1935

Advisory Opinion of the RI Supreme Court Relating to the Constitutional Convention, Part 4 (pp. 245-317)

State of Rhode Island and Providence Plantations

SUPREME COURT — OCTOBER TERM, A. D. 1934

In re OPINION TO THE GOVERNOR
Re CONSTITUTIONAL CONVENTION

BRIEF SUBMITTED BY COUNSEL AS AMICI CURIAE BY LEAVE OF COURT IN OPPOSITION TO THE LEGISLATIVE POWER AND AUTHORITY OF THE GENERAL ASSEMBLY OF THE STATE OF RHODE ISLAND TO CALL A CONVENTION TO REVISE OR AMEND THE CONSTITUTION OF THE STATE

Argued February 18, 1935

by

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On January 24, 1935, under the authority of Article 10, Section 3, of the Constitution of the State of Rhode Island, the Governor of the State of Rhode Island requested the judges of the Supreme Court of Rhode Island to give their written opinion upon the following questions:

> "Would it be a valid exercise of the legislative power if the General Assembly should provide by law
>
> "(a) for a convention to be called to revise or amend the Constitution of the State;
>
> "(b) that the Governor shall call for the election, at a date to be fixed by him, of delegates to such convention in such number and manner as the General Assembly may determine;
>
> "(c) that the General Officers of the State shall by virtue of their offices be members of such convention;
>
> "(d) for the organization and conduct of such convention;
>
> "(e) for the submission to the people, for their ratification and adoption, of any constitution or amendments proposed by such convention; and

"(f) for declaring the result and effect of the vote of a majority of the electors voting upon the question of such ratification and adoption?"

This brief is submitted by leave of Court by the undersigned *amici curiae* in opposition to the legislative power and authority of the General Assembly of the State of Rhode Island to call a convention to revise or amend the Constitution of the State.

Counsel regret the undue length of this brief and any apparent lack of coordination in presenting their argument. Any such defects in form are due to the desire of counsel to use the time available for preparation in presenting to the court substantive material rather than in developing a formally finished brief.

HISTORY OF THE QUESTION

Abraham Lincoln is credited with saying that government in the United States is "of the People, by the People, and for the People." Lincoln's phrase epitomizes our theory of government, whereby we hold that the sovereign powers of government are in the People; that in the exercise of those powers they may organize and establish whatever form of government they desire; and that once a government is established, it should exercise its powers for the benefit of the People.

Of course, it is obvious that no matter how thoroughly we may believe that the powers of government are in the People, the People must necessarily delegate certain of those powers to the government which they at any particular time establish. History records that in the evolution of government in a variety of civilizations many forms of government have been developed, not the least of which is constitutional government. In 12 Corpus Juris at p. 12 we read:

> "A constitution may be defined as that fundamental law of a state which contains the principles on which government is founded, regulates the division of sovereign powers, and directs to what persons each of these powers is to be intrusted and the manner of its exercise."

The same authority points out that there may be written or unwritten constitutions. The latter is the result of gradual growth, changing by accretions rather than by any systematic method. Such were the constitutions of Athens and Rome, and such is the constitution of England today. In Freeman's Growth of English Constitution at p. 122 the author says:

> "The code of our unwritten constitution has, like all other English things, grown up bit by bit, and for the most part silently and without any acknowledged author."

On the other hand, written constitutions are those which exist in definite written form and are promulgated at a particular time. They are usually prepared by a specially constituted authority which is generally known in the United States as a constitutional convention, made up of delegates thereto elected by the people.

Text writers agree that a constitutional convention is peculiarly an American institution. It arose from the *necessity for organized governments* to replace the charter governments which were terminated by the Declaration of Independence in all the colonies except Rhode Island and Connecticut. In organizing such new governments the conventions acted in the most practical manner demanded by local conditions. They were irregular in organization, indefinite as to functions, and in all cases except one the constitutions drafted were promulgated by the conventions without submission to the people. See Jameson Const. Conv. (4th ed.) Sec. 131-158.

In Rhode Island, however, no such convention was held. Instead we find that on May 4, 1776 the General Assembly repealed an act of allegiance to Great Britain and the government continued under the charter of 1663. Thereafter on July 18, 1776 the General Assembly approved the Declaration of Independence, and changed the name of the colony to "State of Rhode Island and Providence Plantations." The people did not dispute this action of the General Assembly but clearly acquiesced in a government under the provisions of the Royal Charter of 1663. *Thus did sovereignty pass from the English Crown to the People.* The explanation usually given is that the provisions of the charter were particularly liberal in the matters of self-government, thus making it unnecessary to restate established principles of government in order to perpetuate the political and civil rights of the people. Nevertheless, it cannot be denied that *a new government actually came into existence with sovereignty in the People.*

Subsequent to the adoption of the Federal Constitution, agitation arose for the drafting of a constitution for Rhode Island. This agitation was due partly to the fact that under the charter suffrage was limited to landholders and partly to the fact that the centers of population were dissatisfied with their representation in the General Assembly. This agitation continued for half a century and finally culminated in the adoption of a constitution framed by a constitutional convention in 1842. For a more detailed account of this movement see Appendix A.

Since the charter contained no provision for amendment and since the adoption of a new constitution involved the institution of a new government, it was generally conceded that a constitutional convention was a proper method of procedure. Thus in June, 1842 the General Assembly passed an act whereby the *People* of the several towns and of the City

of Providence, "qualified to vote as hereinafter provided, are hereby requested * * * to choose delegates as they will be severally entitled to according to the provisions of this act, to attend a Convention * * * to frame a new Constitution for this State, either in whole or in part, with full powers for that purpose." The act is otherwise similar to those of 1824, 1834 and 1841, with additional provisions for the extension of the suffrage. A convention organized pursuant to this act and framed a constitution, which was submitted to and adopted by the people in November, 1842, the government thereunder going into effect in May, 1843. However, it is significant to note that under Article XIII of the new constitution amendments were to be proposed by the legislature and then submitted to the people. The method of amendment by a constitutional convention was ignored as was every other possible method of amendment. Article XIII reads as follows:

"Of Amendments

> The general assembly may propose amendments to this constitution by the votes of a majority of all the members elected to each house. Such propositions for amendment shall be published in the newspapers, and printed copies of them shall be sent by the secretary of state, with the names of all the members who shall have voted thereon, with the yeas and nays, to all the town and city clerks in the state. The said propositions shall be, by said clerks, inserted in the warrants or notices by them issued, for warning the next annual town and ward meetings in April; and the clerks shall read said propositions to the electors when thus assembled, with the names of all the representatives and senators who shall have voted thereon, with the yeas and nays, before the election of senators and representatives shall be had. If a majority of all the members elected to each house, at said annual meeting, shall approve any proposition thus made, the same shall be

published and submitted to the electors in the mode provided in the act of approval; and if then approved by three-fifths of the electors of the state present and voting thereon in town and ward meetings, it shall become a part of the constitution of the state."

From a perusal of Appendix A it will be noted that in 1821 and 1822 the General Assembly submitted the question whether it was expedient to provide for the election of delegates to a convention. In 1824, 1834, 1841 and 1842 the General Assembly *requested* the election of delegates to a convention and provided for the organization of the convention. At the May Session, 1853 the proponents of a constitutional convention secured the passage of an act, whereby "The people of this State are hereby *invited and requested* to give in their ballots * * * in relation to the Convention hereinafter provided for". Those in favor of a convention were requested to write "Convention," and those who were opposed, "No Convention." The act then provides that "the people are further *invited and requested,* at the time and place aforesaid, to elect delegates * * * to meet in Convention * * * for the purpose of forming a Constitution of government for this State". In October, 1853 a similar act was passed and the proposition was again rejected by the people in November, 1853.

From the above it is clear that after the adoption of the constitution of 1842 the proponents of a constitutional convention believed that under the constitution the people must first express a desire for a convention before one could be called. Hence the electors were *requested* to vote on that proposition before proceeding to elect delegates. Moreover just as before the constitution, the people were not "required" to hold a convention; the legislature merely "invited and requested" the election of delegates to such convention. In other words neither before nor after 1842 did

the general assembly attempt to *legislate* with respect to a constitutional convention.

It will also be noted that the acts of 1853 provided for a new constitution and not for the amendment of the one then existing. Apparently it was conceded that amendment was possible only in the manner prescribed by Article XIII. This view is confirmed by the fact that in 1881 a bill was introduced into the general assembly to amend Article XIII, so that the assembly would have the authority to call constitutional conventions to revise, alter or amend the constitution. It was submitted to the electors in 1882 but was rejected.

The proponents of the convention method then sought to determine whether a convention to frame a *new* constitution could be called by the legislature. In 1883 the state senate passed a resolution requesting the judges of the Supreme Court to give their opinion on (1) the legal competency of the general assembly to call upon the electors to elect members to a constitutional convention to frame a new constitution and (2) the legal competency of the general assembly to submit to the electors the question whether the electors would call such convention, and if the majority were willing, whether the general assembly was legally competent to provide by law for the holding of such convention and for the submission of the new constitution to the electors. It should be noted that no question was raised as to the procedure to be followed in *amending* the constitution. In a celebrated opinion rendered March 30, 1883 the judges unanimously answered the questions in the negative.

The opinion of 1883 gave rise to a thorough discussion of the legal questions involved by the foremost lawyers of Rhode Island, led on the one hand by Chief Justice Thomas Durfee and on the other hand by ex-Chief Justice Charles S. Bradley. From that time until the present day the issues

involved have been the subject of political agitation, despite the fact that the constitution of 1842 has been amended fourteen times in the manner prescribed by the constitution and without the use of a constitutional convention.

STATEMENT OF POSITION

In arguing that the court should answer in the negative the question submitted by the governor, the position of the undersigned may be stated as follows:

As set forth in the Declaration of Independence, it is self-evident that all men are endowed with certain unalienable rights and

> "That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government * * * ."

Also everyone will subscribe to the statement of George Washington incorporated into Section 1 of Article I of our State Constitution that

> "the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

However, it is our contention that the right thus declared both by the Declaration of Independence and by the State Constitution is not a right derived from the government established by the constitution, but a right which exists independent of the constitution. In other words, it is a right of the people to make changes in their government without the authority of the government. In short, it is nothing more or less than the right of revolution as set forth in the Declaration of Independence. This right of revolution may

be exercised peacefully or by force of arms. A constitutional convention is an example of the former, while the American Revolutionary War is an example of the latter. In neither case, however, is the alteration or change in government brought about by the authority of the existing government, which can neither consent thereto nor acquiesce therein. As George Washington once said:

> "The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government."

Hence, the governor's inquiry should be answered in the negative.

The governor, legislature and courts of this state are sworn to uphold the constitution of the State of Rhode Island; that is, they are sworn to uphold the existing government. Accordingly, they violate their oath of office whenever they initiate, promote or participate in any act of the people not authorized by the existing constitution of government which is intended to alter that constitution of government. Their sworn obligation demands support of the existing government and the refusal to participate in any movement that is revolutionary. The matter is expressed in Jameson on Constitutional Conventions at pp. 233-6 as follows:

> "The right of revolution stands not upon the letter of any law, but upon the necessity of self preservation, and is just as perfect in the single man or in the petty state as in the most numerous and powerful empire in the world. This right, the founders of our system were careful to preserve not as a right *under,* but, when necessity demands its exercise, *over* our constitutions state and Federal. . . . The second class of documents consists in the bill of rights of a large number of our constitutions, containing broad general assertions of the right of the people to alter or abolish their form of

government, at any time, and in such a manner as they may deem expedient. The *peculiarity of these documents is, that they seem to assert the right in question as a legal right; at least, they furnish a plausible argument for those who are willing to have it believed that the right is a legal one; when in fact it is a revolutionary right.* The framers of those constitutions generally inserted in them provisions for their own amendment. Had nothing further been said, it might have been inferred that no other mode of securing needed changes was under any circumstances to be pursued, but that prescribed in those instruments. Such however was not the intention of the framers. They meant to leave to the people, besides, the great right of revolution, formally and solemnly asserted in the Declaration of Independence. They therefore affirmed it to be a right of the people to alter or abolish their constitutions in any manner whatever, that is, *first, legally,* in the mode pointed out in their constitutions, or by the customary law of the land, and *secondly, illegally*, that is, for sufficient causes, by revolutionary force." [Italics partially ours]

So far as the use of a constitutional convention to revise or amend our state constitution is concerned, the question before this court is whether such means of altering the constitution is authorized by the constitution. Our position is, as stated by Jameson, above, that the method of amending the constitution prescribed by Article XIII is exclusive of every other method to revise or amend the same constitutionally. Any other method is revolutionary. In other words, the mere fact that under Section 1 of Article I the framers of our constitution recognized the revolutionary right of the people to make and alter their constitutions is not a delegation of the power to do so *under the authority* of the constitution itself.

It should be noted further that the Declaration of Independence states that the powers of government are derived

"from the consent of the governed." In other words, when the people establish a government they consent to be governed by the provisions of its constitution, and as declared by Section I of Article I of our constitution, "the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all." In other words, by adopting the existing constitution and by incorporating therein a specific provision for its amendment, the people have consented to be bound by such provisions as long as such constitution continues to exist as a constitution of government. In this connection see Cooley, Const. Limitations (7th) p. 56, where the author says:

> "The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. The people of the Union created a national constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. *By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law.*" [Italics ours]

It is submitted, therefore, that the fundamental question before the court is whether a constitutional convention may be employed as a means of revising or amending the constitution under authority contained in the constitution itself. If such convention is not so authorized, it is obvious that no member of the existing government can constitutionally have any part whatsoever in the calling, organization or deliberations of such a convention. In fact, it is their sworn duty to oppose it. Thus Cooley says at p. 892:

"Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute; and *if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government.*" [Italics ours]

We believe that constitutional history both within and without Rhode Island fully supports our major contention. Furthermore, the same support is found in the opinions and judicial utterances of the courts. However, we would point out to the court that *the constitutions of only seven states provide for advisory opinions* by the court to the legislative and executive departments of government, so that it is difficult to find instances where the constitutionality of a constitutional convention has been raised prior to the calling of the convention.

The general situation revealed by the authorities is that constitutional conventions have been called and held and that a new constitution has been drafted and promulgated

or adopted before the question has been brought before a proper judicial tribunal. Accordingly, by the time the court has been called upon to act in the matter or express an opinion, the changes in government brought about by the new constitution of government are an accomplished political fact, and the court expressing an opinion is existing under the new or amended government and sworn to uphold it or is in some other manner compelled to accept the political situation as it then exists. A classic example of a peaceful revolution is the transition of our national government from that under the Articles of Confederation to that under our Federal Constitution. In this connection see *Luther* vs. *Borden,* 7 How. (U. S.) 1.

We believe, however, that it can definitely be said without contradiction that there exists no judicial decision to the effect that a constitutional convention can be called by a constitutional legislature, unless the constitution of the particular state involved specifically provides for that method of amendment. The expression of any court to the contrary is purely dictum. On the other hand, in addition to the opinion of the judges contained in 14 R. I. 649 we would refer the court to the case of

Bennett vs. *Jackson,* 186 Ind. 553, 116 N. E. 921 (1917), which is a *judicial decision* to the effect that the general legislative power conferred upon the General Assembly by the Indiana Constitution does not authorize the General Assembly to call a constitutional convention without first securing authority from the people. This case arose upon a bill for an injunction against certain state officials prohibiting them from doing any act as required by an act of the legislature calling a constitutional convention for the purpose of revising the constitution. It will be observed, therefore, that the question came before the court before any action had been taken pursuant to the act of the legislature and the court,

acting under the existing constitution, had no alternative than to grant the injunction.

It should also be noted that in connection with our constitutional history, the original constitutional conventions were irregularly called and held because of the necessities of the situation incident to the Declaration of Independence. The only practical method open to the people for setting up a new government was through some kind of representative assembly. They had long been accustomed to representative government and were not shocked by having a representative assembly meet and create new constitutions of government. It is not surprising, however, that in creating new constitutions, provisions were incorporated in some of them and finally in all for their future amendment, since it was obvious that some means other than revolution should be provided whenever a change should be desired.

But it should be remembered that by incorporating a particular method of amendment in their constitutions, the people tied their hands with respect to employing constitutionally any other method of amendment. Thus by adopting the method prescribed by Article XIII the people of Rhode Island chose to ignore all methods, including a constitutional convention, and agreed to be bound by the method prescribed. In this connection the views of Thomas W. Dorr, Rhode Island's foremost champion of a convention, are enlightening. In Burke's Report at p. 863 he is reported as saying:

> "Where there is a mode of amendment prescribed by the constitution of a State, it ought to be followed."

However, the argument is sometimes made that despite the provisions of Article XIII, the legislature is given the power to call a constitutional convention, because it was one of the powers exercised by the General Assembly under the charter government and was delegated to our present gen-

eral assembly under the provisions of Sec. 10 of Article IV of the constitution, which reads as follows:

> "Sec. 10. The general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution."

The short answer to such argument is that by providing a specific method of amending the constitution under Article XIII, the framers of our constitution prohibited the use of any other method under any general delegation of power contained in Sec. 10 of Article IV. In this connection see *Taylor & Co.* vs. *Place,* 4 R. I. 324.

Of course, it may be argued that even if the right of the People to hold a constitutional convention is extra-constitutional, the legislature has the power as a representative of the people to call such convention. The answer to such argument is that in so acting the legislature acts extra-constitutionally as an agent of the people in doing an extra-constitutional act. Such act is in no sense an exercise of the legislative power given to the general assembly under the constitution but is entirely independent thereof.

When a legislature acts extra-constitutionally it steps from the legislative field into the political field, and by committing an unconstitutional act, it does so at the risk of misinterpreting the will of the people. Thus can the action of the General Assembly and of the people under the charter of 1663 be explained. It must be conceded that the government under the charter was definitely a constitutional government, which was required to observe the organization of government and the rights protected thereby as set forth in the charter and certain other documents which are to be found in the Digest of 1798, such as the Declaration of Independence and the so-called Bill of Rights passed by the General Assembly in 1798. (See Appendix A.) Although the General Assembly recognized the fact that the adoption of

a new constitution meant the abolition of the existing government, nevertheless, in view of the fact that no method of bringing about amendments to the existing government was prescribed, and in view of the public demand for some orderly and peaceful method of bringing about a change of government, the General Assembly relied upon political judgment in utilizing existing governmental machinery for organizing a constitutional convention. In so doing, it ran the risk of being repudiated by the freemen, and as a matter of fact no convention was successful until 1842. But even under the necessities of the situation, the General Assembly deemed it politically wise to go no further than to "request" or "invite" the freemen or the people to choose delegates. In so doing, they merely gave the people the opportunity to exercise a political right which they had apart from the existing constitution or government, and to that extent they acted merely as an agency of their constituents. *There was no attempt to legislate or to compel the holding of a convention and no exercise of legislative power.*

It is our contention that there is no necessity for the legislature to act extra-constitutionally in order to give the people an opportunity to amend the constitution in a manner other than that prescribed in Article XIII, since that method is ample for effecting any amendment desired by the people. In fact since 1842 eighteen such amendments have been adopted. In other words, the degree of necessity for such action which existed under the charter government does not exist under the present constitutional government.

Furthermore, even if there is a demand for a new constitution, such new constitution can be obtained under the provisions of Article XIII, and in fact such method was attempted in 1898 and 1899, when a new constitution drafted by a legislative commission was submitted to the people and

rejected. As pointed out by the opinion of the judges in 14 R. I. 649, such new constitution is no more than an amendment of the old, since it cannot create a different form of government but must conform to the requirements of the Constitution of the United States by providing for a Republican form of government.

However, if the court sees fit to disregard such broad and fundamental reasoning and decides to construe narrowly the word "amendments" in Article XIII and comes to the conclusion that a constitutional convention is proper for the framing of a "new" constitution, it is submitted that the legislature, relying upon its political judgment and in the commission of an extra-constitutional act, should proceed no further than did the legislature in 1853, when it submitted to the electors (1) the question whether they desired a convention to frame a new constitution and (2) a "request" to choose delegates for such convention. In so doing the legislature will not be acting in the exercise of legislative power but will merely be volunteer agents assisting their principals in an orderly, extra-constitutional manner to exercise a sovereign power to change their government. In other words, although the legislature has no constitutional power to render such service to the people, it may conclude that it is politically expedient to do so. However, with questions of political expediency this court is not concerned and it must confine itself to expressing the opinion that if such action is taken by the legislature it will be unconstitutional.

The situation is perhaps better stated by the court in the case of *Bennett* vs. *Jackson*, *supra*.

> "The Legislature has no inherent rights. Its powers are derived from the Constitution, and hence, where some action of the legislative body, which action is outside of the particular field fixed by the Constitution and is not strictly legislative within the meaning of section

1, art. 4, supra, is sought to be justified, a warrant for the same must be found somewhere; if not in the Constitution, then directly from the people, who, by the terms of section 1, art. 1, of the Bill of Rights, have retained the right to amend or change their form of government. The right of the people in this regard is supreme, subject, however, to the condition that no new form of a Constitution can be established on the ruins of the old without some action on the part of the representatives of the old, indicating their acquiescence therein; and, the General Assembly being the closest representative of the old, its approval must be obtained by some affirmative act. This is the only orderly way that could be conceived. The question then arises: How may these, the people and the Legislature, get together on this proposition? If no positive rule is provided by the fundamental law of the state, then, if a custom has prevailed for a sufficient length of years so that it is said to be fully established, that rule or custom must prevail.

"It seems to be an almost universal custom in all of the states of the Union, where the Constitution itself does not provide for the calling of a constitutional convention, to ascertain first the will of the people and procure from them a commission to call such a convention, before the Legislature proceeds to do so. The people being the repository of the right to alter or reform its government, its will and wishes must be consulted before the Legislature can proceed to call a convention. 6 R. C. L. § 17, p. 27; Hoar, Constitution Conventions, p. 68 (1917)."

OUTLINE OF ARGUMENT

ARGUMENT

I. THE RHODE ISLAND CONSTITUTION CAN BE LEGALLY REVISED OR AMENDED ONLY AS ALLOWED IN ARTICLE XIII.

This was the unanimous opinion of the Justices of the Supreme Court of Rhode Island in answer to a request of the Senate in 1883.

In Re Constitutional Convention, 14 R. I. 649.

This opinion has stood uncontradicted and uncriticized by our Court for fifty-two years. On two occasions it has received implied approval.

State vs. *Kane,* 15 R. I. 395 (1886).

Higgins vs. *Tax Assessors of Pawtucket,* 27 R. I. 401 (1905).

In the latter opinion, rendered by a Court upon which there were none of the Judges sitting at the time of the original opinion, the Court, referring to the opinion of 1883, stated:

> "There it was held that the specified method of amending the Constitution was the only lawful method; and it is difficult to imagine a reason for selecting one method out of several possible ones, if all the others are still to remain legal and available."

The opinion of 1883 speaks for itself, and the acquiescence of the highest Court of the State in that opinion over the long period of years which has ensued, cannot be lightly disregarded. In the realm of Constitutions, long established usage, conforming to the dicta of a Court of last resort, creates a strong presumption of constitutionality. When the usage of a people and the language of their highest Court concur for half a century, the Court itself must pause before lightly considering the enunciation of a different doctrine. This is the more true because it is a Constitution and not a mere statute or other ordinary instru-

ment which is being construed. In Cooley's Constitutional Limitations (8th) at p. 123, the author says:

> "A cardinal rule in dealing with written instruments is that they are to receive an invarying interpretation and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as to make a different rule in the case seem desirable."

See also

South Carolina vs. *United States,* 199 U. S. 437.

In a recent opinion of this Court, the decision was given and the Court then enunciated dicta covering a much wider field than the decision and at much greater length. *Brereton* vs. *Board of Canvassers*, 55 R. I. (1935). This pronouncement attempted to cover and lay down the law in regard to the marking of ballots at elections. If this opinion should stand for fifty years and no cases of any kind were brought to the Court within the field covered by the dicta, and subsequent Courts should, in several instances cite the dicta with approval, it is submitted that a strong implication would arise that the dicta was law.

Since this is, however, the identical question asked the Court in 1883, it seems proper to let that opinion and its language speak for itself and to brief the argument in favor of the conclusion there reached in the same fashion as if this were a question which the Court were approaching anew and upon which all pertinent arguments were desired. With this in mind, such argument will be taken up step by step.

1. The Constitution itself clearly specifies ARTICLE XIII as the method for its alteration or revision.

When the meaning of any instrument is desired, the method of approach is always first to consider the instrument itself. In the world of hieroglyphics the pictures

themselves are considered. In a written instrument the first recourse is always to the words themselves and, if their meaning is clear, no further search is necessary. This is a rule of common sense which has become embodied in the legal phrase that if the meaning of the instrument can be gathered from its own four corners, no outside construction is necessary. In Cooley on Constitutional Limitations (8th), pp. 123, 124, the author continues:

> "The object of construction, as applied to a written Constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the language that is to be enforced. But this intent is to be found in the instrument itself."

And, as will be seen from the quotation above cited, it is accepted law that a Constitution shall be construed in the same method as applied to statutes and other written instruments. See

Knight vs. *Shelton*, 134 Fed. 423.
Shepard vs. *Little Rock*, 35 S. W. 2nd 261 (Ark.).
Hoffman vs. *Warden*, 2 Fed. Supp. 353.
12 C. J. 699, and cases cited.

An examination of the instrument itself should, therefore, first be made to find its true intent.

Downes vs. *Midwell*, 182 U. S. 244.
Old Wayne Mutual Life Association vs. *McDonough*, 204 U. S. 8.

When this is done, it will be found that there is a specific Article entitled, "Of Amendments," consisting of Article XIII and reading as follows:—

"Of Amendments

> "The general assembly may propose amendments to this constitution by the votes of a majority of all the members elected to each house. Such propositions for amendment shall be published in the newspapers, and printed copies of them shall be sent by the secretary of

state, with the names of all the members who shall have voted thereon, with the yeas and nays, to all the town and city clerks in the state. The said propositions shall be, by said clerks, inserted in the warrants or notices by them issued, for warning the next annual town and ward meetings in April; and the clerks shall read said propositions to the electors when thus assembled, with the names of all the representatives and senators who shall have voted thereon, with the yeas and nays, before the election of senators and representatives shall be had. If a majority of all the members elected to each house, at said annual meeting, shall approve any proposition thus made, the same shall be published and submitted to the electors in the mode provided in the act of approval; and if then approved by three-fifths of the electors of the state present and voting thereon in town and ward meetings, it shall become a part of the constitution of the state."

Here is an express method laid down for proposal and adoption of amendments to the Constitution. By its very title it is the place to which one would look for provisions in this regard. Nowhere else in the Constitution is there any expressed method of amendment or revision mentioned.

In only two other places is there language which might even remotely bear upon the subject.

Article I, Section 1, reads as follows:

"Section 1. In the words of the Father of his Country, we declare that 'the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.'"

This seems clearly to be a declaration of right and not a grant of power to the Legislature or any other branch of the government. Clearly, there is no method of amendment or revision therein set forth.

Article IV, Sec. 10, reads as follows:

> "The general assembly shall continue to exercise the powers they have heretofore exercised unless prohibited in this constitution."

This is a grant, but only a general grant, and there is certainly no express provision for amendment or revision therein contained.

It is to be noted that in no part of the Constitution is there any mention of a convention of any kind for any purpose.

It is submitted that the Constitution itself thus clearly specifies Article XIII as the method for any change to be made in the instrument. Since this is clear, the result should be accepted and there should be great reluctance in allowing a different conclusion to be reached by implication. There is a heavy burden upon those seeking to arrive at a conclusion inconsistent with the words of the instrument itself, and at variance with their natural meaning. With this method of approach in mind, it is proper to consider the instrument in the light of secondary rules of construction.

2. The sole, express method for change specified in ARTICLE XIII prevents the strained fabrication of other methods by implication.

It is a universally accepted method of construction that the expression of one method of doing a thing prohibits the raising of other methods by implication. The basis of this rule is that expressed intention is stronger than any implication and hence an express, indicated method will be taken as mandatory as against possible different implications. It purports to attach more significance to what is said than to what is left unsaid. This rule of construction is sometimes expressed in the Latin maxim:

"Expressio unius est exclusio alterius."

This is, however, more than a mere Latin maxim: it is a method of construction of universal application which has grown up from the experience of mankind in considering the essentials to ascertaining the intent of an instrument. This rule of construction, like other commonly accepted rules, applies to constitutions as well as to statutes and other instruments. See

12 C. J. 699 and cases cited above.

The application of this rule of construction in the instant problem is, of course, obvious. An attempt is made to raise by implication provision for a Constitutional Convention. One school of thought attempts to seek this result by raising the implication from the language of Article I, Section 1. A second school of thought seeks to reach the same result by fulsome implication from Article IV, Sec. 10. A third would imply the legal formation of such a Convention from fundamental principles of natural law. It is not important at this point to consider the strength or weakness of these implications, but only to call attention to the fact that they are all *implications*. They, therefore, fall under the prohibition of the rule of construction above stated, that, being implications, they give way to the intention of the instrument as contained in an expressed provision. It follows that Article XIII contains the only method for change in the Constitution.

This result, achieved by use of the well-established principles of construction, is also just as clearly and conclusively reached if a general construction of the whole instrument is attempted, with the object of ascertaining its true intent. Since there is no other specific method set forth in the Constitution, the only method known to American political institutions to achieve an amendment or revision would be that of a Constitutional Convention. In the absence of any specific method of calling such a Convention, it would pre-

sumably be done through the medium of the Legislature providing for a vote of the people as to whether such a Convention should be established.

Such a Convention, once in session, could make a whole new Constitution. The time which might elapse from the first step taken by the Legislature to the calling of such a Convention and the actual adoption of an entirely new Constitution might be quite short. In any case, it might be far short of the time set forth in Article XIII as necessary before taking action, namely, the time necessary for vote by two General Assemblies and the submission of the proposed amendment to the people. But it seems clear that Article XIII provides for such delay in order that adequate consideration may be given to any proposed amendment to the Constitution. Is it conceivable that the intent of the instrument is that there should be ample time for a consideration of a single amendment but that the whole instrument might be radically changed or scrapped without such consideration? It is no answer to such argument that a Constitutional Convention is for the very purpose of deliberating upon fundamental changes in Constitutions and, therefore, an adequate safeguard. While a Constitutional Convention might result in ample deliberation and full consideration by the people of the proposals of the Convention, there is no assurance of such result. The apathy of the people to measures which are to them of vital importance often endures for a short period of time, but such apathy does not continue in "all of the people all of the time." As time goes on, they become more conscious of the affairs of State. It is for this reason that there is no adequate substitute for the time element embraced in Article XIII.

A second consideration is just as important. It was apparently recognized by our ancestors that a minority opinion needs protection and that it may be advisable, under certain

circumstances, that that minority be guaranteed certain rights and given such a guaranty that they may be deprived of those rights only by a vote of more than a bare majority at a given election. The philosophy of a 3/5 vote required under Article XIII is just such. It may even be based upon the thought that, considering the number who vote, a 3/5 plurality is no more than an indication of the majority sentiment of the people. If such a vote is deemed necessary in order to make a minor change in the Constitution, what justification is there for disregarding this clear provision and setting up a method of change which will allow a complete revision without such safeguards?

These conclusions, apart from a careful study of the instrument itself, are made more striking by a consideration of what was in the minds of the members of the Convention of 1842 when the Constitution was adopted. Constitutional Conventions were not unknown to them. The United States Constitution had been framed in the most celebrated Convention then or since known to history. Rhode Island had ratified the Federal Constitution by such a Convention elected by the people. Of the Constitutions existing in other States of the Union in 1842 many contained specific provisions for Constitutional Conventions. Such assemblies were, therefore, not unknown to those who drafted our Constitution at that time. If the safeguards of a Constitutional Convention had been considered adequate and that method had been desired to be made available to us, provision could have been made in the Constitution. With amendment or revision by use of a Convention or by the method set forth in Article XIII as possibilities, those who framed the Constitution chose the latter method with the safeguards which it included.

Not only were there Constitutions then extant containing such provisions, but the question of Conventions, with its

various ramifications, had been at the very heart of the Dorr agitation, which had led to actual armed insurrection. The question had been agitated and almost fought over for years. Within a year two Conventions had been held, the People's Convention and the Land Owners' Convention; and twice ballots had been cast on the adoption of the instruments thus drafted. Never, perhaps, in the history of the world, did a Convention ever meet which was better acquainted with the possibilities of Constitutional Conventions than that which drafted our present Constitution in 1842. Not one of its members, for one instant, could have been unmindful of the other Conventions within the space of a few months. In this frame of mind, they drafted the Constitution and made no reference whatever to the use of Conventions as a method of altering the fundamental law. It needs no use of Latin or stereotyped rules of construction, however valuable, to conclude that the makers of the present Constitution, knowing full well the meaning of Constitutional Conventions, decided to set up, not that method, but another method, of effecting such changes. Judge Jameson may make a plausible assault on the Latin and the rule, but it is submitted that the realities are against him. See

Jameson on Constitutional Conventions, p. 605.

If a homely example may be pardoned upon such a solemn question, it is submitted that the situation is similar to that of the draftsman of a Will under the Rhode Island statute which, as then worded, provided that children would take as if by intestacy unless the omission of a bequest to them appeared to be intentional. Under these circumstances, a widow's Will concisely contained only the following:

> "Having in mind my son William, I give everything to my son John."

It is submitted that the intent of the Convention of 1842 was, because of the above mentioned circumstances, much clearer than that of Daniel Webster when he reported to the Massachusetts Convention of 1820, as Chairman of the Committee on the subject of provisions for amendment to be written into the Constitution. The report as made and finally adopted provided that amendments might be adopted by a vote of 2/3 of both Houses of the Legislature, and a majority vote of the people. In the course of debate on the subject, Webster stated:

> "It occurred to that committee that, with the experience that we had had of the Constitution, there was little probability, after the amendments which should now be adopted, there would ever be any occasion for great changes. No revision of its general principles would be necessary, and the alterations which should be called for by a change of circumstances would be limited and specific. It was therefore the opinion of the committee that no provision for the revision of the whole Constitution was expedient, and the only question was in what manner it should be provided that particular amendments might be obtained." Deb. Mass. Conv. 1820, pp. 413-414.

It is submitted that Webster and the Massachusetts Convention did not intend that a Constitutional Convention could be called under the adopted Constitution. (Jameson on Constitutional Conventions, p. 613.) The assertion of Jameson that such is not its meaning is not at all convincing. And if that was the intention of the Massachusetts Convention, the same philosophy may have led to the conclusion of the Rhode Island Convention of twenty-two years later. The fact that Massachusetts later changed its Constitution by a Convention is beside the point, since the legality of such procedure was not raised prior to its becoming a *fait accompli.*

The Constitution does not make a Convention impossible; it merely makes a Convention illegal unless it is brought about in the only method possible in accordance with the terms of the instrument. If it is desired that provision be made for a Convention, all that is necessary is to amend Article XIII in accordance with its terms, so as to allow a Convention to be set up for the purpose of revising the Constitution. A provision permitting a Convention would seem to be a typical amendment to the present Constitution and, when once adopted, a Convention could then be called in accordance with its terms. This is legal and orderly procedure. It was accepted procedure even prior to the opinion of 1883. In 1882, in accordance with the provisions of Article XIII, there had passed the second successive General Assembly a provision to amend that Article itself so as to allow the use of Conventions to revise the Constitution. See

Acts and Resolves, May 1882, p. 7.

This was submitted to the people and rejected by a vote of 4,393 to 5,121. This recent usage was before the Court when it rendered its opinion and might have been cited as confirming usage, if the Court had felt any need of further buttressing its reasons.

If there were no method of amending the present Constitution, it is arguable that there would be, of necessity, a power to call a Convention and revise or amend the Constitution. Likewise, if the method of amending the present Constitution was such as practically to preclude amendments of any kind, it might be interpreted as being, in effect, a negation of amendment, and an argument could be made that the right of revision existed and could, perhaps, be exercised otherwise. This argument, however, is not available in regard to the Rhode Island Constitution, which has been amended on fourteen occasions by the adoption of eighteen

separate Articles, in such manner that the amendments to the Constitution are, in length, equal to approximately three-fourths of the Constitution.

If it seems advisable to revise the whole Constitution, that can be accomplished under the present provisions. Let a Commission draft a new Constitution, submit it to the Legislature for proposal, and later to the people for adoption, under the provisions of Article XIII. This procedure was actually followed in 1898 and the proposed Constitution was rejected by the vote of the people. Again in 1915, the same procedure was followed, except that on this occasion the proposals were not passed by the General Assembly. It, therefore, cannot be argued that there is not abundant provision not only for amendment of separate Articles, but for the entire revision of our present fundamental instrument of government within clearly legal and orderly procedure.

3. The arguments in support of the contention that the constitution permits amendment or revision by a constitutional convention are unsound.

Against the conclusions set forth above, arguments have been made with several different theories as their basis. The fact that the opposition is based upon several theories in itself indicates a lack of clear demarcation as to the reasons for the conclusion, and, as pointed out below, includes also a certain inconsistency in argument among those who seek the same conclusion. This suggests the possibility that the opposition is motivated by a desire to seek reasons to support a desired result rather than by the attempt to consider the facts and draw such deductions from them as will achieve the proper conclusion. It seems proper, therefore, to consider in brief the varying theories of the opposition.

A. Article I, Section 1, contains no grant of power to revise the constitution by a convention.

This involves the first school of thought among the opposition, namely, that this section, in and of itself, is a grant of such power, but it seems at once upon reading this section that it is a general declaration of principles rather than a grant of power. So general are its terms that this conclusion is inevitable. Furthermore, the word "alter" is clearly synonymous with the word "amend," as contained in Article XIII and hence, so far as "altering" or "amending" are concerned, there would seem to be no question that this section is merely a general declaration, the method for the carrying out of which is contained in the subsequent Article. The word "make" would, under ordinary circumstances, refer to the initial construction, namely, the adoption of the original instrument. In that context, the declaration is, of course, literally true. On the other hand, if the phrase "make and alter" is considered together, having in mind a general revision or a specific amendment, clearly the whole phrase relates only to the type of thing possible under Article XIII, as set forth above.

The power intended to be granted or set up under this Section is, however, more clearly seen when consideration is given to the action of the Convention of 1842 at the time the Constitution was adopted. A motion was made to amend this section by inserting in place of it the following:

> "All political power and sovereignty are originally vested in, or, of right, belong to the people. All free governments are founded in their authority and are established for the greatest good of the whole number. The people have, therefore, an inalienable and indefeasible right, in their original sovereign and unlimited

> capacity, to ordain and institute government, and, in the same capacity, to alter, reform or totally change the same whenever their safety or happiness requires."

There was immediate opposition to this amendment and it was rejected. It will be seen at a glance that an argument could be made that this proposed amendment was attempting to set up in the people themselves a certain right which it was claimed could not be delegated. Even then, the existence of such a right in its conflict with Article XIII would have been doubtful. By the ordinary canons of construction, however, the fact that a provision more clearly implying the existence of such a right was rejected, leads to the conclusion that those who were framing our present Constitution had no intention of setting up such a provision.

In that original Convention, on the contrary, there was apparently a desire to let it appear in the fundamental instrument that sovereignty was in the people and that the voice sounded by the agencies of government was always the voice of the people. With this in mind they turned to the words of Washington in his Farewell Address and quoted them in Article I, Section 1. In choosing these words, they must, of course, have had reference to the context in which they appeared in the Farewell Address and were undoubtedly familiar with the thought in the mind of the Father of his Country when he used these phrases. Because one striking sentence might have appeared in that oration would hardly have led the convention of free citizens to adopt and quote that sentence when they were entirely out of sympathy with its context and the thought of its writer. It is, therefore, important to see the theme upon which Washington was discoursing and the context in which these words were used. Reference to the whole paragraph in which these words appear and the two succeeding paragraphs will disclose without question what the

first President had in mind. He had been the head of a government founded upon revolution. That government had succeeded to a marked extent. There still were, however, dissents within it. There still was fear of violent opposition to the central authority. Washington knew these facts. He knew that Revolution had been used to establish their institutions. He was not, however, delivering an eulogy of that method. He was not commemorating that event. On the contrary, he was struck with the sober thought that while such means were occasionally necessary and advisable, the danger to a free government once established was in the use on subsequent occasions of the same means. With this in mind, he uttered the words quoted in our Constitution and then went on specifically to warn against departure from orderly principles.

> "All obstructions to the execution of the Laws, all combinations and associations, under whatever plausible character, with (the real) design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle, and of fatal tendency . . ."
>
> * * *
>
> "Toward the preservation of your Government and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular opposition to its acknowledged authority, but also that you resist with care (the) spirit of innovation upon its principles however specious the pretexts. One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, (and thus to) undermine what cannot be directly overthrown. In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of Governments, as of other human institutions—that experience is the surest standard, by which to test the real

> tendency of the existing Constitution of a Country—that facility in changes upon the credit of mere hypothesis and opinion exposes to perpetual change from the endless variety of hypothesis and opinion; . . . "

It is submitted that any fair construction of the words of Article I, Section 1, put back into their original context, will disclose that they are not intended as the basis for extraordinary assemblies to accomplish fundamental changes in government. On the contrary, it is clear that the emphasis in the quoted portion of this address is upon the second part and that the primary purpose in the pronouncement was to warn the people "that the Constitution which at any time exists, *till changed by an explicit or authentic act of the whole people,* is sacredly obligatory upon all."

If this be true, where should one look for an "explicit or authentic act of the whole people"?

Article XIII is "explicit." Action under Article XIII would be "authentic." An adoption of a change under Article XIII must be by the "whole people." The "whole people" are represented in government by the electors. The "whole people" can set up such procedure as they see fit and if they desire to provide that changes in their fundamental law shall be accomplished only by 3/5 vote, no other vote is an act of the "whole people."

It is submitted that a fair consideration of Article I, Section 1, word by word, aside from its original context, its general meaning as derived from its original context, or its proper interpretation in the light of the action of the Rhode Island Convention in rejecting a substitute, can lead only to the conclusion that it does not provide a method for amending or revising the Constitution in addition to, and, in spirit, at variance with, Article XIII.

B. There is no inherent, inalienable right in the majority of the people under the Constitution to revise the Constitution contrary to and in spite of the provisions contained within it.

This refers to a second school of thought. Those who hold this view quote Article I, Section 1, but do not see in it any specific grant but only general significance. They use it as a text for the proposition that there is an inherent, inalienable right in the majority to revise the fundamental instrument of government and that this right cannot be controlled or curbed. From the discussion above, it will be seen how much solace such a philosophy can draw from the words of Washington. A consideration of the above will disclose that any fair-minded person will conclude that it is the very type of thing of which he was afraid and concerning which he was advising the new Nation. This leaves this particular school of thought without Washington as proper authority.

These people of necessity must go the full distance which their philosophy dictates. Even if there were a specific provision in the Constitution whereby a Convention might be called, they take the attitude that that provision itself is subject to fundamental, natural law relating to the inherent rights of a sovereign people said to reside in a majority. Of course, there is such a right, perhaps more properly called a power. It is a power, of course, in the realm of political science, defined as the "right of revolution." Washington had it in mind and was warning against it. He recognized it, but he recognized it quite separately from the powers contained in the fundamental instrument of government.

The argument in favor of such an inherent, inalienable sovereignty in the people was that made by Hallett in the

case of *Luther* vs. *Borden,* 1 How. (U. S.) 1, in which he drew the striking picture of a whole people assembled on a plain and assumed that sovereign power was present. Jameson, in striking language, denies this conclusion, even if it were physically possible for every last citizen so to assemble, and says that under those circumstances such an assembly

> "clearly would have no constitutional or legal right to pass an ordinance at all. Such an assemblage would not constitute, in a political sense, The People. The people of a State is the political body—the corporate unit—in which are vested, as we have seen, the ultimate powers of sovereignty; not its inhabitants or population considered as individuals, . . . except as an organized body and except when acting by its recognized organs, the entire population of a State, already constituted, were it assembled on some vast plain, could not constitutionally pass a law or try an offender."
>
> Jameson on Constitutional Conventions, Sec. 225.

The same authority, after making reference to Hallett's argument as a "most ingenious defense of anarchial principles," goes on to state that Webster's argument in opposition is the classical enunciation of true principle in this field. This argument of Webster, Jameson succinctly summarizes in part as follows:

> " . . . that not only do the people limit their governments, National and State,—it is another principle, equally true and important, that *they often limit themselves; that they set bounds to their own powers; securing the institutions which they establish against the sudden impulses of mere majorities;* thus, by the Fifth Article of the Constitution, Congress, two-thirds of both Houses concurring, may propose amendments of the Constitution, or, on application of the Legislatures of the States, may call a convention—the amendments proposed, in either case, to be ratified by the Legislatures or Conventions of three-fourths of the States: . . .

> That it is in these modes we are to ascertain the Will of the American People and that our Constitutions and Laws know no other mode; that we are not to take the Will of the People from public meetings, nor from tumultuous assemblies by which the timid are terrified, the prudent alarmed, and society disturbed." [Italics ours]

See also

> Jameson on Constitutional Conventions, Sec. 229.
> See also Cooley on Constitutional Limitations, p. 56.

The right of a majority to enforce its will, exclusive of the method provided by the fundamental law, is the right of revolution. It is that described in the Declaration of Independence as "the right of the people to alter or abolish it (the government)." That Declaration was a revolutionary document, and the right so asserted is a right of revolution whether it be specifically contained in a revolutionary document or be impliedly urged as abiding in a people living under a Constitution.

And it is no answer to this clear statement of principle that such Conventions have been held and the governments set up under them have continued to exist. Revolution may be peaceful and accepted, but it is, nevertheless, revolution. Jameson in commenting upon three such Conventions, strikingly concludes:—

> "It is obvious that to justify such proceedings on legal grounds would be to take away from the fundamental law, that characteristic quality by which it is the Law of Laws—the supreme law of the land. If it is not the supreme law, for all purposes of a Constitution, in the American sense, it might as well be a piece of blank paper."
> Jameson on Constitutional Conventions, Sec. 221, *et seq.*

There is another principle established by authority and accepted for its reasoning, which is fundamentally incon-

sistent with the claimed inherent, inalienable right of the people to a Convention. This is the principle that where the Constitution contains a provision for specific method of amendment, a particular amendment can be adopted only in that fashion and not by a Convention for the purpose of that amendment alone. This was the opinion of the Justices of the Massachusetts Supreme Judicial Court in answer to a question of the House of Representatives in 1832.

Opinion of the Justices, 6 Cush. 573.

Furthermore, as observed by the Justices of the Massachusetts Court in the opinion cited, it is presumed that it was not the intention of the Governor to request an opinion upon natural rights, nor the effect of changes sanctioned by people in emergencies, but

> "We presume, therefore, that the opinion requested applies to the existing Constitution and laws of the Commonwealth, and the rights and powers derived from and under them."

A following of the procedure indicated by the Massachusetts Court is bound to reach the conclusion that *under* the Rhode Island Constitution, there is no inherent, inalienable right in the majority of the people to change that instrument without regard to the provisions of it.

C. *The general grant of power in Section 10 of Article IV contains no power to revise or amend the Constitution.*

Article IV, Sec. 10, reads as follows:

> "The general assembly shall continue to exercise the powers they have heretofore exercised unless prohibited in this Constitution."

The argument of those who attach significance to this clause sufficient to achieve their desired result, is that since

the General Assembly, prior to 1842, had called Constitutional Conventions, that power still resides in them under the above quoted section. A consideration of the facts will disclose the weakness of this argument.

Prior to 1842, the General Assembly had extraordinary powers under the Charter of King Charles, then our Constitution. It was restricted in few ways. The present Constitution, however, defined and restricted grants of power, and in order that there might be no question in regard to the power of the Legislature, there was inserted in Article V, Section 1, entitled, "Of the Legislative Power," at the very beginning the following:

> "This constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void."

The Constitution, therefore, was made supreme and the legislative power was subject to the Constitution and the results of the Constitution which fair construction might reach.

It is also clear that the grant contained in Section 10, above quoted, is a general grant and if it contains any power in regard to Constitutional Conventions, it does so by implication only. If this is so, it has been pointed out above that an implied grant is negatived by an express grant in another part of the instrument, when the two are inconsistent.

Section 10, therefore, can only be of importance if, on a fair construction of the whole Constitution, the power sought to be implied is present. If, on such construction, the implication of such a power is absent, Section 10 will not help. This is most clearly seen here in Rhode Island by the case of *Taylor* vs. *Place,* 4 R. I. 324. That case decided that the judicial power of the State was in the Courts and not in the Legislature. There was urged against this conclusion the full force of Section 10, above quoted, and it was conclusively shown that the Legislature not only under the King Charles Charter, but after its adoption, had exercised judi-

cial powers. The Rhode Island Court, however, stated that the Constitution was a new instrument that had to be interpreted to accomplish the object for which it was established, and that the powers and rights under it would not be unduly influenced by such a general grant as contained in the cited section. This was stated clearly at Page 355, where, in reference to the Legislature, it was stated:

> "Strong as it is, however, it is, alike with the other departments of the government, powerless before the Constitution, and the will of the people, which that instrument expresses."

If the implications of this fundamental instrument made necessary to accomplish its general intent are strong enough to overcome any arguable grant under Section 10, how futile it is to contend that the specific, express method of amendment in Article XIII is rendered surplusage by this general grant!

Furthermore, early Rhode Island history discloses that there was never a willingness to accept too extraordinary powers as residing wholly in the General Assembly. The early towns claimed the right to nullify acts of the General Assembly. A specific town constituting a clear minority of the people claimed that similar right. With this history and in the face of the language of Article XIII, there should be great hesitation in so construing our fundamental law that the safeguards against change set up by the people themselves in specific words were not intended to be more than mere words, since a quicker accomplishment of the same result by a smaller vote is at all times possible.

4. The Opinion of the Judges of 1883 is the only direct authority upon the specific question.

In the field of fundamental law involved in the construction of Constitutions, a local precedent is a far greater authority than any observations by foreign Courts. In the gen-

eral field of law involving general customs, usage, commerce, etc., the precedents of other Courts are of the greatest importance, even though not controlling. That this is so is demonstrated by the calling of the field the "*common* law." In the realm of sovereignty, we are, however, a State unto ourselves, not the national State, it is true, but, nevertheless, a sovereign State. Under these circumstances, the opinion of our own Court and the acquiescence in it over a period of years should be controlling as against any outside precedent. This does not, however, justify ignoring any possible light to be derived from outside opinion and, accordingly, the reference should, perhaps, be made to such possible authorities.

The extended argument above in relation to the reasons for arriving at the indicated conclusion that a constitutional convention makes it unnecessary again to cover that field by considering the arguments in text books upon this subject. It is true that writers upon the general topic have not agreed with the decision of 1883, but since the authority of such authors is based upon the cogency of their reasoning and has not the weight of a decision, the only importance to be attached to their attitude is in consideration of the arguments involved in comparison with the reasonable approach to this question indicated above.

Jameson on Constitutional Conventions,
Section 570, 574d.
Dodd on The Revision and Amendment of State Conventions, pp. 45, 56.
Hoar on Constitutional Conventions, pp. 43, 48.

In some of the texts and in one or two opinions, there has been used loose language which would indicate that there were decisions actually contrary to that of the Rhode Island Court in 1883. At least, that is what is ordinarily meant when the term "weight of authority" is used. A careful consideration of the decided cases, however, reveals that in all

instances the references are merely to dicta and there is not one case in a Court of last resort actually decided contrary to the opinion of 1883.

It must first be observed that the only authority cited in the opinion of 1883 was the Opinion of the Justices of the Massachusetts Supreme Judicial Court in 6 Cushing, 573. Certainly, that decision in general was upon the same subject, and while attempts have been made technically to cut down its meaning, a fair consideration of the thought of the Court is bound to lead to the conclusion that if the Massachusetts Court had been asked the question put to the Rhode Island Court in 1883, the answer would have been the same. And it is no answer to the weight to be attributed to that opinion to state that thereafter in Massachusetts a constitutional convention was held without a change in the constitution. The legality of that convention was not raised in the courts, and after it had once been held and a constitution purported to have been adopted and officers elected under it, there was no way to raise the question of its legality.

There are certain cases sometimes cited as being at variance with the opinion of the Rhode Island Court.

Wells vs. *Bain,* 75 Pa. St. 39.
Wood's Appeal, 75 Pa. St. 59.
Collier vs. *Frierson,* 24 Ala. 100.
State vs. *Powell,* 77 Miss. 543.
State vs. *Dahl,* 6 N. D. 81.
Ellingham vs. *Dye,* 178 Ind. 336.
State vs. *American Sugar Refining Co.,* 137 La. 403.

A consideration of the cases themselves will, of course, reveal to what extent they have purported to cover the topic involved in the present question, but just a word by way of reference to them may not be out of place.

In *Wells* vs. *Bain, supra,* the decision was upon the question as to whether the supervision of the balloting relating to a convention should be by ordinance of the convention or

under the general laws passed by the legislature. The Court did imply the existence of a power to create a constitutional convention, but in doing so it was considering the language of the Pennsylvania Constitution, which stated that the people "have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper." The significance of this provision is more clearly recognized in the second Pennsylvania case of *Wood's Appeal, supra.* In that case, at Page 70, the Court, speaking of the above provision of the constitution, stated:—

> "It defines no manner or mode in which the people shall proceed to exercise their right, but leaves that to their after choice. Until then it is unknown how they will proceed, or what powers they will confer on their delegates."

And again, at Page 72, the Court states:—

> "The calling of a Constitutional Convention and the regulating of its action by law is not forbidden in the Constitution. *It is a conceded manner* [italics in original opinion] through which the people may exercise the right reserved in the Bill of Rights. It falls, therefore, within the protection of the Bill of Rights, as a very manner in which the people may proceed to amend the Constitution . . . . "

The construction of the right to call a convention under such a provision is clearly apparent as a possibility, and the Court so stated. This provision is, of course, far different than the provision in Article I, Section 1, of the Rhode Island Constitution. It is also true, in *Wood's Appeal,* that the Court openly stated that since the convention had been held and the new constitution adopted, under which the Court was holding, there could be no review of its legality. This appears in the opening sentence where the Court states:

> "The change made by the people in their political institutions by the adoption of the proposed Constitution since this decree, forbids an inquiry into the methods of this case. The question is no longer judicial . . . "

From that opening point onward, the case is dicta.

In *Collier* vs. *Frierson, supra,* the question was as to the validity of the adoption of a certain amendment to the constitution in view of the fact that it had been omitted from the Resolution at one of the sessions of the General Assembly. In *State* vs. *Powell, supra,* the question was a similar one in relation to the validity of the adoption of an amendment. In each of these cases, there is but a single sentence which bears at all upon the question at issue in the instant case, and that sentence is wholly unnecessary to the decision.

In *State* vs. *Dahl, supra,* the question was the validity of a mode of procedure by the General Assembly in relation to amending the constitution, as to whether a joint Resolution or an actual legal Act was required. The Court expressly stated at the end of the opinion that it was not necessary to pass upon the question as to whether a constitutional convention could be held. It then went on to state that the weight of authority and precedent was in favor of such power, citing "Jameson, Const. Conv., ss 570, 574d; *In Re Constitutional Convention,* 14 R. I. 649; *Opinion of Justices of Supreme Court,* 6 Cush. 573."

Since Jameson cites no judicial opinions to uphold his point of view, the North Dakota Court is in the peculiar position of stating a proposition as law, which is the exact opposite of that held by the only cited cases.

In *Ellingham* vs. *Dye, supra,* the decision involved the legality of an attempt to submit a new constitution without compliance with the amending clause of the old consti-

tution. In a long opinion upon this subject, numerous quotations are made and arguments proposed, but all, with the exception of the above decision, are dicta.

In *State* vs. *American Sugar Refining Co., supra,* some dictum appears but the case itself apparently involves the extraordinary decision that part of the very constitution, under which the Court held, was not effective, although the constitution had been adopted as a whole. Under these circumstances, it is not extraordinary that a dissenting Judge should have stated, in declaring the Court to be without jurisdiction:

> "Our authority or jurisdiction cannot rise higher than its source."

It is submitted that it is extraordinary, indeed, if, as alleged by certain text book writers, the weight of authority is against the Rhode Island opinion of 1883, to find that there are no actual decisions to that effect. Such decisions would be expected to be in corroboration of the action of other branches of the government and, therefore, the type of decision which the Court would not hesitate to give, even though the question be somewhat political in its nature. However, there are none such. On the other hand, one would not expect to find cases on all fours with the Rhode Island decision. In only a few States are advisory opinions of the Justices legal, and it is in one of these, Massachusetts, that there appears the opinion closest to that of the Rhode Island Court. When a convention, regardless of legality, is actually being called or in existence, the judicial branch of the government is always loathe to interfere and entertain jurisdiction. It foresees that the result may ensue despite its decision and realizes the probable impotency in what it may decide. What is true at the time is clearer still after the convention has been held and the new con-

stitution adopted. The Court then is in this dilemma: It can decide that it is holding over, deriving its authority from the old Constitution. In this case, as a Court it has no executive or legislative branch available to carry out its decisions, and thus it stands as a mere academic tribunal. Or it can decide that it is holding under the new constitution; but it then follows that it has taken an oath to uphold that constitution and it does not then lie in its power to declare as of no effect the *sine qua non* of its own very existence.

See

Wood's Appeal, supra.

State vs. *American Sugar Refining Company,* (Dissenting Opinion), *supra.*

The fact that this is so means that one would expect to find precedents in action taken which would not, under ordinary circumstances, bear the scrutiny of judicial inquiry as to legality under the ordinary processes of decision.

It is, therefore, submitted, on reason and authority, that the Rhode Island opinion of 1883 should be followed by the Court in answering the questions now before it, and the method of approach is well laid down by Judge Cooley in *Bay City* vs. *State Treasurer,* 23 Mich. 499, at p. 506:

> "Constitutions do not change with the varying tides of public opinion and desire: the will of the people therein recorded is the same inflexible law until changed by their own deliberate action, and it cannot be permissible to the Courts that, in order to aid evasions and circumventions, they shall subject these instruments . . . to a construction as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around the provisions whenever practicable and give them a damaging thrust whenever convenient. They must construe them as the people did at their adoption, if the means of arriving at that construction are within their power."

In 1842 a Constitutional Convention, only too well acquainted with Conventions, chose to omit provision for such a convention; in 1882 the people of Rhode Island, at the polls, indicated their opposition to the inclusion in our fundamental law of a provision for such convention; in 1883 our highest Court rendered the opinion that the constitution did not permit the calling of a convention, and that opinion has been referred to with approval on two subsequent occasions. The Rhode Island Constitution in 1935 is the Constitution of 1842, 1882, and 1883, and it is to be hoped that its meaning remains the same.

II. EVEN IF THE GENERAL ASSEMBLY CAN CALL A CONSTITUTIONAL CONVENTION, IT MUST FIRST RECEIVE AUTHORITY TO DO SO BY A REFERENDUM TO THE PEOPLE.

Assuming that this Court arrives at the conclusion that the provisions of the present constitution of Rhode Island do not prevent the calling of a constitutional convention in this state,—in other words, that the opinion of the justices found in 14 R. I. 649 is unsound,—there still remains to be answered the question of how such a convention may be called, how it may be constituted, the extent of its powers, and the method of finally adopting the new constitution when drafted. The next section of the brief will be devoted to a consideration of the methods of calling such a convention.

1. The Development of the Law of Constitutional Conventions.

The constitutional convention as we know it is of modern origin, and such conventions are of two classes,—first, constitutional, and second, revolutionary. We will treat only of the first class. The two conventions most frequently referred to as a starting point are those of 1660 and 1689 in England, and they were revolutionary. Owing to the liberal

powers given to Parliament by custom and practice, this system of law, as we know it, has not arisen in that country. The English system of parliamentary government has no written constitution or constitutional law in the sense that we have one.

The constitutional convention was largely a development from the conditions surrounding the Revolutionary War. It was the result of the emergency and the growth of the unusual times which surrounded the reconstruction period of this country during the years following the Revolutionary War. Too much weight should not be given to the precedents established prior to the period about 1800. They may be helpful, but the conditions under which they were given must be carefully considered. From 1800 to the period of the secession movement in the South about 1860, conventions were with few exceptions called and conducted in the ordinary way with much regularity. Similarly the constitutional conventions of the period from 1860 to 1870 were in general so closely connected with the secession movement and the Civil War, either directly, as in the case of seceding states, or indirectly, as the result of the reconstruction period following the war, that they are of little value as precedents. The period from about 1870 to 1895 or 1900 was a period when the calling of conventions continued to gain both as to the method of their calling and as to their operations in a logical and established manner. (Dodd, The Revision and Amendment of State Constitutions, Chap. 2.) In *Ellingham* vs. *Dye,* 178 Ind. 336, 99 N. E. 1, the Court said:

> "The formation of Constitutions in the Revolutionary and reconstruction periods of our history and instances * * which involved the validity of a Constitution submitted to the people by the territorial Legislature, and by which a state government was instituted, are obviously distinguishable."

And in *Wood's Appeal,* 75 Pa. St. 59, the Court said:

> "No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times when necessity begets a new government."

The methods of calling constitutional conventions and the powers of the people over their conventions have now taken definite form and are quite well established. Even after giving effect to the above comments, however, there is still left an amount of material for consideration upon the questions before us. This material may be divided into two general classes, which in order of their importance as legal authorities are,—

(1) Decisions of courts in contested cases;

(2) Opinion and comments of individual jurists, text writers and others.

2. The Sovereignty of the People.

Underlying every decision of a court, every opinion of a justice, and every comment by a jurist, must be the fundamental idea of all constitutional law, so well stated in Article I, Section 1 of the present Constitution of Rhode Island, that

> "the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

It would be impossible, however, as Jameson says, for the people in a modern state to gather as one unit "on one great plain" and, if they so gathered, there to transact the affairs of state. Cooley, in his work on Constitutional Limitation (8th Ed., 1927), Vol. I, page 81, says:

> "The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority."

and again at page 82:

> " * * * as a practical effect, the sovereignty is vested in those persons who are permitted by the constitution of the state to exercise the electors' franchise."

Just as "necessity, the mother of invention," has brought into existence the idea of representative government and the legislature as an expression thereof, so too in any government of law, necessity requires that some legally constituted body, presumably the legislature, take the initial step of submitting to the people the question of such a convention. *The authorities are practically unanimous, however, in holding such submission of the question to be the limit of the power of the then existing legislature,* this principle arising from the fundamental fact that the making of a new constitution is a sovereign act of the sovereign people and the necessary corollary that the legislature acts not under powers previously delegated to it by the people, but as an agent of necessity.

The present legislature of Rhode Island derives its authority from the Constitution of 1842, which provides no mechanism for a constitutional change by the convention method. In the absence thereof (assuming that the calling of a convention is nevertheless permissible) *the legislature can act only in the submission of the question to the people of the calling of a convention,* by force of necessity, as the only body reasonably available to provide a mechanism for ascertaining the wishes of the sovereign people from whom it and the whole existing government draw their powers. When acting in this capacity as an agent of the sovereign people it acts not under the rights conferred upon it by the Constitution of the state, but as the voluntary agent of what is sometimes referred to as the fourth department of our state, namely, the people acting in their sovereign right. That the sovereignty vests in the people is an accepted fact,

but from such fact it does not follow that there has been any delegation of authority to the legislature to initiate proceedings for a constitutional convention. Even after a convention is organized, the extent of its authority may be questioned.

During the early part of the nineteenth century it was sometimes argued that the people's sovereignty was delegated to the convention and that it and it alone had the full rights of the people when once called into being, but this theory is no longer accepted. Dodd says in his work at page 77:

> "The theory of conventional sovereignty has been advanced by speakers for several conventions beginning with that in New York in 1821, but no convention seems, however, to have attempted to act upon the theory or even to have endorsed it."

Probably the best summary of the powers of a convention is found in Dodd, p. 77-80, where he says:

> "Under Judge Jameson's theory a constitutional convention called by a vote of the people may be restricted by simple legislative act so that it may not revise or propose the revision of any part of the existing constitution which the legislature may forbid it to touch. The convention is made subordinate to an organ of the existing government. Judge Jameson proceeded on the assumption that a constitutional convention must possess sovereign power—that is, all of the power of the state—or that it must be strictly subordinate to the regular legislature. He could conceive of no middle ground between these extremes. In attempting to demolish the theory that the convention is sovereign, he went to the other extreme and really made the legislature the supreme body with respect to the alteration of state constitutions, for under his view a convention may be restrained by a legislature as to what shall be placed in the constitution, and no alteration can be made without legislative consent. Judge Jameson pushed his theory to its logical conclusion and held that

> a convention, even after elected and assembled, might be dissolved by legislative act, or that the legislature might prevent the submission of its work to the people. . . . The better view would seem to be that the convention is a regular organ of the state (although as a rule called only at long intervals)—neither sovereign nor subordinate to the legislature, but independent within its proper sphere. Under this view the legislature cannot bind the convention as to what shall be placed in the convention, or as to the exercise of its proper duties."

Judge Jameson would deny all sovereign power to the convention and make it an instrument of the legislature, but Dodd says of his work (p. 77, note 10),—

> "Judge Jameson's work may be said to have been written to disprove the theory that a convention has sovereign power, and under these conditions the theory assumed in his mind a much more important position than it ever attained in fact."

We may conclude, therefore, that the doctrine of sovereign power is today that it rests in the people and extends to the convention or other agency of the people only so far as is expressly and clearly given by them. In no sense does it rest in the legislature, except so far as it is voluntarily assumed by the legislature as a voluntary agent to initiate the submission of the question of the calling of a convention to the people and in the calling of a convention when so approved.

See *Bennett* vs. *Jackson,* 186 Ind. 583; 116 N. E. 921, where the court says:

> "It seems to be an almost universal custom in all of the states of the Union, where the Constitution itself does not provide for the calling of a constitutional convention, *to ascertain first the will of the people and procure from them a commission to call such a convention,* before the Legislature proceeds to do so. The people being the repository of the right to alter or reform its

government, its will and wishes must be consulted before the Legislature can proceed to call a convention." [Italics ours]

The several questions asked by the Governor lead to four considerations,— (1) the method of calling a convention, (2) the power and duties of a convention, (3) the manner of ratification and adoption of the constitutional form, and (4) the method of electing delegates.

3. The Method of Calling a Convention.

This question submitted is a very important one. No method of calling a convention is designated in the Constitution. The prevailing doctrine today, as we shall show, is unquestionably that the question should be first submitted to the people by an act of the legislature, allowing them to vote whether in favor of or against such a convention. In the past there have been instances where the convention has been called by the legislature. It is doubtful if that ever has been the prevailing view, and it certainly is not today. Both the opinions of the court and of the accepted writers sustain this view. The reasons for this view are easy to see. The reframing or revising of a constitution is a matter of great importance and far-reaching in its effect. It affects the fundamental law of the state. It of necessity requires deliberation, mature thought and careful consideration.

The great danger is that one political party, swept into power by temporary issues, may hastily rush through a Constitution and thereby solidify themselves in office. It *takes* time to submit to the people the question of calling a convention. It *saves* time if the legislature can by its own act eliminate this step and proceed directly to the election of delegates. But delay is desirable, as it leads to deliberation, thought and study, which are of the essence of wise constitution framing.

If the legislature passes upon this question of calling a convention, the electors are deprived of their opportunity to pass upon the question and aroused public opinion is unable to express its views as to the scope and purpose of the convention. The voter will be called upon to designate delegates and not to express his views upon the question of holding a convention or upon the scope of its works. If he votes for delegates, he votes for his representatives who may be limited in their deliberation by legislative act. If he refrains from voting, delegates will still be elected. Obviously such a convention when chosen is the creature of the legislature. Under this method there is no expression of the people's wishes. Their sovereign rights are ignored.

It is true that if the legislature submits the work of a convention to the people for their approval or rejection they may accept or reject it, but that is not a full exercise of the sovereign power of the people. It is their right to initiate and direct the framing as well as to accept a Constitution.

The delays caused by the submission of these questions to the people are highly desirable. The calling of a convention is not frequent and is little understood. Intelligent action on the part of the electorate requires time. One of the greatest evils is too much speed in the inception of the movement for a new Constitution. For these reasons the principle of the legislature submitting the question of calling a constitutional convention to popular vote has become well established.

These thoughts were concisely and ably stated by Judge Cooley in an article in the American Law Review (1889), page 311, when that eminent constitutional writer said:

> "A good Constitution should be beyond the reach of temporary excitement and popular caprice or passion. It is needed for stability and steadiness; it must yield to the thought of the people; not to the whim of the

people, or the thought evolved in excitement or hot blood, but the sober second thought, which alone, if the government is to be safe, can be allowed efficiency. * * * Changes in government are to be feared unless the benefit is certain. As Montaign says: 'All great mutations shake and disorder a state. Good does not necessarily succeed evil; another evil may succeed and a worse.'"

They have been well stated in *State, ex rel. Wineman* vs. *Dahl,* 6 N. D. 81-85 (1896), where the court says:

"Nor can it be said that it is an empty form to leave to popular vote the grave question whether the people shall assemble in convention, and revise their fundamental law."

and on page 87:

"But while the power resides in the legislature, and that body only, to call a constitutional convention, *it is obvious that the agents of the people, who have not been selected on that particular issue, should not take upon themselves the responsibility of burdening the people with the expense of such a movement, without first submitting to them the question whether they desire such a convention to be called.* The argument against the taking of the initiative by the legislature in such cases, without first ascertaining public sentiment on the question, is so strong, and lies so plainly on the surface, that in many states the Constitution, in terms, requires the submission of the proposition to popular vote, and a majority vote in its favor, before the legislature can legally summon the people to meet in convention to revise their organic law." [Italics ours]

In *Ellingham* vs. *Dye,* 178 Ind. 336, 99 N. E. 1, 17, col. 1, 2, (1912), the court says:

"It must be remembered that the Constitution is the people's enactment. No proposed change can become effective unless they will it so through the compelling force of need of it and desire for it. We have not heard the voice of the people raised in a demand for a

> new Constitution. And so we doubt if there is reason for applying the doctrine of construction *ab inconvenienti* to the existing Constitution to hurry to the people organic change which they had not called for. That the Constitution may need an amendment may be true. But there has never been a time when the people might not, if they pleased and if they had believed it necessary, have made any change desired in the orderly ways provided. That they have not done so, and that the General Assembly may believe good will follow by deviating from slow and orderly processes, will not justify a construction of the Constitution which does violence to its intent and express provisions."

Probably the weightiest opinion on this particular point is that of Chancellor Kent written in 1820. The New York State Assembly had undertaken to call a convention without first submitting the question of the call to the people as a whole. The opinion in question was included in the statement of objections made by the council of revision in returning the bill to the Assembly. See Jameson pp. 669-671:

> "The council therefore think it the most wise and safe course, and most accordant with the performance of the great trust committed to the representative powers under the constitution, that the question of a general revision of it should be submitted to the people in the first instance, to determine whether a convention ought to be convened. The declared sense of the American people throughout the United States on this very point cannot but be received with great respect and reverence; and it appears to be the almost universal will, expressed in their constitutional charters, that conventions to alter the constitution shall not be called at the instance of the legislature without the previous sanction of the people, by whom these constitutions were ordained."

An equally straightforward statement by the New York Supreme Court made in connection with the New York con-

vention of 1894 is found in the Journals of the 69th New York Assembly, p. 919; approved by committee headed by Elihu Root in report to New York Convention of 1894, Rev. Record Vol. 1, p. 258-60-270:

> "The legislature is not supreme. It is only one of the instruments of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government it acts under a delegation of powers; and cannot rightfully go beyond the limits which have been assigned to it. This delegation of powers has been made by a fundamental law, which no one department of the government nor all the departments united, have authority to change. That can only be done by the people themselves. A power has been given by the legislature to propose amendments to the Constitution, which, when approved and ratified by the people, becomes a part of the fundamental law. *But no power has been delegated to the legislature to call a convention to revise the Constitution. That is a measure which must come from, and be the act of the people themselves.*" [Italics ours]

A still more powerful statement of the principle involved was adopted at the Mississippi Convention of 1851 (See the Journals of that Convention, pp. 48-50, and the quotation therefrom in Hoar, p. 67):

> "That in the opinion of this Convention, without intending to call in question the motives of the members of the Legislature, by the call of this Convention, the Legislature, at its last extraordinary session, was unauthorized by the people; and that *said act, in peremptorily ordering a Convention of the people of the State, without first submitting to them the question whether there should be a Convention or no Convention, was an unwarranted assumption of power by the Legislature;* at war with the spirit of republican institutions, an encroachment upon the rights of the people and can never be rightfully invoked as a precedent." [Italics ours]

Most constitutions expressly require action by the people. The correctness of the principle of requiring action by the people before a convention can be called is affirmed not only by the decisions and opinions cited above, but by the fact that it is expressly written into the text of thirty-two of our state Constitutions.

Dodd in his work, Revision and Amendments of State Constitutions (1910), says at page 51:

> "The practice of obtaining the popular approval for a convention may be said to have become almost the set rule. Thirty-two constitutions require such an expression of approval and even where it has not been expressly required, such a popular vote has been taken in a majority of cases in recent years."

Mr. Dodd then summarizes the situation and states at page 53:

> "According to what is now the most usual procedure in the adoption of constitutions there are three popular votes connected with the matter: (1) The vote of the people authorizing the convention; (2) Selection by the people of delegates to the convention; (3) Submission to the people for their approval of a constitution framed by the convention."

Mr. Hoar at page 60 reaffirms the statement of Mr. Dodd:

> "Thus the practice of obtaining the popular approval for the calling of a convention may be said to have become almost the settled rule. Thirty-two State constitutions require such a popular expression of approval, and even where it has not been expressly required, such a popular vote has been taken in a majority of cases in recent years."

See also Hoar, p. 68:

> "Thus convention calling is not a regular function of the legislature, and there is a growing tendency towards a view that the legislature has no power to call a convention without first obtaining permission from the people."

The latest authority and in most respects the best is the case of *Bennett* vs. *Jackson,* 186 Ind. 533, 116 N. E. 921, 923 (1917). In that case an injunction was sought to prevent a convention which had been called by the legislature without first submitting the question to the people. We again quote the language of the court, which is the last judicial utterance which we have been able to find which is in point:

> "The Legislature has no inherent rights. Its powers are derived from the Constitution, and hence, where some action of the legislative body, which action is outside of the particular field fixed by the Constitution and is not strictly legislative within the meaning of section 1, art. 4, supra, is sought to be justified, a warrant for the same must be found somewhere; if not in the Constitution, then directly from the people, who, by the terms of section 1, art. 1, of the Bill of Rights, have retained the right to amend or change their form of government. The right of the people in this regard is supreme, subject, however, to the condition that no new form of a Constitution can be established on the ruins of the old without some action on the part of the representatives of the old, indicating their acquiescence therein; and, the General Assembly being the closest representative of the old, its approval must be obtained by some affirmative act. This is the only orderly way that could be conceived. The question then arises: How may these, the people and the Legislature, get together on this proposition? If no positive rule is provided by the fundamental law of the state, then, if a custom has prevailed for a sufficient length of years so that it is said to be fully established, that rule or custom must prevail.
>
> "It seems to be an almost universal custom in all of the states of the Union, where the Constitution itself does not provide for the calling of a constitutional convention, to ascertain first the will of the people and procure from them a commission to call such a convention, before the Legislature proceeds to do so. The peo-

ple being the repository of the right to alter or reform its government, its will and wishes must be consulted before the Legislature can proceed to call a convention. 6 R. C. L. §17, p. 27; Hoar, Constitution Conventions, p. 68 (1917)."

* * * *

"It is therefore ordered and adjudged that the judgment of the lower court denying injunction be reversed, with directions to restate its first, third, fourth, and fifth conclusions of law in conformity with this opinion."

The dissenting opinion by Lairy, J., was based on other grounds.

This is probably the latest authority that we have upon this subject and is a well-considered case. The legislature cannot create the convention or bring it into being without a mandate from the people. It is not within the legislature's power. Hoar reasons thus, at p. 65:

"A still further consideration is as follows: If it be the legislature which enacts the convention act and thus calls the convention into being, then the legislature can confer on another body (i. e., the convention) a power (i. e., to propose a constitution) which the legislature itself does not possess; which is absurd."

4. The Danger in Calling a Convention without a Referendum to the People.

If this first important step is eliminated, the American system of reforming the constitution is deprived of one of its most important elements in securing the enlightenment and education of the people to perform their necessary part in the adoption of the constitution. Why should it be eliminated? Why the haste? The old government still exists and functions. There is no demand heard on the part of the people that there should be a new form of government. If it is done for mere political reasons, if it is done for a mere de-

sire to perpetuate the reign of those in power, such motives while inspiring haste furnish the strongest of arguments why exceptional and unlawful methods should not be resorted to.

Jameson (Const. Conv. §122, p. 110) states the danger of omitting to submit the question of calling a constitutional convention to the people, and holds that "public opinion should have settled upon its necessity." He says:

> "A simple resolution or vote [of the legislature] would commonly give expression to the general desire, but were that all, there would be danger *that party spirit might avail itself of majority to call conventions for partisan purposes.* This danger being far from unreal, doubtless the wiser course would be for the legislature so to act as to forestall it. A check ought to be found by which the probability of its occurrence would be reduced to a minimum." [Italics ours]

The author then refers to the expedient adopted in many states, of submitting the question to the people for their approval or rejection. He refers with full approval to the language of Chancellor Kent in the report of N. Y. Council of Revision, where this practice was much commended, (1821 App. F. 669-71, for full copy) and proceeds (p. 111, referring to the report of this Council upon the principle of first submitting the question of calling a convention to the people):

> "* * *, by whom it was declared to be most consonant to the principles of our government and of the practice of other states. * * * * *There can be no doubt that this decision was a sound one on constitutional principles.* The intervention of the legislature is necessary to give a legal starting point to a convention, and to hedge it about by such restraints as shall ensure obedience to the law; but as a convention *ought to be called only when demanded by the public necessities,* and then to be as nearly as possible the act of the sov-

ereign body itself, it would seem proper to leave the matter to the decision of the electoral body, which stands nearest to the sovereignty, and best represents its opinion. Such seems to be the prevailing sentiment in most of the states. * * * " [Italics ours]

Jameson further refers to the danger of hasty action and says:

§532. "It is obvious that, were the existing government of a state, or any branch of it, invested with the power, without condition or limit, to call conventions to change the organic law, there would be cause to apprehend two dangers; * * * * that our conventions would become *the arenas, and our constitutions the objects as well as the instruments* of party conflict. The right of the people at any time to amend their constitutions must be admitted; but as they can never do this directly, the necessity becomes apparent of checks, to render it probable that a movement to that end has been sanctioned by them, and that it has *been done upon due consideration.* * * *, the checks must be such as will obviate the evils above enumerated, *resulting from haste, excess, and partisan zeal, in legislation.*" [Italics ours]

The author then advocates the submission of the question of holding a constitutional convention to a vote of the people, saying,

"and, therefore, whenever the electors have assented to the call of a convention, its necessity or eminent propriety may be considered to be beyond doubt."

James Madison also appreciated the dangers of hasty action in the alteration and changing of constitutions, (Madison's Works, Vol. 1, p. 177).

Jameson uses appropriate, if strong, language when he describes the all too prevalent conditions which surround the calling of constitutional conventions. They are very true today in all parts of this country. This state could hardly

be called an exception. The danger is that the convention will be called for partisan purposes; that it will become an "arena" and the objects of the convention become the "instruments of party conflict." Our courts and writers have been well aware of this situation, and have endeavored to lessen the evils by removing the conventions as far as possible "from haste, excess and partisan zeal" as a result of legislation.

The court cannot be unaware that the tide of party passion is running high in this state at the present time. Words are spoken and action is contemplated, if not actually undertaken, which would not be thought of in normal times. Therefore, the exercise of those safeguards which constitutional law has so carefully and wisely provided, should in a time like this, as in all other times, be applied to the present situation. Chief among these safeguards is the one which we have just considered with such care and at such length.

5. Rhode Island Precedents.

The only precedents which have arisen under the Rhode Island Constitution are in full accord with the foregoing authorities. After Rhode Island had adopted its Constitution of 1842, the question of holding a constitutional convention in Rhode Island was submitted to the people twice in 1853. Rhode Island then had a Constitution and a General Assembly elected under that Constitution. When seeking a constitutional convention the General Assembly did not attempt to call a convention itself, but sought the express approval of the electors.

At the May Session 1853 of the General Assembly (Acts and Resolves, May Session 1853) an act was passed by which

> "The people of this State * * * are * * * invited and requested to give in their ballots upon the question of holding a Convention. And if it shall appear that a

> majority * * * are in favor of said Convention, it shall be deemed and taken to be the will of the people of this State, that a Convention shall meet * * *."

And the people were further requested to elect delegates to such Convention in the event that it should be approved by the electors. A majority of the votes were against the holding of a convention, but delegates were elected.

Again at the October Session 1853 of the General Assembly (Acts and Resolves, October Session 1853) an act was passed in similar language to that of the May Session inviting and requesting the people to vote upon the question of a convention.

The two acts are important.

(1) They show full recognition of the right of the people of this state, and not the General Assembly, to pass upon the question of calling a convention. This was in full conformity with the well-established practice of that time.

(2) The General Assembly acted as the voluntary agent of the people. Notice the humble and deferential language when it "invited and requested" the "people" to give in their ballots. There is no command, no threat of punishment if action is not taken. The Assembly declares that if a majority votes favorably "it will be *deemed* and *taken to be the will of the people* of this State" that a convention be held. Not the decree or edict of the Assembly but the will of the "people" must determine. All this is recognized by the Assembly, and it speaks as the agent, the servant, and to the people, its master.

These two acts are drawn in the most correct and approved manner.

All undertakings to revise or amend the charter after 1853 were in accordance with Article XIII of the Constitution.

The use of earlier instances in which constitutional conventions were called and the General Assembly did not sub-

mit the question of holding a convention to a vote of the people as an argument that the legislature may itself call a convention is not warranted. Conventions were called in this state by the General Assembly in 1824, 1834, 1841 and 1842. But at that time the state was acting under its old charter granted by Charles II. These charters placed almost controlling authority in the General Assembly in the government of the colony. The judiciary and other branches of the government were treated as subordinate to it. Constitutional government did not exist at those times as we now understand that branch of our law. Therefore, the calling of the conventions under the charter can not fairly be cited as arguments in favor of the power or practice of legislatures themselves to call constitutional conventions without first submitting the question to the people.

In support of this view we will refer to the comments of Mr. Dodd (at p. 37) written when discussing the adoption of a Constitution by Vermont in 1786. He says:

> "A Vermont author [Thomas Crittenden] has well expressed what were at that time popular views in this state as to the relation between the constitution and the legislature: 'In all governments which had previously existed, the legislature, the law-making power, had been sovereign, absolute and uncontrollable.' Judge Blackstone says: 'Legislation is the greatest act of superiority that can be exercised by one being over another, wherefore it is requisite to the very essence of law, that it be made by the supreme power. Sovereignty and legislation are, indeed, convertible terms. One cannot subsist without the other.' This constitutional law, this omnipotence of the legislature, the colonists brought with them from the mother country, as they brought with them the common law."

This idea that the legislature was supreme, which was brought to this country from England together with the

English common law, and which placed the judiciary and executive departments below the legislative department, was the English law. So long as we were acting under the charter, until 1842, it was the law in this state. The theory of the superiority of the legislature to the judiciary was not exploded until the case of *Taylor* vs. *Place,* 4 R. I. 324. Dodd says that it continued until a late date in Pennsylvania and Vermont.

However, it should be noted that in the acts of 1824, 1834, 1841 and 1842 the General Assembly went no further than to provide that the freemen or people "are hereby requested to choose" delegates to a convention for the purpose of framing a new constitution. Such an act is clearly not legislation; the people may observe or disregard the same at pleasure; and it amounts to no more than utilizing the existing machinery of government for the purpose of giving the people an opportunity to act in an orderly and reasonable manner to bring about changes, when no other manner is prescribed.

Accordingly, we submit that precedents both before and after 1842 are in accord with the argument heretofore advanced; to wit, that even if the General Assembly can call a constitutional convention, it must first receive authority to do so by a referendum to the people.

III. IF A CONSTITUTIONAL CONVENTION IS CALLED, THE GENERAL ASSEMBLY HAS NO POWER TO PROVIDE THAT THE GENERAL OFFICERS OF THE STATE SHALL BY VIRTUE OF THEIR OFFICES BE MEMBERS OF SUCH CONVENTION.

This question, it is clear in our opinion, should be answered in the negative. The thought behind subdivision (c) of the Governor's question evidently is that the General As-

sembly might by act or resolution make the Governor, Lieutenant Governor, Secretary of State, General Treasurer and Attorney General ex-officio members of the convention, with the same powers as other delegates.

This proposal is absolutely foreign to the whole theory of constitution making as emanating from the people. It suggests a usurpation of power by the General Assembly for which no authority worthy of consideration can be found either in practice or in theory. It may be that in the confusion which attended the setting up of new constitutions immediately after the Revolution, a few instances may be found where the legislature went so far as to designate delegates to a constitutional convention. Such instances are not surprising, considering the pressure of the times. Men could not in the midst of a revolution halt to consider all the precedents. In emergencies they resorted to emergency measures. Moreover, the colonial legislatures, operating under charters from the Crown, had exercised much broader powers than they possess under American theories of constitutional law.

The only court opinion which we have found in which such action was even referred to is that of *Wells* vs. *Bain,* 75 Pa. St. 39, where, though the legality of such action was in no way involved, the court in its passing remarks throws grave doubt upon the wisdom of the legislature selecting any of the members of the convention. Aside from the Revolutionary examples, and with the possible exception of *Wells* vs. *Bain,* it seems never to have occurred to anyone that it was not a necessary element of every constitutional convention that the delegates thereto be elected by the people themselves. It is difficult to argue otherwise. The convention should be so constituted as to obtain the greatest freedom from partisan bias and control and the maximum capacity for deliberate, dispassionate, unbiased action to be applied

to the important duty of making a constitution. The members thereof should be the choice of the whole people and not of a partisan body such as the legislature.

Beyond those functions assumed by it under *the necessity* of the occasion in respect to those acts which the people cannot perform themselves, the legislature may act, *but in no other respect.* But in so acting, the legislature is not exercising legislative power under the constitution. Furthermore, there is no necessity for the legislature to elect all or any of the delegates as the voluntary agent of the people. All the delegates can easily be elected by the people.

It seems clear that that department of government—the executive department—which is most likely to be affected by the action of the convention as to its powers, election of its officers, and in other respects, should not have its active representatives ex-officio or otherwise as members of that important body. If they wish to impress their views upon the convention they should appear *before* the convention, not *in* it.

These five general officers should not be made members of the convention by legislative act any more than high members of the judiciary or the members of the legislative branch. If it can be done in one instance it can be done with equal propriety in the other,—and so on, without limit. The views of all of these three departments of the state, each of which may be so vitally affected by the action of the convention, can be effectively presented to the convention by their representatives appearing before the convention without being represented by membership within it.

If the General Assembly can pass an act that the five general officers shall be members of the convention, it can pass an act that the entire membership of the legislature shall be members of the convention or perhaps the only members. If it can designate five members it can designate half or three-quarters or all of the members. Even the entire Gen-

eral Assembly could be made a part of the convention. There is no stopping place once the *power* is conceded. Consideration of these possibilities goes far to show the unsoundness of the proposition submitted.

There is no inherent power in the legislature to take such action, nor is there any occasion for the existence or exercise of such power. The lack of precedent goes far to show this. If it can declare these five general officers members of the convention, by virtue of their office, it can so constitute the convention that these five would control the work of the convention. For example, it could so enact as to give an equal number of delegates to its own major party and an equal number to the opposite party but add thereto the five general officers of the state, *ex-officio,* as suggested by the governor's question. Or again, suppose those same general officers happened to be of the opposite party, would the legislature then feel that it had the power to elect or designate the holders of these same general offices as members of the convention? Of course not. Again, each department of the government is to be affected by the new constitution in its powers, rights and privileges, and consequently its officials are highly interested parties in the results of that convention. They are not disinterested and should not be members and, it is submitted, the General Assembly in the exercise of its legislative power or in the exercise of any assumed role of agent of the people has no power to make them members.

IV. IF A CONSTITUTIONAL CONVENTION IS CALLED, THE GENERAL ASSEMBLY HAS NO POWER TO CONTROL THE ACTION OR WORK OF SUCH CONVENTION.

Cooley (p. 87), III:

"* * * But no body of representatives, unless especially clothed with power for that purpose by the people