, would be amendments which are limited to the supplying of deficiencies in the application of the law to the purpose for which it was enacted. "No future General Assembly has the power to repeal the law so as to destroy the policy enacted in the Bonus Act."

It is therefore my opinion that Chapter 249 of the Session Laws of 1947 is not subject to amendments of substance. What the people have legally authorized, the legislature may not take away. In the words of the Montana Supreme Court in Herrin v. Erickson, 90 Montana 259, 2 Pac. 2d 296, "The Act must remain inviolate in its provisions until the bonds are completely redeemed". The Herrin case has been limited by the later case of Nordquist vs. Ford, 112 Mont. 278, 114 Pac. 2d, 1071, in which Chapter 168, Session Laws of 1939 was upheld; but nothing in the later decision warrants any conclusion that an Act such as the instant one can be altered or repealed by subsequent Legislatures, after having been approved by the people. It is further my opinion that any attempt to alter the mandate of the people would, of necessity, require the approval of the people. (See Beneficial Loan Society v. Haight, 215 Cal. 506, 11 Pac. 2d 857 (1932).

While it has been held in Montana that initiative and referendum statutes are of equal dignity with those passed by the Legislative Assembly, and subject to amendment by the Legislative Assembly, (State ex rel. Evans v. Stewart, 53 Mont. 18, 161 Pac. 309; State ex rel Jones v. Erickson, 75 Mont. 429, 244 Pac. 287; Bottomly vs. Ford, 117 Mont. 160, 157 Pac. 2d 108) it must be kept in mind that the referendum was here merely the form adopted by the Legislature to comply with Article XIII, Section 2 of the Constitution of Montana, which requires that, except in certain emergencies, any law authorizing the creation of a debt in excess of one hundred thousand dollars ($100,000.00) must be approved by the people at a general election. Article XIII, Section 2 was in effect long before the amendment which added the

initiative and referendum methods of legislation to our law (The referendum amendment to Article V, Section I was declared to be in force and effect by proclamation of the Governor, Dec. 7, 1906). The mandate of the people having been thus expressed stands on a plane somewhat higher than an ordinary referendum. The mere fact that the referendum method was chosen to enable the people to pass on the act does not subject the act so approved to the law governing ordinary referenda.

In conclusion, then, it is my opinion that there is need for some action on the part of the Legislative Assembly. Very definitely the Legislature is called upon to levy an annual tax. While it is entirely possible that Chapter 249, Session Laws of 1947 might be held to be self-executing, I believe, the language of Section 1 thereof calls for an enactment along the lines of Chapter 55, Session Laws of 1941, which was passed to implement Chapter 168, Session Laws of 1939, with such alterations as are made necessary by the differences already referred to between Chapter 168 and the instant Act. Any such act should not deviate in its material provisions from the act approved by the people at the General Election on November 2, 1948.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.

Opinion No. 8

Purchase of Road Equipment By County Commissioners—Constitutional Prohibition On Expenditures—Budget Act—Emergency Expenditure.

Held: That the purchase by the Board of County Commissioners of a road grader, together with accessories thereto, which will cost more than ten thousand ($10,000.00) dollars, does not violate Article XIII, Section 5 of the Constitution of the State of Montana. Such a purchase, although not provided for in the fiscal budget, may be purchased under the emergency provision of the Budget Act, when in fact such emergency does exist.

February 23, 1949.

Mr. Melvin E. Magnuson
County Attorney
Helena, Montana

Dear Sir:

You have requested an opinion of this office upon the following questions concerning the purchase of road equipment by the County Commissioners.

(1) May the County Commissioners purchase a basic grader unit, which costs less than ten thousand ($10,000.00) dollars, and thereafter add accessories, the total cost of which basic unit and accessories would exceed ten thousand ($10,000.00) dollars, without violating Article XIII, Section 5 of the Constitution of the State of Montana?