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## What Is the Nature of the Montana Constitution?

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should be treated as if it were non-negotiable. It must be remembered, however, that this language is not technically correct. The instrument is still negotiable, but the holder not in due course is precluded from taking advantage of the negotiability of the instrument.

The conclusion to be drawn from the foregoing material must be that the correct rule under the *NIL* and the Montana statutes is that a holder not in due course of a negotiable instrument is subject to a set-off arising from a collateral transaction, and that this is likely to be the rule that Montana will adopt.

DEAN JELLISON.

### WHAT IS THE NATURE OF THE MONTANA CONSTITUTION?

A familiar constitutional doctrine declares that a state constitution is not a grant of, but a limitation upon, power. Inherent in this statement is the contrast that authority for Federal activity must exist within the scope of delegated power—either enumerated or implied in the Federal Constitution—whereas authority for state activity exists unless the activity be forbidden, expressly or impliedly, by the state constitution, or the superior Federal Constitution. State authority otherwise is plenary.

As a working principle the majority of states have found it unnecessary to qualify the doctrine further than to assert that the constitution is an instrument of limitation upon *legislative* authority.<sup>1</sup> Where more fully refined the doctrine has been taken to mean either:

- (1) the constitution is a limitation upon legislative power but a delegation of judicial and executive power, or
- (2) the constitution is a limitation upon each of the departments of government.<sup>2</sup>

Relying on three cases the editors of *CORPUS JURIS SECUNDUM* present Montana as being the only state holding the latter view.<sup>3</sup> The purpose of this comment is to question our unique stand and by consideration of the Governor's office under the Constitution suggest what may be a less defeasible position.

From 1895 to 1916 the Montana Supreme Court had need in

<sup>1</sup>C.J.S. *Constitutional Law*, § 70, p. 134, gives Connecticut as holding that their legislature acts under delegated power.

<sup>2</sup>C.J.S. *Constitutional Law*, § 70, footnote 88.

<sup>3</sup>Mont.—State ex rel. DuFresne v. Leslie, 50 P.2d 959, 100 Mont. 449, 101 A.L.R. 1329—Great Northern Utilities Co. v. Public Service Commission, 293 P. 294, 88 Mont. 180—Hilger v. Moore, 182 P. 477, 56 Mont. 146.

at least nine<sup>4</sup> of the many cases involving constitutional construction to consider the nature of the Montana Constitution. The expression of its nature, of course, varies among these cases, but their tenor is that our constitution is a limitation upon legislative authority. The issue of each of these cases concerned legislative power; the decisions therefore did not preclude the possibility that as to the judicial and executive departments the constitution could be either one of limitation or delegation. Such further delimitation is first hinted in *Northern Pacific Railway Company vs. Mjelde*,<sup>5</sup> where Justice Holloway writes, "Our Constitution is not a grant of power, but a limitation—*particularly* a limitation upon legislative action." This was in 1913. In 1917 the judicial and executive departments were included within the sweep of this characterization—and seemingly through happenstance.

The first pronouncement of this change is found in *McClintock vs. City of Great Falls*.<sup>6</sup> In reaching the decision Justice Holloway commented, "*Speaking generally*, our Constitution is not a grant of powers, but a limitation upon the powers which may be exercised by the various branches of the state government." The issue concerned only legislative power. No explanation is furnished for the gratuitous extension to the judicial and executive departments. *Hillis vs. Sullivan*<sup>7</sup> is cited as authority for the statement. While true that the *Sullivan* case in some measure dealt with judicial power, the court in that case did not find the appointment of an attendant by the district Judge to be unwarranted because of constitutional limitation upon the judiciary, but rather because the orderly method of appointment prescribed by the legislature had not been followed, the statutory mode being deemed not an objectionable invasion of a judicial function. Further the expression of the doctrine in the *Sullivan* case is in its broad form, "Our Constitution is not a grant but a limitation of power . . .," and is made not with particular reference to the judiciary but with general reference to the historical background of the Constitution. Thus,

<sup>4</sup>State v. Hitsman, 99 Mont. 521, 44 P.2d 747 (inherent powers); State v. Stewart, 53 Mont. 18, 161 P. 309 (plenary power); Butte & Superior Mining Co. v. McIntyre, 71 Mont. 254, 229 P. 730 (plenary power of legislation); State v. Erickson, 75 Mont. 429, 244 P. 287 (plenary power); State v. Dixon, 59 Mont. 59, 195 P. 841 (plenary legislative power); Mills v. State Board of Equalization, 97 Mont. 521, 33 P.2d 563 (plenary power); State ex rel Normile v. Cooney, 100 Mont. 391, 47 P.2d 637 (plenary power); State v. Keaster, 82 Mont. 106, 266 P. 387 (inherent powers).

<sup>5</sup>Northern Pacific Railway Company v. Mjelde, 48 Mont. 287, 137 P. 386.

<sup>6</sup>McClintock v. City of Great Falls, 53 Mont. 221, 163 P. 99.

<sup>7</sup>Hillis v. Sullivan, 48 Mont. 320, 137 P. 392.

considering the issue and the authority cited, the pronouncement in the *McClintock* case is not telling.

*Edwards vs. Lewis and Clark Co.*<sup>8</sup> decided later in 1917 reiterates the broad expression of the doctrine expressed in the *Sullivan* case, but in *Hilger vs. Moore*,<sup>9</sup> Justice Holloway ceases "speaking generally" and announces, "Our State Constitution, unlike the Constitution of the United States, is not a grant of power or authority; but is distinctively a limitation imposed by the people upon the several departments of state government." The *McClintock* case is cited as authority, but again only legislative power is in issue. However, that studied consideration may have been given to this expression is emphasized by Justice Cooper's dissent, which concurs with this construction.

Justice Holloway, though, may have had some misgivings about the exclusive utterances in the *McClintock* and *Moore* cases, for in *Heckman vs. Custer County*,<sup>10</sup> decided in 1924, we find him saying, "So far as it operates upon the lawmaking department of government our state Constitution is a limitation of power as distinguished from the federal Constitution which is a grant of power."

But if Justice Holloway had any misgivings, they did not influence subsequent utterances, for in *Great Northern Utilities Co. v. Public Service Commission*,<sup>11</sup> decided in 1930, we find this declaration: "The Constitution of Montana is not a grant of power, but rather a limitation upon powers exercised by the several departments of the state government."

All hesitation is removed in *State ex rel. Dufresne v. Leslie*,<sup>12</sup> which through error quotes the headnote from *Hilger v. Moore*,<sup>13</sup> rather than the text, with this succinct result: "The state Constitution is not a grant of, but a limitation upon power exercised by the several departments of state government." In neither the *utilities company* or *Dufresne* case was judicial or executive power in issue.

Four cases, then, have discovered the nature of the Montana Constitution to be a limitation upon the power of each of the departments of Government. Yet, since neither executive or judicial power was in issue, the discovery in each case is by way of *dictum*, and what potency it has as *dictum* disappears if it can

<sup>8</sup>*Edwards v. Lewis and Clark County*, 53 Mont. 359, 165 P. 297.

<sup>9</sup>*Hilger v. Moore*, 56 Mont. 146, 182 P. 477.

<sup>10</sup>*Heckman v. Custer County*, 70 Mont. 84, 223 P. 916.

<sup>11</sup>*Great Northern Utilities Company v. Public Service Commission*, 88 Mont. 180, 293 P. 294.

<sup>12</sup>*State ex rel. DuFresne v. Leslie*, 100 Mont. 449, 50 P.2d. 959, 101 ALR 1329.

<sup>13</sup>*Supra*, note 8.

be established that any department of the state government acts under delegated power.

With that in mind let us consider the most important of the seven offices of the executive department, the Governor's, and from the Constitution itself, its historical background and some representative cases approach the nature of his power.

Sections 5 through 15 of Article VII of the Montana Constitution primarily pertain to the Governor. Collated with Article II of the Federal Constitution devoted to the President, the conclusion is inescapable that these Sections were modeled after the Federal prototype. Indeed, the language of some provisions is a literal copy of the Federal constitutional language.<sup>14</sup> And, like Article II of the Federal Constitution, these sections are cast in the affirmative language of grant rather than the negative language of limitation which predominates in Article V pertaining to the legislative department. No distinction in the language of the instruments themselves could serve for holding that although the President's powers are those delegated by the Constitution the Governor's powers are those not forbidden by the state Constitution. The subject matters of their powers are substantially the same.<sup>15</sup> In fact, from the mere matching of the applicable executive Articles of the Constitutions the finding of comparison rather than contrast is patent.

But was the understanding of the framers of our Constitution different; did they, although using language of delegated power, conceive of the Governor's office otherwise? The material on this is meagre. In the Constitutional Convention we find the only discussion of the nature of his office arising in debate over the salary to be paid him.<sup>16</sup>

In urging a lower salary than recommended by the Committee of the Whole, Mr. Collins made this disparaging argument:

I think in the first place that the office of Governor is more of an ornament than anything else. . . . The *routine duties* of his office can be performed by his private secretary.

The basis of argument by the proponents of a larger salary is summarized by Mr. Burleigh who had this to say:

<sup>14</sup>Compare this with the federal constitution (see Sections 7, 9, 10, 11, and 12 of Article VII of the Montana Constitution).

<sup>15</sup>Commander-in-chief of the military forces; nominates and appoints officers; power to grant pardons; furnish information to the legislature on the condition of the state; convene the legislature on extraordinary occasions; power to veto bills.

<sup>16</sup>PROCEEDINGS AND DEBATES, CONSTITUTIONAL CONVENTION (1889), pp. 442-443.

Now I do not believe that the salary should be fixed so low that none but a rich man can occupy the position. That it is a good deal of a *sinecure* I will admit, but I will admit that it is a stepping stone to something higher, for instance to the Senate of the United States or to some other high office, and I think the Governor should have sufficient salary here in the state to enable him to live as a gentleman; to provide all the necessaries for the entertainment of the members of the Legislature as well as the foreign ambassadors.

This constitutional debate hardly suggests that the Governor's power is plenary except as limited by the Constitution. Exactly the opposite is suggested—that he acts under delegated power.

Based on their apprehension of territorial governors our constitutional framers certainly would not conceive of a governor having other than delegated powers. It is elementary that the Montana Territory acted under delegated power conferred by Congress in the Organic Act of 1864.<sup>17</sup> There is nothing in that Act which indicates that the Governor's power is other than those specified in it. Again in this instrument reference to his power is in the affirmative language of grant.

The nature of the governor's office in the Territory is somewhat discussed in *Territory v. Rodgers*,<sup>18</sup> where the Supreme Court was presented with this question:

If there is no express law or authority conferring on the governor of the Territory the power to fill vacancies by appointment, or any appointing power, as distinguished from the power to recommend, select or nominate, and appoint only after having obtained the advice and consent of the legislative council, has the governor the inherent executive or incidental power?

The Territorial Supreme Court answered no to this. It compared his power under the Organic Act to that of the President of the United States under Article II, Sections 2 and 3 of the Constitution of the United States and noted that the Constitution provided for presidential interim appointments whereas the Organic Act did not, and held that, lacking that express power, the Territorial Governor had no inherent power to fill the vacancy in the office of the Territorial Auditor.

And this conception of the nature of his office was not singular with the framers of our Constitution. In his CONSTITUTIONAL

<sup>17</sup>*Territory v. Lee*, 2 Mont. 124, see p. 134.

<sup>18</sup>*Territory v. Rodgers*, 1 Mont. 252.

LIMITATIONS<sup>19</sup> published just six years before our Constitutional Convention, we find Professor Cooley, in speaking of Legislative Encroachments upon Executive Power, saying:

That such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature can not require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law. *But other powers or duties the executive cannot exercise or assume except by legislative authority.* . . .

This specific quotation was used by the compilers of the MONTANA CODE, 1895, to annotate Section 370, Paragraph 15, now RCM 1947, Section 82-1301, Paragraph 15.<sup>20</sup>

In the ENCYCLOPAEDIA OF LAW,<sup>21</sup> published 9 years after our Constitutional Convention, and which may be taken to represent the general understanding of the office of governor, we find:

Governors.—Historically the office of governor was the prototype of the presidency. And it has been said that "the chief magistrate or governor of the state bears the same relation to the state that the president does to the United States."

There are numerous cases involving the Governor's power. The great bulk of them are concerned with whether the power in issue was expressly or impliedly granted in the Constitution. No Montana case has been found holding that the Governor has the particular power in issue because it is not otherwise forbidden by the Constitution. Several cases, it is true, have found that he does not have a particular power because Constitutional construction forbids it. These cases would be flimsy footing for inferring that had the Constitution not forbidden it, in that event he could have asserted the power.

It was argued in *In re McDonald*<sup>22</sup> that when martial law prevails the governor through the militia has the inherent power to suspend civil processes, particularly *Habeas Corpus*. The court was able to reject this as being contrary to the Constitution without the necessity of deciding whether his power be delegated or inherent.

The suggestion of inherent power was also made in *Herlihy*

<sup>19</sup>COOLEY'S CONSTITUTIONAL LIMITATIONS, 5th ed., 1883, p. 136.

<sup>20</sup>"He has such other powers and must perform such other duties as are devolved upon him by this code, or any other law of this state."

<sup>21</sup>AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW, 2d ed., 1898, *Constitutional Law*, p. 1010.

<sup>22</sup>*In re McDonald*, 49 Mont. 454, 143 P. 947.

*v. Donohue*<sup>23</sup> but apparently not seriously pressed. The court did not directly pass on this theory, but by way of *dictum* did say:

The Governor is *at all times* amenable to the Constitution and the laws of the state. They are the charters of his powers, and in them he must find the authority for his official acts. While he may not exceed their bounds in any instance he may invoke any remedy *provided by them* for the purpose whenever the exigencies of a particular case call for it.

These cases offer little solace for believing that the Governor has other than delegated power. But a much more recent case<sup>24</sup> is yet more significant. In defending Governor Bonner's removal of the Chairman of the Unemployment Compensation Commission the argument proceeded on the basis that he had been given this power by the Act itself,<sup>25</sup> and by R.C.M. 1935, Section 422. No effort was made to find that this power existed because it was not otherwise forbidden by the Constitution and laws pursuant to it. This would have been an appropriate case to urge this theory had it been believed to exist for the power to remove where not conferred could be said to be inherent, and not forbidden by the Constitution.

Doubt thus having been cast on the thesis that the Governor's powers are those not otherwise forbidden by the Constitution, it is tempting to discard entirely the doctrine that the Montana Constitution is one of limitation on each of the departments of government and hold as apparently Illinois does:

The constitution is a limitation upon the powers of the legislative department of the government; but it is to be regarded as a grant of powers to the other departments. (a) Neither the executive nor the judiciary, therefore, can exercise any authority or power, except such as is clearly granted by the constitution.<sup>26</sup>

Or as Wyoming apparently does:

This is elementary, and too familiar to need elaboration, that, while the judiciary and the executive have only enumerated powers, the sway of the legislative department is supreme, except as controlled by the limitations imposed by the organic law.<sup>27</sup>

Both the Illinois Constitution, which was adopted in 1871,

<sup>23</sup>Herlihy v. Donohue, 52 Mont. 601, 161 P. 154.

<sup>24</sup>Bonner v. District Court, 122 Mont. 464, 206 P.2d. 166.

<sup>25</sup>Unemployment Compensation Law, Laws 1937, c. 137.

<sup>26</sup>Ill., 2 Scammon, p. 79, People v. Fields.

<sup>27</sup>35-36 P. 517, see p. 520; 4 Wyo. 535, People v. Henderson.



and the Wyoming Constitution, which was adopted in 1889, are very similar to ours. In each of these constitutions the articles pertaining to the legislature are expressed in the negative language of limitation, while the articles pertaining to the executive are expressed in the affirmative language of grant.

A good case could be made for following their interpretation. But such a rule in view of our present stage in understanding the Montana Constitution is too glib to be reliable. It seems that we can better arrive at the nature of the Montana Constitution by a piecemeal approach. Each of the executive offices and the court systems should be separately analyzed to determine the nature of their particular powers. Appeals in the offing concerning the Attorney General's power should prove helpful. In the meantime, it would be best to return to the earlier Montana holding that the Constitution is a limitation upon legislative authority. And almost certainly at least that much is true.

LOUIS FORSELL

### **MONTANA HOMESTEAD LAWS; THEIR RELATIONSHIP TO BANKRUPTCY**

#### **I. In General: The Homestead Laws of Montana.**

At the common law some exemptions from execution were known both in England<sup>1</sup> and the United States<sup>2</sup> but there was no generally recognized right of homestead. The Republic of Texas in an act dated January 26, 1839 produced the first actual legislation on the subject.<sup>3</sup> In our own state the Constitution specifies that "the legislative assembly shall enact liberal homestead and exemption statutes."<sup>4</sup> Subsequently laws were passed following this general mandate<sup>5</sup> and the Supreme Court in the case of *Mitchell v. McCormick* announced that the statutes then in effect were to carry out that purpose.<sup>6</sup> The laws were enacted for the debtor and were to be liberally construed.<sup>7</sup> The needs served by the allowance of the realty exemption are usually stated to be security of the home, the encouragement of building the home, attraction of people to unsettled areas, the general building up of the community through the absence of pauperism and the con-

<sup>1</sup>Blackstone, III Commentaries (4th) 412 ff.

<sup>2</sup>Haskins, G. L., *Homestead Exemptions*, 63 HARV. L. REV. 1291.

<sup>3</sup>*id.* Source: Laws of Texas, 3rd Congress, 1st session.

<sup>4</sup>Constitution of the State of Montana, Art. XIX, § 4.

<sup>5</sup>First noted in the Montana Code in 1895. But note that Montana homestead laws date from the Bannack statutes of the Sixties.

<sup>6</sup>22 Mont. 249, 56 Pac. 216 (1899).

<sup>7</sup>*Oregon Mfg. Co. v. Dunbar* (1930) 87 Mont. 603, 289 Pac. 559.