

Opinion No. 77

Constitutional Law, Self-Executing Provisions—Hours of Labor, Eight Hours Shall Constitute a Day's Work—Legislature, Cannot Defeat Intent of Constitution by Failing to Provide Enforcement Legislation—Labor Division, Charged With Duty to Enforce Eight Hour Provision.

Held: 1. The Division of Labor of the Department of Agriculture, Labor and Industry has the duty of enforcing the provisions of Section 4 of Article XVIII of the Montana State Constitution relating to the eight hour day. In occupations and pursuits wherein the Legislature has failed to provide legislation making it a criminal offense to violate the eight hour provision, the Division of Labor should proceed in equity and enjoin any violation of such eight hour provision.

December 28th, 1949.

Mr. Robert C. Brown
Chief, Division of Labor
Department of Agriculture, Labor and Industry
Helena, Montana

Dear Mr. Brown:

You have requested my opinion upon the following question:

"What power, if any, has the Department of Agriculture, Labor and Industry to enforce compliance with the Montana 8 hour law in cases where the Constitution is not supplemented with appropriate legislation providing its enforcement?"

The appropriate Constitutional provision is Section 4 of Article XVIII of the Montana Constitution. As late as the year 1936 Section 4 of Article XVIII was rather limited in coverage, reading as follows:

"A period of eight hours shall constitute a day's work on all works or undertakings carried on or aided by any Municipal, County of State Government, and on all contracts let by them, and in mills and smelters for the treatment of ores, and in underground mines."

By an amendment adopted by a vote of the qualified electors of the State of Montana in the general election of 1936, Section 4 of Article XVIII, *supra*, was extended to include a greater number of activities and now reads as follows:

"A period of eight hours shall constitute a day's work in all industries, occupations, undertakings and employments, except farming and stock raising; provided, however, that the Legislative Assembly may by law reduce the number of hours constituting a day's work whenever in its opinion a reduction will better promote the general welfare, but it shall have no authority to increase the number of hours constituting a day's work beyond that herein provided."

Section 5 of Article XVIII, of the Montana Constitution is as follows:

"The Legislature by appropriate legislation shall provide for the enforcement of the provisions of this article."

By Chapter 263 of the Political Code, Revised Codes of Montana, 1935, the Legislature has provided that it shall be a misdemeanor for any person, company, or corporation to violate the eight hour provision in the following named pursuits and occupations; hoisting engineers; drivers and attendants of motor busses; jailors in counties of the first, second and third classes; underground miners; smeltermen; retail stores in all cities with a population of over twenty-five hundred; females employed in specified pursuits and occupations; works and undertakings carried on by any Municipal, County or State Government; cement plants, quarries and hydro-electric dams; and in sugar refineries. In Sessions of the Legislature subsequent to the adoption of the amendment to Section 4 of Article XVIII, *supra*, additional legislation was enacted so as to make it a misdemeanor to exceed the eight hour law in places of amusement and in restaurants.

A perusal of the list of statutes contained in the preceding paragraph discloses that there are many occupations and pursuits which have not been the subject of legislation and therefore there can be no criminal liability for working over eight hours in such occupations and pursuits contrary to the provision of the Montana Constitution. It is also enlightening to note that although the amendment to Section 4 of Article XVIII, *supra*, greatly enlarged the scope of the Constitutional eight hour day provision, the Montana Legislature has met seven times

since the amendment was effective and has added only the two above mentioned occupations to the list of those which provide that it is a misdemeanor to violate the eight hour provision.

Phrased in elemental terms, your question is, conceding that there is no criminal responsibility for violation of the Constitutional eight hour provision in certain occupations and pursuits, is such Constitutional provision in any way so self-executing as to provide for a method of enforcement by the parties charged with such duty?

The commonly accepted definition of a self-executing provision is one that can be given effect without the aid of legislation. 11 Am. Jur., Constitutional Law, Section 71, Page 689.

The question of whether Section 4 of Article XVIII of the Montana Constitution is self-executing and if so, to what extent, has never been ruled upon by the Montana Supreme Court. In the case of *State v. Safeway Stores, Inc.*, 106 Mont. 182, 76 Pac. (2d) 81, the court stated that since it was not necessary for the disposal of the matter before them, they would not rule upon the question of whether or not Section 4 of Article XVIII, *supra*, was self-executing.

The most extensive review of the self-execution of Constitutional provisions contained in the Montana Reports is that set forth in the case of *State ex rel. Stafford v. Fox-Great Falls Theatre Corporation*, 114 Mont. 52, 132 Pac. (2d) 689. Therein the court held that Section 2 of Article XIX of the Montana Constitution, providing that the Legislature should not have the power to authorize lotteries or gift enterprises, was not self-executing. Two of the Justices dissented. In the well reasoned dissent of Mr. Justice Erickson, concurred in by Mr. Justice Angstman, is found the following language which is applicable to the question raised in this opinion:

"The general rule is that none of the provisions of the Constitution can be looked upon as merely advisory, and if the provision is capable of enforcement in **any manner**, it is to be regarded as self-executing. (1 Cooley, Constitutional Limitations, 8th Ed 165).

"Our own court has spoken on this subject in *State ex rel. Bennett v. State Board of Examiners*, 40 Mont. 59, 104 Pac. 1055, 1058. The courts aid, "The question in such cases (that is, whether or not a Constitutional provision is self-executing) is always one of intention, and to determine the intent the general rule is that courts will consider the language used, the objects to be accomplished by the provision, and the surrounding circumstances and, to determine these questions from which the intention is to be gathered, the court will resort to extrinsic matters when this is necessary."

Applying the reasoning of the Bennett case, cited in the above quotation, to Section 4 of Article XVIII, *supra*, it must be manifest

to all that the object intended to be accomplished by the 1936 amendment to Section 4 of Article XVIII was the alleviation of hardships suffered by employees who labored over and above eight hours per day. It was intended to be a great step forward in the field of social progress. With such considerations in mind it cannot be seriously contended that the framers of the amendment to Section 4 of Article XVIII intended that the purpose of such provision could be defeated by the failure of the Legislature to provide for a penalty for violation of such eight hour provision. The above principle is aptly stated in 16 C.J.S., Constitutional Law, Section 48, Page 100, as follows:

"A provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on Legislative will."

A very able discussion of self-executing provisions is set out in *Rice v. Howard*, 136 California 77, 69 Pac. 77, wherein the court employed the following language:

"As to the question whether the provision is self-executing, it is well to note at the outset that the presumption is not precisely as it would have been had such a matter been presented for consideration 50 years ago. When the Federal Constitution and first State Constitutions were formed, the idea of a Constitution was that it merely outlined a government, provided for certain departments and some officers and defined their functions, secured some absolute and inalienable rights to the citizens, but left all matters of administration and policy to the departments which it created. The law-making power was vested wholly in the Legislature. . . . Later, however, all this has been changed. Through distrust of the Legislatures, and the natural love of power, the people have inserted in their Constitutions many provisions of a statutory character. These are in fact but laws, made directly by the people instead of by the Legislature, and they are to be construed and enforced in all respects as though they were statutes. . . . Recently adopted State Constitutions contain extensive codes of laws, intended to operate directly upon the people, as statutes do. To say that these are not self-executing may be to refuse to execute the sovereign will of the people. The different policy requires a different ruling. I should say the rule now is that such Constitutional provisions must be held to be self-executing when they can be given reasonable effect, without the aid of legislation, unless it clearly appears that such was not intended. If the Legislature must, or even may, provide for the mode of executing such Constitutional laws, it may to a great extent, and in some cases altogether, prevent their having any effect at all. . . . The change in mode of Constitution making indicates that the Legislature is not to be trusted with such power. In general, such Constitutional Statutes, if I may so speak of them, were intended to prevent the Legislature from legislating otherwise upon the subjects covered by such provisions."

With the language of the above-quoted case in mind the wording of Section 4 of Article XVIII, *supra*, should be re-examined in an effort to ascertain the intent of the people. Section 4 of Article XVIII provides in part that "But it (the Legislature) shall have no authority to increase the number of hours constituting a day's work beyond that herein provided." Such phrase is an absolute prohibition against the power of the Legislature to increase beyond eight hours, the number of hours constituting a day's work in all "Industries, occupations, undertakings and employments, except farming and stock raising." To hold that Section 4 of Article XVIII was not self-executing in any manner would allow individuals and corporations to violate the eight hour provision with impunity except when there is a specific statute covering the occupation or pursuit involved. Is it conceivable that the Legislature should be allowed to accomplish by inaction exactly what it is prohibited from doing by direct action? This would be a farcial result.

By virtue of Section 3635, Revised Codes of Montana, 1935, the Division of Labor is held responsible for the enforcement of the eight hour provision. Section 3635 is as follows:

"The Department of Agriculture, Labor and Industry, through the division of labor and publicity, shall be charged with the duty of enforcing all the laws of Montana relating to hours of labor, conditions of labor, protection of employees, and all laws relating to child labor regulating the employment of children in any manner; it shall also be the duty of such division to administer all the laws of the State relative to free employment offices."

Admitting that the Division of Labor cannot enforce the eight hour provision in a criminal proceedings except in those instances where the Legislature has acted to provide a penalty for non-compliance with such provision, I am of the opinion that the Division of Labor has an injunctive remedy and may enjoin violations of the eight hour day. Such procedure was outlined and approved in the case of *Way v. Barney*, 116 Minnesota 285, 133 N.W. 801, wherein the court held as follows:

"This provision is self-executing, otherwise the Legislature by is nonaction could emasculate it, and it creates an individual liability on the part of a stockholder for corporate debts, to an amount equal the amount of stock held or owned by him. The Legislature cannot defeat this obligation, but it may prescribe the procedure for the enforcement of the liability. In the absence of such legislation, equity can and will find a way for its enforcement."

It is my opinion that the Division of Labor of the Department of Agriculture, Labor and Industry has the duty of enforcing the provisions of Section 4 of Article XVIII of the Montana Constitution relating to the eight hour day and that in occupations and pursuits wherein the

Legislature has failed to provide legislation making it a criminal offense to violate the eight hour provision, the Division of Labor should proceed in equity and enjoin any violation of such eight hour provision.

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