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CONSTITUTIONAL LAW - Legislature, bicameral system; CONSTITUTIONAL LAW - Bills, passed by majority of each house; CONSTITUTIONAL LAW - Statutes, enactment of; LEGISLATURE - Bicameral houses; LEGISLATURE - Statutes, enactment of; STATUTES - Enactment of. Article V, sec. 11 (1), Constitution of Montana, 1972.

HELD: Article V, sec. 11 (1), Constitution of Montana, 1972, requires passage of a bill by a majority of each house of the legislature present and voting thereon.

December 29, 1972

Mrs. Rose Weber
Executive Director
Montana Legislative Council
State Capitol
Helena, Montana 59601

Dear Mrs. Weber:

This is in response to your request for my opinion on the following question:

Whether Article V, section 11 (1), Constitution of Montana, 1972, requires that no bill shall become law except by a majority of the entire legislature present and voting or whether the section requires that no bill shall become law except by a majority of each house present and voting.

Article V, section 11 (1), *supra*, states:

“(1) A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose. No bill shall become law except by a vote of the majority of all members present and voting.”

If the first suggestion is followed it would in effect create a unicameral process housed under a bicameral structure. If the second suggestion is followed the traditional bicameral process, such as was utilized under Montana’s original constitution, will continue.

The members of the Constitutional Convention set forth alternative proposals for creating a bicameral and a unicameral legislative process. (See: Section 2, Adoption Schedule, Constitution of Montana, 1972.) These alternative proposals were presented to the voters of Montana in the following form:

“

2.

- 2A. FOR a unicameral (1 house) legislature
- 2B. FOR a bicameral (2 houses) legislature”

The people of the state of Montana by an overwhelming vote adopted “2B” above and thus created a bicameral legislature. It should also be noted that the 1971-72 constitutional convention in its official

publication pursuant to the provisions of Chapter 296, Laws of 1971, commented on the constitutional section concerning the passage of bills under a bicameral system: "No change except in grammar", thus indicating a continuation of the process under the old constitution requiring a majority vote of both houses.

Most indicative of the intention of the drafters of the constitution, and the vote of the people thereon, is the explanation found in the history of the bicameral system. In Story's **Commentaries on the Constitution of the United States**, the author in introducing the structure of the legislative branch states at page 407:

"The first section of the first article is in the following words: 'All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

"'This section involves, as a fundamental rule, the exercise of the legislative power by two distinct and independent branches.'"

If the passage of a bill is dependent on the majority vote of the **entire** legislature present and voting, it would of necessity require dependency on the body as a whole rather than independence of action by each branch. This subverts the fundamental rule suggested by Story.

Story then continues on pages 413-14 as follows:

"The value, then, of a distribution of the legislative power between two branches, each possessing a negative upon the other, may be summed up under the following heads. First: it operates directly as a security against hasty, rash, and dangerous legislation; and allows errors and mistakes to be corrected, before they have produced any public mischiefs. It interposes delay between the introduction and final adoption of a measure, and thus furnishes time for reflection, and for the successive deliberations of different bodies, actuated by different motives, and organized under different principles."

Story again contemplates an independent consideration by each branch of the legislative process with an independent vote by each branch as to its wishes. This concept can only be carried out by requiring that a bill be passed by a majority of the members of **each house** voting thereon.

Though the concept of bicameral legislative process is a well understood doctrine within the various states of the United States, it is a concept that has found scant consideration in the decisions of our courts. Perhaps the reason for this lack of judicial determination is occasioned by the fact that a bicameral system, requiring an indepen-

dent consideration and vote by each house of the legislature, has become such a fundamental principle in American government that it is not questioned. (The freedom of migration through the various states of the Union was acknowledged as just such a fundamental principle in **Shapiro v. Thompson**, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322.) The concept of bicameralism, then, is discussed more in treatises than in court decisions.

Despite the fact that bicameralism is not a frequent subject of discussion by the courts, there does exist precedent concerning the acts of a two-house legislative body. In **Rhode Island Episcopal Convention v. City Council of Providence**, 159 Atl. 647 (1932), the Supreme Court of Rhode Island was confronted with the interpretation of a statute which read in part:

“ . . . no such amendment or repeal shall be passed except by a three-fifths vote of such city council or representative council . . . ”

The city council was composed of a common council and a board of aldermen. The situation then confronting the court was described as follows on pages 647-48:

“The question on the passage of the proposed ordinance and voted upon (by the common council); twenty-one voted in the affirmative and sixteen in the negative, with two absent, this being less than a three-fifths vote in the affirmative, the proposed ordinance failed of passage. The president of the common council then ruled that action on the ordinance by the board of aldermen must be awaited before the result could be determined. Later, notice having been received that the vote in the board of aldermen was thirteen in the affirmative and none in the negative the president of the common council announced that the ordinance passed by a vote of thirty-four to sixteen.” (Bracketed words supplied)

The court, however, disagreed with the conclusion reached by the president of the common council, stating at page 648:

“The city government is made bicameral by its charter, and we find no provision therein for both branches functioning as a unicameral body, except for purposes of electing certain officers.

* * *

“It was clearly the intention of the Legislature to make repeal or amendment of the zoning ordinance more difficult than in the ordinary case where only a majority vote is necessary.

“This intention would be defeated if the respondent’s contention were accepted for the reason that the negative vote of one branch of the city council might be nullified by the passage of an ordinance amending the zoning by a vote of thirty-two members of the common council. If such a vote were recorded in favor of amendment, or repeal, the reference to the board of aldermen would be a mere formality.”

In a similar manner an aggregate vote of seventy-six votes in support of a proposition by the House of Representatives would negate the need for reference to the Senate, for their vote would be inconsequential, if the unicameral concept is adopted. It is difficult to believe that the framers of the new constitution would create a body such as the Senate and then render it potentially impotent.

In summary, the phrase “all members (of the Legislature) present and voting” merely denotes the body acting and does not define its functions. The Constitution created a bicameral system and each body must operate independent of the other.

THEREFORE, IT IS MY OPINION that Article V, section 11 (1), requires passage of a bill by the majority of each house present and voting thereon.

Very truly yours,

ROBERT L. WOODAHL
Attorney General