

## REMARKS ON THE CONSTITUTION OF THE STATE OF WASHINGTON\*

The Territory of Washington was created by act of Congress approved March 2, 1853. It was originally a part of the Territory of Oregon.

At the date of the Organization of Washington Territory it had a population of 3,965 of whom 1,682 were voters. The increase in population was slow until the coming of the Northern Pacific Railroad, which reached Ellensburg March 30, 1886, and made connection east and west at bridge No. 21 on the Switchback over the Cascade Mountains July 1, 1887. Up to the year 1876, twenty-three years after its organization, the population had reached but little over 40,000. Within the next thirteen years, 1889, the population had jumped to 242,046.

There had been much talk throughout the Territory about admission into the Union for a number of years. The Legislature in 1867-8 passed an act to submit the question, of calling a constitutional convention, to the people at the next general election but there was such a small vote polled in 1869 that the move went no further. The Legislature of that year passed another act calling for a vote in 1870 and making it a duty of the next Legislature, should there be a majority in favor of such convention, to provide for holding the same, but again the people showed indifference. The Legislatures of 1871 and 1873 respectively passed acts of like purport and they met the same results as those that had gone before. In 1875, a similar act was passed, this time calling out a vote of 7,000, with a majority for a constitutional convention of 4,168. Accordingly the following Legislature appointed a constitutional convention to be held at Walla Walla in June, 1878, and delegates were elected in April of that year and the convention was duly held, convening at Walla Walla on June 11, 1878. The names of the delegates were; W. A. George, S. M. Wait, C. M. Bradshaw, Francis Henry, Elwood Evans, B. F. Dennison, H. B. Emory, A. S. Abernethy, S. M. Gilmour, Charles H. Larrabee, D. B. Hannah, George H. Stewart, O. P. Lacey and L. B. Andrews, J. V. Odell and Alonzo Leland were delegates from north Idaho. A. S. Abernethy was elected President of the Convention and W.

\* Mr. Ausin Mires prepared this document which he delivered as an address before the State Normal School at Ellensburg on July 11, 1923. He has brought it down to date in such matters as the survivors of the Constitutional Convention. He is one of the four such survivors and, for that reason, it is especially desirable that his comments should be published for permanent preservation.—EDITOR.

Byron Daniels Secretary, assisted by William S. Clark; Henry D. Cock Sergeant-at-arms, John Byrant and John W. Norris, Messengers. The session lasted twenty four days. The constitution formulated by that convention was submitted to the people at the November election and adopted. Congress had passed no enabling act and the convention was purely voluntary. Thomas H. Brents, the newly elected Delegate to Congress, offered the State of Washington for adoption into the Union immediately upon taking his seat, but Congress turned it down. At that time Washington had a population of little more than 40,000 inhabitants, while the number required by the general apportionment bill for a member of congress was 124,000.

#### *Admission Convention*

By the dawn of the year 1889, there had come about great changes in conditions and the people were becoming restive at the seeming inattention of Congress, which resulted in the holding of one of the most important and by far the most representative conventions ever held in the Territory of Washington, right here in Ellensburg, Jan. 3, 1889, called the "Admission Convention," The object was to bring about the admission of Washington Territory into the Union as a State. It was non-partisan and attended by the leading men of all parties and from all walks of life. The convention was held in the court house, but at that time the court room covered the entire upper floor of the building and the seating capacity was much greater then, than now, and the room was crowded.

James B. Reavis of North Yakima, a Democrat, was chosen temporary chairman. He was afterward elected to the Supreme Bench of the State of Washington. George H. Jones of Port Townsend, who afterward served as a delegate in the Constitutional Convention, was made temporary Secretary. Watson C. Squire of Seattle, a Republican, was elected permanent Chairman. He was Governor of Washington Territory from 1884 until 1887, and was elected one of the first United States Senators from the New State of Washington. Harry Lane Wilson of Spokane was elected permanent Secretary. He was afterward appointed Ambassador to Mexico.

Among other delegates who were then prominent in the territory or who afterward became prominent, were; Samuel C. Hyde and John L. Wilson of Spokane Falls, as the city was then called. John L. Wilson was elected the first Representative to Congress from our new State, and after filling that place for several terms

was elected to the United States Senate. S. C. Hyde served one term as Representative in Congress. Edward Whitson was sent from North Yakima. He was afterward appointed to the Federal Bench, and died in Spokane. John A. Shoudy, W. R. Abrams, E. P. Cadwell and Austin Mires, were the delegates from Kittitas Conuty. John A. Shoudy was the founder of Ellensburg and the town was named for his good wife Ellen Shoudy. From King County came John J. Hoyt, who had served on the Territorial Bench and who was afterward President of our Constitutional Convention and member of the Supreme Bench of Washington after its admission into the Union. Cornelius H. Hanford, afterward member of the Federal Bench. General Granville O. Haller, a Mexican War veteran and who had gained some fame as an Indian fighter. Orange Jacobs, who was a member of the Supreme Court of the Territory in 1869 and 70 and Chief Justice from 1871 to 1875, and Delegate in Congress for two terms.

Olympia sent N. H. Owings, who served on the staff of General Sherman during the War of the Rebellion and who was then and for ten years had been Secretary of the Territory. John F. Gowey, who later served as United States Minister to Japan. . George D. Shannon, a large man physically and with a big heart as well, and the last man of my acquaintance who possessed any of the old \$50.00 slugs, gold pieces coined by private parties in San Francisco before the United States Government had established a mint on the Pacific Coast. He used to carry three of these pieces in his pocket. Allen Weir came from Port Townsend, He afterward served as a Delegate in the Constitutional Convention from Jefferson County and was the first Secretary of the new State of Washington. W. H. Doolittle was one of the delegates from Tacoma and he was afterward elected to Congress along with Hyde of Spokane.

In the evening the people gave a banquet to the delegates at the Johnson House, and the attendance filled the dining room, where good cheer prevailed. In reporting the occasion, a Seattle paper said, in part; that The Puget Sounders felt at home as the first course was Olympia oysters and the second course Puget Sound flounders. The brand of champagne, too, was familiar, and there was plenty for every toast, and I want to add, there were many toasts.

Whether or not that convention had any influence in bringing about action on the part of Congress, that body did pass an Enabling Act which was approved February 22, 1889, just a little over a month after the Ellensburg Convention, which act included Da-

kota, to be divided into North Dakota and South Dakota, Montana and Washington Territories, and provided for calling Constitutional Conventions therein.

For the purpose of such Convention The Territory of Washington was divided into twenty-five districts and each district was to have three Delegates; but it was further provided that no elector should vote for more than two persons for delegates; thus securing representation to the minority party in the Convention.

According to the Enabling Act, the proclamation of the Territorial Governor, Miles C. Moore, dated April 15, 1889, fixed May 14, 1889, as election day for choosing Delegates to the Constitutional Convention.

The Enabling Act fixed July 4, 1889, as the date for convening of the Convention and it authorized the Governor, Chief Justice and Secretary of the Territory to make the apportionment of the several districts.

Kittitas County, together with three precincts of Douglas County, namely; Waterville, Mountain and Midland, constituted district No. 5.

The names of the Delegates chosen from this district were John A. Shoudy and Austin Mires, Republicans and J. T. McDonald, Democrat.

The Delegates met at Olympia, in the old Capitol building up on the hill July 4, 1889, at noon, and effected temporary organization by electing J. Z. Moore of Spokane, temporary President and Allen Weir of Port Townsend, temporary Secretary, and on the next day, July 5, the convention was permanently organized by the election of John P. Hoyt of Seattle, President, and John I. Booge, of Spokane, Secretary, together with such minor officers as the Convention required.

George Turner of Spokane was Hoyt's leading opponent for President; S.G. Cosgrove from Pomeroy, elected as an Independent, was a candidate, but his following was meager.

The membership of that convention was made up of forty-three Republicans, twenty-nine Democrats, counting W. W. Waltman, of Colville, who occupied a seat in the Convention for six days when it was determined that the seat belonged to Dr. J. J. Travis, two Independents, being S. G. Cosgrove, of Garfield County and J. J. Weisenburger, of Whatcom County, both of whom claimed to be Republicans, and two Labor Party men, M. J. McElroy, a logger of King County and W. L. Newton, a coal miner, of King County.

The occupations were represented as follows; 22 lawyers, 13 farmers, 6 physicians, 5 bankers, 5 merchants, 4 stockmen, 3 teachers, 3 miners, 2 real estate dealers, 2 editors, 2 hop growers, 2 mill men, 1 lumberman, 1 logger, 1 mining engineer, 1 surveyor, 1 fisherman, 1 preacher.

The work of the convention was assigned to twenty-seven committees, as there were seventy-five delegates in the convention and but twenty-seven committees, it is plain to be seen that they could not all have chairmanships. Kittitas County, more accurately speaking, district No. 5, fared as well as any other, two of its three members being assigned chairmanships, namely John A. Shoudy that of committee No. 25 on Engrossment and Austin Mires that of No. 16 on Water and Water Rights. I heard of but one member who displayed resentment at being left out of chairmanship assignments, that was S. G. Cosgrove. He told me he considered it a direct slight on the part of Mr. Hoyt, the President, in not naming him as chairman of some committee.

The convention was in session until the evening of August 22, 1889, just fifty days including Sundays. It will be impossible to recite more than a very few incidents connected with the convention in a talk like this, but it seems proper and fitting that some of them be mentioned.

On July 5, when the convention assembled we learned that Ellensburg had been almost entirely destroyed by fire the night before. Let me say in passing that Seattle had a disastrous fire in June, 1889, and Spokane on the 4th of August following. Mr. Lindsley of Clark County and Mr. Fairweather of Sprague were constituted a committee to pass around the hat, and the delegates in a few minutes contributed \$300 as a relief fund for the people of Ellensburg. Before any committee had been appointed Dr. Thomas T. Minor of Seattle, took out his purse and emptied its entire contents into Mr. Shoudy's hands. I never ascertained the amount of his contribution but I was standing right by them and I saw one or more gold pieces among the other change.

On July the 23rd, the convention met in the morning and after a short session adjourned for the day to participate in a clam bake given by the Olympia Board of Trade at Butler's Cove, a few miles down the Sound from Olympia. We were carried to the place on board a large scow propelled by a small steamer or tug boat. Most of the Delegates had their families with them and all seemed to enjoy themselves.

That evening after returning to Olympia, we listened to an

able and instructive address on irrigation and silver by William M. Stewart of Nevada. For many years he was engaged in silver mining in the State of Nevada, and was one of the chief factors in the developing of the famous Comstock lode, and he represented his State in the United States Senate for eighteen years. He was a large man and wore a full beard. He was a forceful speaker and fully acquainted with the subject of his talk.

(1) Mrs. Henry B. Blackwell, a woman with a national reputation, under the name of Lucy Stone as a champion of woman suffrage, was in Olympia a good portion of the time the Convention was in session, and she had her husband, Henry B. Blackwell with her. At that time he was Secretary of the American Woman Suffrage Association. They, along with many others, were dilligently lobbying for an article in the Constitution giving women the right to vote. Dr. Blackwell, as he was called, made an address on the evening of July 25th. appealing to the Delegates to keep the word male out of the Constitution.

On July 26 we were treated to an address by "Sun Set" Cox. He was one of the National leaders of the Democratic party. I make this recitation in no sense of eulogy but simply in illustration of his prominence. He represented the State of Ohio in Congress for something like twelve years, and afterward moved to the State of New York, and represented that State as Congressman for eight years or more. He was the introducer of the bill concerning the life-saving service which finally became a law, and was United States Minister to Turkey. He was also an author, and was an entertaining speaker. During his address he referred to Washington as "The Sun Set State," which reference called forth general applause.

In framing the Constitution the Delegates were confronted with many important and vexing questions, the chief of which was that of tide lands. There had been, right from the start, studied opposition to any and all propositions looking toward the control, regulation and disposal of the tide lands, and many Delegates were convinced there existed a strong combination bent on stealing these valuable lands; and it began to look as if we would adjourn without giving any constitutional expression upon this important question. The *Daily Oregonian* of August 21, 1889 contained the following statement from one of its correspondents: "It appears to be the determination of the Democratic members of the Convention, aided by a few Republicans interested in tide and school lands, to adjourn the Convention without any expression on the subject of school,

state or granted lands in the Constitution, thus leaving it open for the formation of cess pools of corruption in future legislatures."

On the night of August 21, I went to the room of T. L. Stiles, who had consistently opposed every move for a constitutional provision on the subject of tide lands, for the purpose of having a heart to heart talk with him and if possible reach some agreement on the question. Allen Weir, a Delegate from Port Townsend, happened in. The three of us went over the whole situation, from a partisan standpoint, all being Republicans, and otherwise, and along toward morning, came to an agreement and drew an article, which I was to take charge of and introduce in the convention the next day.

On Thursday, August 22, 1889, after everything else had been disposed of, I submitted the article we had drawn the night before. Judge Turner moved that the rules be suspended and it be placed on final passage as an original and independent article. The motion prevailed and as was stated by the *Tacoma Globe*, of August 23: "A murmur of satisfaction went around the hall, and when put to a vote it was adopted by fifty-seven for to fifteen against it." It now stands, a part of our State Constitution, as article XVII. Section 1.

On this day, August 22, 1889, we finished our work by signing the instrument we had framed, and at the election held October 1, it was ratified by the people of the territory, the vote being 40,152 for and 11,679 against it, and therefore became the fundamental law of the State. We were admitted into the Union, on this constitution, November 11, 1889.

Four members of the Convention did not sign the constitution, they were J. C. Kellog, who was sick at home at the time. Lewis Neace of Waitsburg and James Hungate of Pullman, who had been absent from the Convention for several days; (A special act was passed by the 1931 Legislature permitting him to sign,) and W. L. Newton, the Labor Delegate, who refused to sign.

At the election, October 1, 1889, there were submitted to the voters three other propositions, two of which, if carried were to become parts of the Constitution. They were; Woman Suffrage, Prohibition and The Seat of Government.

Woman Suffrage was defeated by the following vote; For, 16,527, against, 34,513.

On the prohibition proposition the vote was; For, 19,546; against, 31,487.

On the location of the State Capitol the vote stood; Olympia,

25,490; North Yakima, 14,718; Ellensburg, 12,833; Centralia, 607; Yakima, 314; Pasco, 120; Scattering, 1,088.

It was provided that no place should be the permanent capital unless it should receive a majority of all the votes cast at the election and in case none should have such majority the two receiving the highest votes should be the candidates at the next election. At the first election there was no choice and at the following election the race was between Olympia and North Yakima, and Olympia won. Had North Yakima and Ellensburg stood together and rallied their combined vote for one of them, that one would have won the Capital at the first election by 932 votes. But there was bitter enmity between the two places engendered when Kittitas County was created from the north part of Yakima County.

Of all the members of that convention George Turner was conceded the first rank in the way of ability. He was afterward elected to the United States Senate from the State of Washington, where he gained recognition as one of the ablest members of that august body. He along with Henry Cabot Lodge and Elihu Root, were appointed by President Roosevelt to represent the United States to meet with representatives from Great Britain to settle the boundary between Canada and the United States. And he had no superior there. His reputation is not confined to his own country but he is considered one of the greatest international lawyers of the world. He never went to school after he was twelve years old.

R. O. Dunbar, T. L. Stiles and John P. Hoyt were elected to the Supreme Bench of our State at the first election under our Constitution, and Dunbar was continued in that place until he died. No State ever had a better judge. B. L. Sharpstein, D. J. Crowley, Edward Eldridge and T. T. Minor were all men of more than ordinary ability.

Of the seventy-five delegates in that convention all are now dead but four. Those still living taking them in alphabetical order are; James Hungate, Spokane; Austin Mires, Ellensburg; J. J. Travis, Northport; George Turner, Spokane.

The first to die was T. T. Minor. He was drowned in Puget Sound along with G. Morris Haller and Lewis Cox, while duck hunting in canoes in December, 1889. Of my two colleagues in that memorable convention, both then residents of Ellensburg. John A. Shoudy died at his home May 25, 1901, and J. T. McDonald died at Republic, Washington, in July, 1911.

*Why a written Constitution?*

Our ancestors were apt students of and versed in the science of government. They had learned that in what is termed free government, it is necessary to protect the people against themselves, the individual against the sovereign, whether that sovereignty abide in the people, as in our country, or in an individual person, by the declaration of rights and the enactment of restrictive laws that are plainly understood, and are not subject to sudden or easy change. Chief Justice Marshall, speaking from the Supreme Bench of the United States, says: "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."

It is said that the Constitution of England is unwritten, but we find the people of Great Britain have many written safeguards, some of which date back to fairly early times, as that of Magna Charta, signed by King John, June 14, 1214. The reason for these written instruments appear clearly from the following language of Sir William Blackstone, the great expounder of the English Constitution: "The absolute rights of every Englishman, which, (taken in a political sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change, their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigor of our free Constitution has always delivered the nation from these embarrassments; and as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level, and their fundamental articles have been from time to time asserted in Parliament, as often as they were thought to be in danger."

First by the Great Charter of liberties, which was obtained, sword in hand, from King John, and afterwards with some alterations, confirmed in Parliament by King Henry the Third, his son. Which charter contained very few new grants; but as Sir Edward

Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterward by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void, etc. Next by a multitude of subsequent corroborating statutes, (Sir Edward Coke, I think reckons thirty-two) from the first Edward to Henry the Fourth. Then after a long interval by the Petition of Right; which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First, in the beginning of his reign, which was closely followed by the still more ample concessions made by that unhappy prince to his parliament before the fatal rupture between them; and by the many salutary laws, particularly the habeas corpus act, passed under Charles the Second. To these succeeded the Bill of Rights, or declaration delivered by the Lords and Commons to the Prince and Princess of Orange, February the 13th, 1688; and afterward enacted in Parliament, when they became King and Queen. And lastly these liberties were again asserted at the commencement of the present century in the Acts of Settlement whereby the crown was limited to his present Majesty's illustrious house; and some new provisions were added, at the same fortunate era, for better securing our religion, laws and liberties which the statute declares to be: "The birthright of the people of England" according to the ancient doctrine of the common law.

It is plain to be seen these depressions, oppressions, embarrassments and convulsions could not have made any headway had England been blessed with a written Constitution. It was to guard against just such acts of oppression, such tyranny and injustice that the American State builders formulated and adopted a written Constitution.

When it became clear to our forefathers that the Articles of Confederation, which they, in the capacity of States, had adopted, were lacking in essentials of a perfect union as well as of a general government, they not only as States but as a people agreed upon and adopted a Constitution to be and remain the supreme law of the land, and they made clear and unmistakable declaration of the purposes of that general government, in the brief but comprehensive preamble to their Constitution.

By the adoption of the Constitution the people of the States before united in a confederacy, became a nation under one government and the citizens of every State became also citizens of the United States.

It may not be out of place to here note the difference between the National and State Constitutions. In its nature the Constitution of the United States is a grant of power, while on the other hand the Constitutions of the State governments are instruments of limitation.

The Federal Government can exercise only the powers that were granted to it by the people, which powers are measured by the Constitution as the granting instrument. All other powers not expressly or by implication granted to the general government are reserved to the people. And in order to avoid any doubt on this subject, the people, speaking through their constitution, declare; Article IX, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others, retained by the people," and Article X, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This reservation of power applies not only to the original States and the people thereof, but as well to all the States and their people, respectively, which have since been admitted into the Union.

How to determine whether any power assumed by the government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and if the grant does not appear, the assumption held unwarranted, says Judge Cooley, that eminent authority on constitutional law and the Federal Constitution. And, "To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all."

There are some provisions in our State Constitution that in substance are found in the Constitutions of all the States as well as in the Federal Constitution. Section 15 of Article I, of the Constitution of the State of Washington reads: "No conviction shall work corruption of blood, nor forfeiture of estate;" and section 23 of the same Article declares: "no bill of attainder, ex post facto law, or law impairing the obligations of contract shall ever be passed."

Attainder and corruption of blood seem to have just about one and the same meaning. When at the common law a person was sentenced after conviction of a capital crime, Blackstone tells us, the immediate and inseparable consequence was attainder. He was then attaint, attinctus, stained or blackened. From attainder re-

sulted corruption of blood and forfeiture of his possessions. His heirs were cut off. Neither from him nor through him could any inheritance come. By bill of attainder the result to the person declared attained was exactly the same as attainder following conviction and sentence, though reached by an entirely different process. By bill of attainder is meant a legislative act which inflicts punishment without a judicial trial. Judge Story tells us that such bills have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties and to trample upon the rights and duties of others.

Bills of attainder were in fact: 1. convictions and sentences pronounced by the Legislative Department of the government instead of the Judicial; 2. the sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule; 3. the investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry. (Quotation from Judge Story.)

These acts called bills of attainder were gross usurpations of judicial functions by the legislative department of government. And Alexander Hamilton declared: "There is no liberty if the power of judging be not separated from the legislative and executive powers."

In considering the clause "No ex-post facto law shall be passed," the Supreme Court of the United States divides all laws which come within that inhibition into four classes:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2nd. Every law that aggravates a crime, or makes it greater than it was when committed.

3rd. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense to convict the offender.

Chief Justice Marshall defined an ex-post facto law to be one, "Which renders an act punishable in a manner in which it was not punishable when it was committed."

Our State Constitution and our State operating under it are subject always to the Constitution, laws and treaties of the United States and to the provisions of the Enabling Act in all instances in which they may be involved.

It is unwise to change the fundamental law of the State or the Nation at the mere call of expediency. Such laws ought to be made and continued as permanent as humanly possible, for they are nothing less than rules of right, and changes in them ought to require time and deliberation.

Section 32 of Article 1, of our Constitution reads: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."

If this admonition could be properly heeded by the coming generations, there would be little danger of erratic or impulsive changes in the fundamental law, and as long as the Constitution can be preserved, liberty cannot be lost.

AUSTIN MIRES