Donovan

25th day 1622 (page 31

Report of Judiciary Committee with reference to the Eligibility of Hon Eugene Fawcett of Santa Barbara —
Made special order for Thursday Oct 24th immediately after reading of Journal

(Preserve Copy)

16207

To the President of the Constitutional Convention.

The majority of the Committee on Judiciary and Judicial Department, to which was referred the resolution introduced by the Hon. Clitus Barbour of San Francisco, instructing the Committee to inquire into the eligibility of the member from Santa Barbara — the Hon. Eugene Fawcett — and his right to a seat in this Convention, beg leave to report, that the subject has been carefully considered by the Committee, and that we are of opinion that the Hon. Eugene Fawcett was eligible and is entitled to a seat in this Convention.

Maj.

As all the members of the Committee do not concur in this view, we may be excused for stating some of the reasons which led the majority to this conclusion.

Before the introduction of the resolution of Mr. Barbour, Judge Fawcett had occupied his seat as a member of this Convention for nearly three weeks. No person had, or has yet, appeared claiming his seat. His own County and Judicial District have raised no question, made no protest and presented no memorial on the subject, but, on the contrary, were desirous of his election, and are well satisfied with him as a member of this Convention, as we are informed and believe. He is a gentleman of high character, of learning and ability, of Judicial Experience, and in every way well qualified to make a useful member. The objection, to him, comes from a point remote from his constituency, and

without a suggestion of unfitness in any respect, is based upon a narrow, literal and technical construction of Section 16 of Article VI of the State Constitution. This declares Judges of the District Courts to be "ineligible to any other office than a judicial office during the term for which they shall have been elected."

As Mr. Fawcett is the Judge of the District Court of the ~~17th~~ First Judicial District of the State and was such at the time of his election as a member of this Convention, it is claimed that he was ineligible and not entitled to retain his seat.

Mr. F.

It is manifest to the undersigned that this is not a correct view of the subject. We are satisfied that a membership of this Convention is not an office in the sense in which that term is used in the Constitution; that a broader and more extended view must be taken; and that to hang upon the letter here is emphatically to hang upon the bark; that to be literal is to be wrong. The Constitution, as it is, creates a form of State Government complete in itself. Under it the State was to be organized, officered and launched into operation. It did not anticipate what should be done under a succeeding constitution, but provided for its own practical working. Its great fundamental principle was the distribution of the powers of Government into three separate departments — the Executive, legislative and judicial — confining

each to its own sphere. There were to be a large number of offices, each of which at once took place in its separate Department. As long as that Constitution should last, those offices would last, and it was in view of that fact that Section 16 of Article VI was adopted, rendering Judges ineligible during their terms to any office in the Executive or legislative Department. This covered the usual ordinary and necessary workings and instrumentalities of the government under that Constitution. It kept the Judge from using his high Judicial functions so as to advance him in the Executive or legislative Department, leaving him however free to seek advancement from a lower to a higher Judicial position. But when we come to the question of a new Constitution, we have something effecting the most radical change possible. The old things are to pass away and new ones take their place. A Constitutional Convention is, therefore, an unusual, rare, and merely occasional instrumentality of the government and of brief existence. It is not one of the three great departments of Government which are created for every-day operations and is not to be thrust into the ranks and limits of one of these three divisions, and take its place either as Executive, legislative or Judicial. The Constitutional Convention outranks them all; it is their Creator and fixes limits to their spheres of action and boundaries to their powers.

Mark

It is occasional, exceptional, brief and peculiar. It represents the people in their primary capacity, and forms the organic, fundamental and paramount law of the State. Its members are mere agents or delegates of the people, and they have no power to adopt or create, but at most can only propose and present to the people, a draft of a Constitution for their adoption or rejection. To confound, therefore, the functions and duties of a member of this rare and exceptional body, for the formation of a new organic law, with those of an officer under the every-day working of an existing system, is in our minds to commit a manifest error. It is to confound the architects and builders of a grand edifice with the people who subsequently occupy it; or the foundryman and machinist who build the engine, with the engineers and firemen who subsequently manage it.

Note

When we examine the frame work of the Constitution itself, we find it divided into Articles under which are systematically arranged the offices pertaining to each division, and their qualifications. Article IV covers the Legislative Department: Article V the Executive and Article VI the Judicial.

In none of these do we find any reference to members of a Constitutional Convention. Such Conventions are only referred to in Article X, a distinct and separate part of the Constitution thus isolating this subject from those portions appertaining to the

ordinary and every-day operations of the Government. This Article X is as broad as can be: no test of eligibility is given; no qualifications are prescribed. The only limit is, that "such Convention shall consist "of a number of members not less than that of both "branches of the Legislature". From this it would seem that the people were left free to select whom they pleased. The statute under which the convention was called is likewise free from any limitation or restriction in this regard.

Norp.

The common practice of the people of the United States is in accordance with the views here presented. Mr John Howard Hinton in the 2nd Vol. of his History & Topography of the United States (pp. 324 to 327) treats of Constitutional Conventions, and, among other things, says: "The constituency who choose the dele- "gates for a convention, is almost always the same "constituency who choose the members of the State "Legislature; but it seems to be open to discretion "to make this occasional constituency even more "extensive. A great peculiarity, however, of the "character of conventions is, that the delegates "may be individuals from any class, including "the ministers of religion, the Governor and other "public functionaries, and the Judges. In this "point the reader will be struck with the resemblance "it bears to the English County Meetings, where "peers and commoners, and Clergy and all other

"men assemble to deliberate on any public concerns.
"Both institutions, indeed, are traceable to a com-
"mon Saxon stock"

Pierson

~~In Massachusetts the Patriot Warren, whilst a United States Senator, became a delegate to a Constitutional Convention, in common with other public functionaries.~~

Norris.

In Virginia the Governor of the State sat side by side with John Marshall, both delegates in the Constitutional Convention of that State, whilst the latter was holding the Exalted position of Chief Justice of the Supreme Court of the United States. Other distinguished officers were likewise delegates to the same Convention.

In the Illinois Convention of 1862 Judge O'Melveny was a delegate and had been Judge of one of the Circuit Courts within one year prior to his election as delegate. The Constitution of that State provided that the Judges of the Supreme and Circuit Courts should not be eligible "to any other office or public trust of "profit" in that State or the United States during the term for which they were elected, or for one year thereafter, and that all votes for them for such "other office or public trust "of profit" should be void. Mr O'Melveny's competitor contested his seat on that ground. But the Convention, acting upon the principle that a delegate to the Convention was not an officer

within the sense and meaning of the Constitution, retained Judge O'Melveny in his seat.

That Convention consisted of the prominent men of Illinois and numbered among its members jurists of national renown. That case affords an exact parallel to this, and is a precedent directly in point, whilst we have been unable to discover a single instance to the contrary.

Beside all this we cannot assume for a moment, that the Convention which framed the present Constitution, intended to trammel the succeeding generation in any such manner in the formation of a new or revised organic law. It would have been contrary to the accepted theories of Our Government, that they should claim a right to define who should constitute the representatives of the people in their great work of defining the fundamental law of the future. Such action would have been contrary to principle and to the common practice of the people in like cases.

We are, therefore, happy to vindicate the able and distinguished men, who framed the present Constitution, from any such aspersion on their fame, and are entirely satisfied that their intention and meaning was merely to prohibit the Judges from discharging the duties of an office belonging to either of the other departments under that Constitution. Clearly the inhibition was intended

to apply only to the Government and the departments thereof created by that Constitution, and not to the rare and exceptional occasion of a Convention, in which the people, resuming their original sovereignty, undertake to change the whole government, and select its own agents for that purpose.

~~We, therefore, respectfully submit that the Hon. Eugene Fawcett was eligible at the time of his election and is entitled to retain his seat in this Convention~~

Nonp

8 So far we have attempted to maintain our conclusion upon reason and the common usages and practice of Constitutional Conventions. But we are not without the authority of some of the highest Courts of the Country in our favor. The Supreme Court of this State directly maintains the principles on which we rely. That Court has ~~[illegible]~~ construed the various sections of the Constitution referred to and held that the Chief Justice of this State may lawfully hold the office of Trustee of the State Library and that the Police Judge of San Francisco may act as Police Commissioner.

See People vs Provines 34 Cal R 5 32 et seq and People vs Bushs 40 Cal R 349.

In the Provines case the Supreme Court held that the Legislative Department referred to in Article III of the Constitution means the Senate and Assembly and nothing else. It is

Mark.

9 very clear then that a Constitutional Convention is not a Legislative body in the sense of the Constitution.

Article III of our Constitution is borrowed from the Constitution of Iowa, and the Supreme Court of that State has held that under that Article one man may exercise the duties of Mayor of a City and Justice of the Peace as the office of Mayor is not a State office.

Nonp.

Santo v The State of Iowa
2 Iowa R 220.

The Constitution of Indiana provided that "No person holding a lucrative office or appointment, under the United States or under this State shall be eligible to a seat in the General assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constitution permitted" &c.

The Director of the State Prison, which was a lucrative office, was also a councilman

of the City of Madison. The Supreme Court of Indiana held that the office of Councilman was a lucrative office and though literally it fell within the clause of the Constitution referred to it was not a State office and that the Constitution only referred to offices provided for under the State Government.

~~We therefore resp~~

See the State Ex rel Platt vs Kirk 44 Ind Rep 405.

We therefore respectfully submit that the Hon Eugene Fawcett was eligible at the time of his election and is entitled to retain his seat in this Convention.

Oct 21st 1878.

S M Wilson
Chairman.
W J Graves
D S Terry
Alex Campbell
J H Laird

S. G. Hilbom
Gen. Venable Smith
J. S. Belcher
V. E. Howard
Henry Edgerton
John A. Edgar
W. L. Dudley
P. Donlan
P. B. Tully
Geo Steele

Tully
Steele

Report of the Judiciary Committee on the case of Judge Fawcett

(11)