Sandy

26th day 1651

Reserve Copy

Mr President.

The undersigned a minority of the Committee of the Judiciary to whom was referred the subject of the eligibility of the Hon Eugene Fawcett to a seat in this convention, finding themselves unable to agree with the majority of such Committee, make this minority Report.

Nonb.

It is admitted, that the sitting member whose seat is contested, was at the time of his election and is now Judge of the District Court of the First Judicial District of California. We think this fact renders him inelligible to a seat in this Convention, and we further think that this result is distinctly required by the present constitution, and the reasons which underlie it. The right of the sitting member has been put 1st upon the general that Conventions are revolutionary bodies, and that in their creation, the People are emancipated from existing laws by which they are controlled in all other affairs, and that the Convention itself is possessed of power to disregard all rules, but its own will.

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2d That the constitution now existing, allowing it to furnish the rule of judgment, sustains his claim.

As to the first ground, the language of the Claimant himself, although somewhat guarded may be accepted as a fair statement of it.

Judge Hawcett

He claimed that this was in no sense an office within the meaning of the Constitution. That even if it was, the people had a right to say who should represent them in the Convention to frame an organic law. That if the people of one generation had a right to dictate to the people of the next, they had a right to say how and what they should do, and we would virtually have no power to alter or amend the organic law. ~~He said he hoped the matter would be~~

Norris

In the cursory examination of the majority report, the same proposition in equivalent terms

To a doctrine so unfounded, and so dangerous, the undersigned express their unqualified dissent. The People of this Republic with all their jural relations, constitute the State. The government is that agency - both of powers and officers by which the business of the State is effectuated. That the people can assemble in any place, or in any manner which caprice a convenience may direct for consultation and to concert action for petition or other

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methods of procedure for change of their legal relations to the State or to each other, disturbing in no manner the public peace may be safely conceded. That they may follow this up by conventions to the same end is equally true. These conventions like hundreds of other of public private character are intended to collect and give expression to public opinion.

Unlike other conventions they propose to operate upon the law through the law making power. Directly of themselves they claim no power over the law but that of Petition and Remonstrance.

There is another class of conventions which sweeping aside constitution, laws institutions and officers at once resolves society into its individual elements and taking a new departure from present chaos endeavors therefrom to create order and institutions. This is simple revolution.

While it is not asserted that this convention is exactly one of this character, yet it is intimated, that if the People have in Judge Fawcett's case elected a gentleman ineligible under the present constitution - they have the right to do so, and this convention is bound to effectuate their choice. That is to say

every provision of the present constitution regulating the calling and purpose of this convention, may be ignored at will, because it has been so ignored by a detached portion of the People.

This doctrine is dangerous to all alike. When this convention is disposed to treat the constitutional inhibition as of no value, it is not perceived why it may not expel, as well as admit members in execution of mere personal preference. That this convention is not a revolutionary body, and that it sits here only under the sanction of laws, it requires but a glance to perceive.

The People operating in accepted mode, invited the legislature to exercise a specific power given them by the constitution, by passing a law submitting the question of general revision of the existing constitution to the People. Upon the returns of such election it was ascertained by the officers of the law, that a revision had been ordered by the People. Another legislature directed, by statute, the election of delegates to this body. It was held and the persons elected presenting themselves here at the hour set by the

Note

legislature, were organised by the designated authority, and took an oath to support the constitution of the state, and to discharge the duties of the office of delegates. After all this, in presence of elements of disorder, which threaten destruction of all conservatism the undersigned cannot permit themselves to be styled revolutionists, nor this body, as one ignoring constitution and all legal forms, limitations and restraints, without entering their solemn protest and dissent.

Nonp.

Beach gal 171

This doctrine of the sovereignty of the Convention was expressly denied by the founders of the national Constitution. Mr Wilson of Pennsylvania of whom it is said he was one of the profoundest jurists our country has ever produced said in regard to the power of the Convention "I conceive myself authorised to conclude nothing, but to be at liberty to propose anything" This doctrine received the concurrence of Gov. Randolph of Virginia James Madison Mr Paterson of N. Jersey and of the Convention. The independence of the Convention and its Sovereignty ~~began to be asserted in 1847 in the Illinois Convention followed up~~

was asserted by Mr Dallas of Pennsylvania in 1836; this was followed up by an Illinois Convention in 1847 and still later in Kentucky and Massachusetts in 1853. To those who desire the restatement and adoption of this theory the tracing of these attempts to point this doctrine upon Constitutional Convention down to their adoption in effecting the actual withdrawal of Eleven States of this Union from their allegiance to it, it will be, if not a pleasant, still a most instructive employment. The undersigned have no wish for such restatement nor for any further experience founded upon it. We persuade ourselves however that this Convention will reject all such ragaries and will not accept the office, nor undertake to proceed upon, the theories nor to any extent discharge the functions of a Revolutionary Convention and that it will leave the claim of the sitting member to stand or fall upon the Constitution alone.

Every one must be aware that Constitutions owe their maxims and existance to the abuses resulting from the too great concentration of power in few or single hands. This idea was so fully conceded in the act of creating

the Federal Constitution. That the only question largely debated was, from which of the departments into which government was resolved was it, that most danger was to be apprehended.

In the Country from which the first colonists came, for many centuries the judges had been the personal advisers of the Crown. The duties they discharged were often of a political character. In the contest with the colonies, they were, many of them at least, the enemies of the Colonists. America was smarting under indignities - advised by the judges and Chancellors of England.

It was in view of this historical fact that American Statesmen in distributing the power of government, undertook at least to separate them by insurmountable barriers. Especially was the intention manifested of cutting off the judicial, from all junction, overlapping, or intermingling with any other department of government.

In short we believe that a judge is forbidden to perform or in any way to represent any function of a public character, during the term for which he was elected, other than those judicial in character, and we

believe further that it is a conclusion justified by reason and authority.

It must be borne in mind that constitutional questions are not to be passed upon like those presented in a plea in abatement or special demurrer. As to these it may be right to stand upon precise terms. Treaties and constitutions require a larger and more comprehensive view, by which the true intention of their terms may be sought. As to such instruments "haeret in litera, haeret in cortice." The whole scope and purpose must be ascertained from all that is in and around the fact of the creation of the instrument to be interpreted.

The committee of the judiciary seem to put their resolution upon the ground that the word "Office" does not properly indicate the function or place of a delegate in this convention. The language of Art. VI, Sec. 16, is as follows. The justices of the Supreme Court, and the District Court, and the County Judges shall be ineligible to any other office than a judicial office during the term for which they shall have been elected.

Newell.

Sandy

The committee make the whole question turn upon the interpretation of this word "office" and hold that it is not applicable to membership in this body. The undersigned do not concur in this opinion and if we did we do not see how it would strengthen the claimant's position. Art. III of the Constitution declares "The power of the government of the State of California shall be divided into three separate departments: the Legislative, the executive, and the Judicial, and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." The People v Sanderson reported in 30 Cal. 160, we think is an authority which accepted and fairly construed is decisive of this controversy. The case was Quo Warranto to settle the title of the Chief Justice of the Supreme Court to hold a seat in the Board of Trustees of the State Library. In the information or complaint in the defendant's demurrer, in the judgment below, in the statutes and in the Brief of Counsel, the right in dispute is called an office.

Wolf

1660

The Court no where call it such nor do they allude to the designation as affecting their decision. This went the whole length of asserting that the legislature could not impose upon a judge "any other duties than those of a judicial nature". After reciting the third Article above recited the Court quote Burgoyne & The Board of Supervisors of S. J. 5 Cal 9. That case after reference to Art VI says "from which it follows no duties except of a judicial character can be conferred on the Court of Sessions inasmuch as the officers composing those Courts are persons charged by the Constitution expressly with the performance of judicial duties." To further emphasize their views the Court in the main case proceed to assign as a reason why a judicial officer could execute no other duties that "No provision is to be found in the "Constitution expressly directing or permitting a Justice of the Court to exercise any functions appertaining to either of the above departments of government. In pursuance to this

Nonp.

larger and more comprehensive interpretation to which we have referred, the Court say "This position of the Constitution so far as it relates to the judicial department of the State, is, in our judgment, eminently wise. One of its objects ~~seems to have been~~ seems to have been to confine judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and another still to save them from the temptation to use their vantage ground of position and influence to gain for themselves position and place from which judicial propriety should of itself induce them to refrain. The Court then decide "that as the duties of a Trustee do not appertain to the Judicial Department of the Government, the Chief Justice could not execute them."

Norris

Donovan

The impropriety of the action contemplated in the Resolution reported by the Committee, and the justice and necessity of the above opinion, as decisively enforced by the results of its adoption. If any thing is certain to be done by this convention, it is a

remodelling of the Judicial Department. One of the propositions already passed upon by the Judiciary Committee and to be reported to this Convention, is the ~~[illegible]~~ abolition of the District Courts. Their name even is to be erased from the Constitution, and yet the majority resolution would retain a gentleman here who will be required to pass upon the further existance of his office and its emoluments, and perhaps to determine the result by his single vote. "No one ought to be judge in his own cause" is a legal maxim hitherto held to be of universal application.

Nonsense

We think further that a delegate to this convention is the holder of an office in the sense that word is used in the Constitution. Jameson's Book upon the Constitutional Convention See 324. Thus states his view. "In my judgment there can be but little doubt that a member of a convention is in the enlarged and proper acceptation of the term an "office of the State in a convention is a part of the apparatus by which a sovereign society does its work as a political organism. It is the sovereign as organised for the purpose of renewing or repairing the

governmental machinery. That same sovereign, as organized for the purpose of making laws, is the legislature; as organized for the purpose of applying or carrying into effect the law, it is the judiciary or the executive. These successive forms into which the sovereign resolves itself, are but systems of organization having relation more or less directly to the government of the society. Together they constitute the government.

Mr Webster in great argument in the Rhode Island case adopts upon this point equivalent terms.

~~The only case we have found which~~ seems to deny the foregoing is that of The People v Provines, 34 Cal. 520.

It is a noticeable fact that this decision, as it is called, asserts itself an an act of judicial legislation. After citing all the California and other cases the Court say, "From them we deduce the following general rule, as embodying the law of the present case as it now stands: The third Article of the Constitution prohibits all persons charged with the exercise of functions which are in their nature of either a legislative executive or judicial character, from exercising

the functions of either of the other two classes. Having thus stated the actual condition of the law the Court, with an admission that it was entirely unnecessary to disturb that condition, proceed to controvert the soundness of a long and unbroken stream of California decisions, by which that law had been declared, and to overthrow if possible the authority of a case in which the judge delivering the had been an unsuccessful defendant.

Nonsp.

As to the precise case three judges undertook to overthrow the opinions of four judges; but of so far as the case shows of all the preceding judges who had passed upon the question one or two perhaps excepted. Such a decision we submit is not entitled to very favorable consideration. Nor within its own terms is it obligatory upon this body which is sole judge of the eligibility of its members. The assertion in this case, that the word "office" used in Art III above cited, is to be confined to those offices which the Constitution created or designated. We do not admit this, but if it is a correct assumption still it remains that the office of delegate to this Commen-

tion is precisely within this category.

In the discharge of the duty which our convictions create, we have not thought it proper to canvas or judge of the merits of the sitting member nor the fact that there is no technical contestant. We agree, that if the wish of the voters, whose suffrages sent Judge Hawcett here can be gratified under a proper construction of the existing state of the Constitution, it should be done.

Having failed to reconcile ourselves to this conclusion we dissent from the report of the majority and recommend the adoption of the accompanying resolutions.

L. McM. Shafter
Edwd. Barry
C. J. Beerstecher

Nonf.

Minority Report
of Judiciary Com-
with reference to
the Eligibility of
Hon Eugene Fawcett
of Santa Barbara

Presented

Minority Report Judiciary Com.