FOLDER NO.

180/

204.4

Constitutional Convention
Committee on Ordinances and
Transition
December 5, 1955

R. J. McNealy, Esq.
Chairman of the Committee
on Ordinances and Transition

Dear Sir:

Following the outline submitted in your Memorandum of November 28, 1955, I have carefully researched the numerous decisions affecting the subject matter embodied in your suggested list.

I have shepardized the decisions with the view of arriving at the ultimate findings indicating which of such decisions have been affirmed, reversed or modified.

The influx of litigation that followed the adoption of Constitutions in some of the States have brought about some very interesting opinions by the Judges and arose as a result of practical actual problems that came before the courts not theoretical or hypothetical questions but solely from litigation where either a direct attack was made on controversial questions or a collateral attack by litigants who elected to invoke some remedies with respect to the validity of the new provisions.

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The word "Ordinance" has been interchangibly used with the word "Schedules" and has been referred to in Judges' opinions under the same definition.

In the case of Mann et al vs. Osborne et al, reported in 261 Pacific, page 146, Judge Reid, speaking for the Supreme Court of Oklahoma clearly defined the distinction between ordinances as

temporary provisions and constitutional provisions as fundamental laws embodied in such documents. Page 148

> "Ordinances and Schedules appended to a Constitution, as distinguished from the permanent and fundamental law embodied in the Constitution itself, are temporary enactments for the purpose of effecting a transition from the old government to the new, and of putting the provisions of the new Constitution into effect." 12 C. J. 696

> "In order that no inconvenience may result by reason of changes arising out of the adoption of a new Constitution, it is the custom to adopt a Schedule which will set forth temporary regulations covering the interim before the new machinery of government is thoroughly established. The only office of a Schedule is to provide for the transition from the old to the new government and to obviate confusion which would otherwise arise during the transition period, and this fact may be material in determining the construction and effect to be given to provisions contained in schedules." 6 Ruling Case Law 36.

The preamble to the Schedule to the Constitution of this state fully defines its purpose and office in the following language:

> "In order that no inconvenience may arise by reason of a change from the forms of government now existing in the Indian Territory and in the territory of Oklahoma, it is hereby declared as follows:"
> (1) In the case of State ex rel. West, Attorney General, v. Frame, 38 Okl. 446, 134 P. 403, this court has defined the office of the Enabling Act, and also the Schedule of the Constitution of this state, in the following language:
> "The purpose of the Congress in the Enabling Act, and the Constitutional Convention in the Schedule was to provide the temporary means necessary for putting the government established by the Constitution in motion without disorder or collision, and not to provide a permanent system of laws for the government of the new state" and this purpose is "stated in the preamble to the Schedule."

In the Richmond, Virginia Mayoralty Case reported 19 Grat. 673, the Supreme Court of the State of Virginia had under consideration

the question of certain provisions in the ordinances of the Constitution of that state under which the State had returned to the Union after the Civil War. In construing the meaning of such ordinances the chairman held a Convention in framing a schedule and ordinances should plainly show that such provisions are subject to future legislation and are provisional in its nature.

> The case of the State ex rel. Reardon, Co. Atty., v. Scales, Mayor, et al., reported in 97 Pacific, page 584 arose as a result of a proceeding instituted in the form of a Writ of Mandamus on the part of the State of Oklahoma on the relation of the County Attorney of Oklahoma County where the question of the constitutional ordinances affecting elections was before the court, the Court stated as follows: "There is absolute harmony to the effect that a Convention assembled for the purpose of framing a constitution for the state has inherent right to adopt ordinances that it might deem proper."

As a most lucid distinction between the permanent provisions of the Constitution itself and the ordinances as employed with relation to constitutional conventions the case most decisive and which has been cited with approval in a great number of decisions is Frantz v. Autry 91 Pacific, page 193. The Court on page 191 stated as follows:

> "The distinction between a Constitution and an ordinance is this: The Constitution is the permanent fundamental law of the state. It is of a stable and permanent character. As is appropriately said in Vanhorne v. Dorrence, 2 Dall. (U.S.) 308, Fed. Cas. No. 16,857, 1 L. Ed. 391: "The Constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events. Notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves." But, under the terms of the enabling act, it is prospective in its operation only; that is, it does not become operative

until it is ratified by the people and approved by the President of the United States. On the other hand, an ordinance, as used in this act, refers to a merely temporary law; its object being to carry into effect the formation of the Constitution and fundamental law of the state, to provide a mode and means for an election of a full state government, including the members of the Legislature and five representatives to Congress, and becomes operative immediately upon its adoption."

The same case sheds a great deal of light on the powers and functions of the delegates and the constitutional convention and the unabridged rights conferred in formulating such constitution. Page 204

"Judge Story, in his work on the Constitution (volume 1 (5th Ed.) 338), declares: "The true view to be taken of our state Constitutions is that they are forms of government ordained and established by the people in their original sovereign capacity to promote their own happiness and permanently to secure their rights, property, independence, and common welfare." Judge Cooley, in his work on Constitutional Limitations, on page 68, in discussing the attributes and objects of a Constitution, says: "In considering state Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of law, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience." In 1894, the state of New York had under consideration the revision of its state Constitution. One of the first questions that arose in the convention was the ascertainment of the rights and powers of the convention to pass upon the election and qualifications of one of its members. This question was referred to the judiciary committee, of which committee the Honorable Elibu Root, now Secretary of State, and one of the ablest lawyers and statesmen of this country, was chairman. In his report to the conven-

tion he says: "The convention has been created by the direct action of the people and has been by them vested with the power and charged with the duty to revise and amend the organic law of the State. The function with which it is thus charged is a part of the highest and most solemn act of popular sovereignty, and in its performance the convention has and can have no superior but the people themselves. No court or legislative or executive officer has authority to interfere with the exercise of the powers or the performance of the duties which the people have enjoined upon this, their immediate agent." And, again, in stating the nature of a constitutional convention, he says: "A constitutional convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its function is not to execute or interpret laws, but to make them. That the consent of the general body of electors may be necessary to give effect to the ordinances of the convention no more changes their legislative character than the requirement of the Governor's consent changes the nature of the action of the Senate and Assembly." And, again, in speaking of the importance of the independence of the convention, he uses this language: "It is far more important that a constitutional convention should possess these safeguards of its independence than it is for an ordinary Legislature, because the convention's acts are of a more momentous and lasting consequence, and because it has to pass upon the power, emoluments, and the very existence of the judicial and legislative officers who might otherwise interfere with it. The convention furnishes the only way by which the people can exercise their will, in respect of these officers, and their control over the convention would be wholly incompatible with the free exercise of that will." See Proceedings of the New York Constitutional Convention, 1894, pp. 79, 80.

In Sproule v. Fredericks, 11 South. 472, 69 Miss. 898, The Supreme Court of Mississippi, in discussing the powers of the convention says: "It is the highest legislative body known to freemen in a representative government, It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faith-

fulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayest and the legal doctrinaire, by which it is sought to be established that the expression of the will of the Legislature shall fetter and control the Constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a Constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers."

Page 207 Autry Case. "The power of the convention to revise and amend the Constitution was not a delegated power derived from the Legislature, but it derived its power directly from the people. And in the performance of the powers and duties and obligations resting upon the convention it could have no superior but the people themselves. Manifestly, to hold otherwise would be to degrade the powers of the convention below the level of the lowest legislative or municipal body. Clearly, such are not the office, functions, and powers of the constitutional convention.

TRANSITION

An interesting question arose in the State of Minnesota which was acted upon in the case of Secombe v. Kittleson, Treasurer reported in 12 Northwestern, page 519.

This matter arose on a restraining order attempting to enjoin the State treasurer from paying out of the funds of the State interest to become due upon the bonds of the State of Minnesota, alleging certain irregularities with respect to constitutional provisions, the Enabling Act, and the manner of admission into the Union. The court, passing on the question when a Territory ceases to be a state. In commenting on the importance of recognizing the sovereignty of the people stated as follows:

"The question as to when a territory ceases to be such and becomes a state, and as to when the constitution and governmental machinery of a new state goes into operation, is one upon which not even courts and constitutional lawyers are agreed. One theory is that a territory continues in all respects a territory until admitted into the Union by act of congress, and that until such act of admission the proposed state constitution cannot take effect, nor any part of the machinery of a state government go into operation. Another theory is that where, under an enabling act of congress, the people adopt a state constitution and form a state government, such constitution goes into effect upon its adoption by the people, and that the former territory thereby becomes a state although not in the Union, for the purposes of representation in congress, until formally admitted by congress. A third theory, which is really only an extension of the one last named, is that an enabling act operates as a constitutional act of admission, and that when a state complies with the conditions of that act she is a state in the Union for all purposes without any further action on the part of congress. See Scott v. Young Men's Society's Lessee, 1 Doug. (Mich.) 119; Campbell v. Fields, 35 Tex. 751."

"As ultimate sovereignity is in the people, from whom all legitimate civil authority springs, and inasmuch as in the inception of all political organizations it is this original and supreme will of the people which organizes civil government, a court has no right to inquire too technically into any mere irregularities in the manner of proposing and submitting to the people that which they have solemnly adopted and subsequently recognized and acted upon as part of the fundamental law of the state."

The revised constitution of 1879 for the State of California appended to it what they termed an ordinance or schedule with respect to "the laws continued in force, the obligations, rights, causes of action, and the judicial system."

That no inconvenience may arise from the adoption of the new constitution and to carry same into complete effect the schedule, ordinance decreed as follows, with respect to:

1. LAWS CONTINUED IN FORCE

Section 1. That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted. The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, 1880, unless sooner altered or repealed by the Legislature.

2. OBLIGATIONS, rights, causes of action, etc., unaffected.

Section 2. That all recognizances, obligations, and all other instruments, entered into or executed before the adoption of this Constitution, to this State, or to any subdivision thereof, or any municipality therein, and all fines, taxes, penalties, and forfeitures due or owing to this State, or any subdivision or municipality

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3. COURTS: ABOLISHMENT: TRANSFER OF RECORDS.

Section 3. All courts now existing, save justices' and police courts, are hereby abolished; and all records, books, papers, and proceedings from such courts, as are abolished by this Constitution, shall be transferred on the first day of January, 1880, to the courts provided for in this Constitution; and the courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein.

10. TERMS OF OFFICERS FIRST ELECTED.

Section 10. In order that future elections in this State shall conform to the requirements of this Constitution, the terms of all officers elected at the first election under the same shall be, respectively, one year shorter than the terms as fixed by law or by this Constitution; and the successors of all such officers shall be elected at the last election before the expiration of the terms as in this section provided. The first officers chosen after the adoption of this Constitution shall be elected at the time and in the manner now provided

by law. Judicial officers and the Superintendent of Public Instruction shall be elected at the time and in the manner that state officers are elected.

11. LAWS RELATIVE TO JUDICIAL SYSTEM CONTINUED IN FORCE

Section 11. All laws relative to the present judicial system of the State shall be applicable to the judicial system created by this Constitution until changed by legislation.

These provisions were upheld in the cases of People v. Bank of San Luis Obispo (1908) 97 P. 306, 154 C. 194 and the case of Fraser v. Alexander (1888) 16 P. 757, 75C. 147; Hastings v. Young (sup. 1888) 17P. 530; People v. Colby (1880) 54C. 184, 5 P.C.L.J. 14; Ex parte Toland (1880) 54 C. 344, 5 P.C.L.J. 182; and Learned v. Castle (1885) 7 P. 34, 67 C. 41.

May I take the liberty in suggesting to your committee that the research for proposed points shall be narrowed down to specific issues avoiding the necessity of going to far afield or going off into a tangent which may have no bearing on the subject matter.

In the absence of any specific instructions I was not certain as to whether the style followed by me is in accord with your method of procedure. I have therefore covered and analyzed only a part of the questions certified by your chairman. I shall cheerfully adhere to any suggested change by your committee.

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That no inconvenience may arise from the adoption of the new constitution and to carry same into complete effect the schedule, ordinance decreed as follows, with respect to:

1. Laws continued in force
2. Obligations, rights, causes of action, etc. unaffected.
3. Courts; abolishment; transfer of records.
10. Terms of officers first elected.
11. Laws relative to judicial system continued in force.
12. Effective dates.

1. LAWS CONTINUED IN FORCE

Section 1. That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted. The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, 1880, unless sooner altered or repealed by the Legislature.

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Section 2. That all recognizances, obligations, and all other instruments, entered into or executed before the adoption of this Constitution, to this State, or to any subdivision thereof, or any municipality therein, and all fines, taxes, penalties, and forfeitures due or owing to this State, or any subdivision or municipality

thereof, and all writs, prosecutions, actions, and causes of action, except as herein otherwise provided, shall continue and remain unaffected by the adoption of this Constitution. All indictments or informations which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon as if no change had taken place, except as otherwise provided in this Constitution.

3. COURTS: ABOLISHMENT: TRANSFER OF RECORDS.

Section 3. All courts now existing, save justices' and police courts, are hereby abolished; and all records, books, papers, and proceedings from such courts, as are abolished by this Constitution, shall be transferred on the first day of January, 1880, to the courts provided for in this Constitution; and the courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein.

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Section 10. In order that future elections in this State shall conform to the requirements of this Constitution, the terms of all officers elected at the first election under the same shall be, respectively, one year shorter than the terms as fixed by law or by this Constitution; and the successors of all such officers shall be elected at the last election before the expiration of the terms as in this section provided. The first officers chosen after the adoption of this Constitution shall be elected at the time and in the manner now provided

by law. Judicial officers and the Superintendent of Public Instruction shall be elected at the time and in the manner that state officers are elected.

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> (1) In the case of State ex rel. West, Attorney General, v. Frame, 38 Okl. 446, 134 P. 403, this court has defined the office of the Enabling Act, and also the Schedule of the Constitution of this state, in the following language:
> "The purpose of the Congress in the Enabling Act, and the Constitutional Convention in the Schedule was to provide the temporary means necessary for putting the government established by the Constitution in motion without disorder or collision, and not to provide a permanent system of laws for the government of the new state" and this purpose is "stated in the preamble to the Schedule."

In the Richmond, Virginia Mayoralty Case reported 19 Grat. 673, the Supreme Court of the State of Virginia had under consideration

the question of certain provisions in the ordinances of the Constitution of that state under which the State had returned to the Union after the Civil War. In construing the meaning of such ordinances the chairman held a Convention in framing a schedule and ordinances should plainly show that such provisions are subject to future legislation and are provisional in its nature.

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As a most lucid distinction between the permanent provisions of the Constitution itself and the ordinances as employed with relation to constitutional conventions the case most decisive and which has been cited with approval in a great number of decisions is Frantz v. Autry 91 Pacific, page 193. The Court on page 191 stated as follows:

> "The distinction between a Constitution and an ordinance is this: The Constitution is the permanent fundamental law of the state. It is of a stable and permanent character. As is appropriately said in Vanhorne v. Dorrence, 2 Dall. (U.S.) 308, Fed. Cas. No. 16,857, 1 L. Ed. 391: "The Constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events. Notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves." But, under the terms of the enabling act, it is prospective in its operation only; that is, it does not become operative

until it is ratified by the people and approved by the President of the United States. On the other hand, an ordinance, as used in this act, refers to a merely temporary law; its object being to carry into effect the formation of the Constitution and fundamental law of the state, to provide a mode and means for an election of a full state government, including the members of the Legislature and five representatives to Congress, and becomes operative immediately upon its adoption."

The same case sheds a great deal of light on the powers and functions of the delegates and the constitutional convention and the unabridged rights conferred in formulating such constitution. Page 204

"Judge Story, in his work on the Constitution (volume 1 (5th Ed.) 338), declares: "The true view to be taken of our state Constitutions is that they are forms of government ordained and established by the people in their original sovereign capacity to promote their own happiness and permanently to secure their rights, property, independence, and common welfare." Judge Cooley, in his work on Constitutional Limitations, on page 68, in discussing the attributes and objects of a Constitution, says: "In considering state Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of law, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience." In 1894, the state of New York had under consideration the revision of its state Constitution. One of the first questions that arose in the convention was the ascertainment of the rights and powers of the convention to pass upon the election and qualifications of one of its members. This question was referred to the judiciary committee, of which committee the Honorable Elihu Root, now Secretary of State, and one of the ablest lawyers and statesmen of this country, was chairman. In his report to the conven-

tion he says: "The convention has been created by the direct action of the people and has been by them vested with the power and charged with the duty to revise and amend the organic law of the State. The function with which it is thus charged is a part of the highest and most solemn act of popular sovereignty, and in its performance the convention has and can have no superior but the people themselves. No court or legislative or executive officer has authority to interfere with the exercise of the powers or the performance of the duties which the people have enjoined upon this, their immediate agent." And, again, in stating the nature of a constitutional convention, he says: "A constitutional convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its function is not to execute or interpret laws, but to make them. That the consent of the general body of electors may be necessary to give effect to the ordinances of the convention no more changes their legislative character than the requirement of the Governor's consent changes the nature of the action of the Senate and Assembly." And, again, in speaking of the importance of the independence of the convention, he uses this language: "It is far more important that a constitutional convention should possess these safeguards of its independence than it is for an ordinary Legislature, because the convention's acts are of a more momentous and lasting consequence, and because it has to pass upon the power, emoluments, and the very existence of the judicial and legislative officers who might otherwise interfere with it. The convention furnishes the only way by which the people can exercise their will, in respect of these officers, and their control over the convention would be wholly incompatible with the free exercise of that will." See Proceedings of the New York Constitutional Convention, 1894, pp. 79, 80.

In Sproule v. Fredericks, 11 South. 472, 69 Miss. 898, The Supreme Court of Mississippi, in discussing the powers of the convention says: "It is the highest legislative body known to freemen in a representative government, It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faith-

fulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayest and the legal doctrinaire, by which it is sought to be established that the expression of the will of the Legislature shall fetter and control the Constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a Constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers."

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TRANSITION

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"As ultimate sovereignity is in the people, from whom all legitimate civil authority springs, and inasmuch as in the inception of all political organizations it is this original and supreme will of the people which organizes civil government, a court has no right to inquire too technically into any mere irregularities in the manner of proposing and submitting to the people that which they have solemnly adopted and subsequently recognized and acted upon as part of the fundamental law of the state."

The revised constitution of 1879 for the State of California appended to it what they termed an ordinance or schedule with respect to "the laws continued in force, the obligations, rights, causes of action, and the judicial system."

That no inconvenience may arise from the adoption of the new constitution and to carry same into complete effect the schedule, ordinance decreed as follows, with respect to:

1. LAWS CONTINUED IN FORCE

Section 1. That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted. The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, 1880, unless sooner altered or repealed by the Legislature.

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Section 2. That all recognizances, obligations, and all other instruments, entered into or executed before the adoption of this Constitution, to this State, or to any subdivision thereof, or any municipality therein, and all fines, taxes, penalties, and forfeitures due or owing to this State, or any subdivision or municipality

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3. COURTS: ABOLISHMENT: TRANSFER OF RECORDS.

Section 3. All courts now existing, save justices' and police courts, are hereby abolished; and all records, books, papers, and proceedings from such courts, as are abolished by this Constitution, shall be transferred on the first day of January, 1880, to the courts provided for in this Constitution; and the courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein.

10. TERMS OF OFFICERS FIRST ELECTED.

Section 10. In order that future elections in this State shall conform to the requirements of this Constitution, the terms of all officers elected at the first election under the same shall be, respectively, one year shorter than the terms as fixed by law or by this Constitution; and the successors of all such officers shall be elected at the last election before the expiration of the terms as in this section provided. The first officers chosen after the adoption of this Constitution shall be elected at the time and in the manner now provided

by law. Judicial officers and the Superintendent of Public Instruction shall be elected at the time and in the manner that state officers are elected.

11. LAWS RELATIVE TO JUDICIAL SYSTEM CONTINUED IN FORCE

Section 11. All laws relative to the present judicial system of the State shall be applicable to the judicial system created by this Constitution until changed by legislation.

These provisions were upheld in the cases of People v. Bank of San Luis Obispo (1908) 97 P. 306, 154 C. 194 and the case of Fraser v. Alexander (1888) 16 P. 757, 75C. 147; Hastings v. Young (sup. 1888) 17P. 530; People v. Colby (1880) 54C. 184, 5 P.C.L.J. 14; Ex parte Toland (1880) 54 C. 344, 5 P.C.L.J. 182; and Learned v. Castle (1885) 7 P. 34, 67 C. 41.

May I take the liberty in suggesting to your committee that the research for proposed points shall be narrowed down to specific issues avoiding the necessity of going to far afield or going off into a tangent which may have no bearing on the subject matter.

In the absence of any specific instructions I was not certain as to whether the style followed by me is in accord with your method of procedure. I have therefore covered and analyzed only a part of the questions certified by your chairman. I shall cheerfully adhere to any suggested change by your committee.

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Lazar Dworkin

Constitutional Convention
Committee on Ordinances and
Transition
December 5, 1955

R. J. McNealy, Esq.
Chairman of the Committee
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Dear Sir:

Following the outline submitted in your Memorandum of November 28, 1955, I have carefully researched the numerous decisions affecting the subject matter embodied in your suggested list.

I have shepardized the decisions with the view of arriving at the ultimate findings indicating which of such decisions have been affirmed, reversed or modified.

The influx of litigation that followed the adoption of Constitutions in some of the States have brought about some very interesting opinions by the Judges and arose as a result of practical actual problems that came before the courts not theoretical or hypothetical questions but solely from litigation where either a direct attack was made on controversial questions or a collateral attack by litigants who elected to invoke some remedies with respect to the validity of the new provisions.

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The word "Ordinance" has been interchangibly used with the word "Schedules" and has been referred to in Judges' opinions under the same definition.

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That no inconvenience may arise from the adoption of the new constitution and to carry same into complete effect the schedule, ordinance decreed as follows, with respect to:

1. Laws continued in force
2. Obligations, rights, causes of action, etc. unaffected.
3. Courts; abolishment; transfer of records.
10. Terms of officers first elected.
11. Laws relative to judicial system continued in force.
12. Effective dates.

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> "In order that no inconvenience may arise by reason of a change from the forms of government now existing in the Indian Territory and in the territory of Oklahoma, it is hereby declared as follows:"
> (1) In the case of State ex rel. West, Attorney General, v. Frame, 38 Okl. 446, 134 P. 403, this court has defined the office of the Enabling Act, and also the Schedule of the Constitution of this state, in the following language:
> "The purpose of the Congress in the Enabling Act, and the Constitutional Convention in the Schedule was to provide the temporary means necessary for putting the government established by the Constitution in motion without disorder or collision, and not to provide a permanent system of laws for the government of the new state" and this purpose is "stated in the preamble to the Schedule."

In the Richmond, Virginia Mayoralty Case reported 19 Grat. 673, the Supreme Court of the State of Virginia had under consideration

the question of certain provisions in the ordinances of the Constitution of that state under which the State had returned to the Union after the Civil War. In construing the meaning of such ordinances the chairman held a Convention in framing a schedule and ordinances should plainly show that such provisions are subject to future legislation and are provisional in its nature.

> The case of the State ex rel. Reardon, Co. Atty., v. Scales, Mayor, et al., reported in 97 Pacific, page 584 arose as a result of a proceeding instituted in the form of a Writ of Mandamus on the part of the State of Oklahoma on the relation of the County Attorney of Oklahoma County where the question of the constitutional ordinances affecting elections was before the court, the Court stated as follows: "There is absolute harmony to the effect that a Convention assembled for the purpose of framing a constitution for the state has inherent right to adopt ordinances that it might deem proper."

As a most lucid distinction between the permanent provisions of the Constitution itself and the ordinances as employed with relation to constitutional conventions the case most decisive and which has been cited with approval in a great number of decisions is Frantz v. Autry 91 Pacific, page 193. The Court on page 191 stated as follows:

> "The distinction between a Constitution and an ordinance is this: The Constitution is the permanent fundamental law of the state. It is of a stable and permanent character. As is appropriately said in Vanhorne v. Dorrence, 2 Dall. (U.S.) 308, Fed. Cas. No. 16,857, 1 L. Ed. 391: "The Constitution of a state is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events. Notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain amidst the strife of storms, or a rock in the ocean amidst the raging of the waves." But, under the terms of the enabling act, it is prospective in its operation only; that is, it does not become operative

until it is ratified by the people and approved by the President of the United States. On the other hand, an ordinance, as used in this act, refers to a merely temporary law; its object being to carry into effect the formation of the Constitution and fundamental law of the state, to provide a mode and means for an election of a full state government, including the members of the Legislature and five representatives to Congress, and becomes operative immediately upon its adoption."

The same case sheds a great deal of light on the powers and functions of the delegates and the constitutional convention and the unabridged rights conferred in formulating such constitution. Page 204

"Judge Story, in his work on the Constitution (volume 1 (5th Ed.) 338), declares: "The true view to be taken of our state Constitutions is that they are forms of government ordained and established by the people in their original sovereign capacity to promote their own happiness and permanently to secure their rights, property, independence, and common welfare." Judge Cooley, in his work on Constitutional Limitations, on page 68, in discussing the attributes and objects of a Constitution, says: "In considering state Constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of law, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience." In 1894, the state of New York had under consideration the revision of its state Constitution. One of the first questions that arose in the convention was the ascertainment of the rights and powers of the convention to pass upon the election and qualifications of one of its members. This question was referred to the judiciary committee, of which committee the Honorable Elihu Root, now Secretary of State, and one of the ablest lawyers and statesmen of this country, was chairman. In his report to the conven-

tion he says: "The convention has been created by the direct action of the people and has been by them vested with the power and charged with the duty to revise and amend the organic law of the State. The function with which it is thus charged is a part of the highest and most solemn act of popular sovereignty, and in its performance the convention has and can have no superior but the people themselves. No court or legislative or executive officer has authority to interfere with the exercise of the powers or the performance of the duties which the people have enjoined upon this, their immediate agent." And, again, in stating the nature of a constitutional convention, he says: "A constitutional convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its function is not to execute or interpret laws, but to make them. That the consent of the general body of electors may be necessary to give effect to the ordinances of the convention no more changes their legislative character than the requirement of the Governor's consent changes the nature of the action of the Senate and Assembly." And, again, in speaking of the importance of the independence of the convention, he uses this language: "It is far more important that a constitutional convention should possess these safeguards of its independence than it is for an ordinary Legislature, because the convention's acts are of a more momentous and lasting consequence, and because it has to pass upon the power, emoluments, and the very existence of the judicial and legislative officers who might otherwise interfere with it. The convention furnishes the only way by which the people can exercise their will, in respect of these officers, and their control over the convention would be wholly incompatible with the free exercise of that will." See Proceedings of the New York Constitutional Convention, 1894, pp. 79, 80.

In Sproule v. Fredericks, 11 South. 472, 69 Miss. 898, The Supreme Court of Mississippi, in discussing the powers of the convention says: "It is the highest legislative body known to freemen in a representative government, It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faith-

fulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayest and the legal doctrinaire, by which it is sought to be established that the expression of the will of the Legislature shall fetter and control the Constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a Constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers."

Page 207 Autry Case. "The power of the convention to revise and amend the Constitution was not a delegated power derived from the Legislature, but it derived its power directly from the people. And in the performance of the powers and duties and obligations resting upon the convention it could have no superior but the people themselves. Manifestly, to hold otherwise would be to degrade the powers of the convention below the level of the lowest legislative or municipal body. Clearly, such are not the office, functions, and powers of the constitutional convention.

TRANSITION

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"As ultimate sovereignity is in the people, from whom all legitimate civil authority springs, and inasmuch as in the inception of all political organizations it is this original and supreme will of the people which organizes civil government, a court has no right to inquire too technically into any mere irregularities in the manner of proposing and submitting to the people that which they have solemnly adopted and subsequently recognized and acted upon as part of the fundamental law of the state."

The revised constitution of 1879 for the State of California appended to it what they termed an ordinance or schedule with respect to "the laws continued in force, the obligations, rights, causes of action, and the judicial system."

That no inconvenience may arise from the adoption of the new constitution and to carry same into complete effect the schedule, ordinance decreed as follows, with respect to:

1. Laws continued in force
2. Obligations, rights, causes of action, etc. unaffected.
3. Courts; abolishment; transfer of records.
10. Terms of officers first elected.
11. Laws relative to judicial system continued in force.
12. Effective dates.

1. LAWS CONTINUED IN FORCE

Section 1. That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted. The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, 1880, unless sooner altered or repealed by the Legislature.

2. OBLIGATIONS, rights, causes of action, etc., unaffected.

Section 2. That all recognizances, obligations, and all other instruments, entered into or executed before the adoption of this Constitution, to this State, or to any subdivision thereof, or any municipality therein, and all fines, taxes, penalties, and forfeitures due or owing to this State, or any subdivision or municipality

thereof, and all writs, prosecutions, actions, and causes of action, except as herein otherwise provided, shall continue and remain unaffected by the adoption of this Constitution. All indictments or informations which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon as if no change had taken place, except as otherwise provided in this Constitution.

3. COURTS: ABOLISHMENT: TRANSFER OF RECORDS.

Section 3. All courts now existing, save justices' and police courts, are hereby abolished; and all records, books, papers, and proceedings from such courts, as are abolished by this Constitution, shall be transferred on the first day of January, 1880, to the courts provided for in this Constitution; and the courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein.

10. TERMS OF OFFICERS FIRST ELECTED.

Section 10. In order that future elections in this State shall conform to the requirements of this Constitution, the terms of all officers elected at the first election under the same shall be, respectively, one year shorter than the terms as fixed by law or by this Constitution; and the successors of all such officers shall be elected at the last election before the expiration of the terms as in this section provided. The first officers chosen after the adoption of this Constitution shall be elected at the time and in the manner now provided

by law. Judicial officers and the Superintendent of Public Instruction shall be elected at the time and in the manner that state officers are elected.

11. LAWS RELATIVE TO JUDICIAL SYSTEM CONTINUED IN FORCE

Section 11. All laws relative to the present judicial system of the State shall be applicable to the judicial system created by this Constitution until changed by legislation.

These provisions were upheld in the cases of People v. Bank of San Luis Obispo (1908) 97 P. 306, 154 C. 194 and the case of Fraser v. Alexander (1888) 16 P. 757, 75C. 147; Hastings v. Young (sup. 1888) 17P. 530; People v. Colby (1880) 54C. 184, 5 P.C.L.J. 14; Ex parte Toland (1880) 54 C. 344, 5 P.C.L.J. 182; and Learned v. Castle (1885) 7 P. 34, 67 C. 41.

May I take the liberty in suggesting to your committee that the research for proposed points shall be narrowed down to specific issues avoiding the necessity of going to far afield or going off into a tangent which may have no bearing on the subject matter.

In the absence of any specific instructions I was not certain as to whether the style followed by me is in accord with your method of procedure. I have therefore covered and analyzed only a part of the questions certified by your chairman. I shall cheerfully adhere to any suggested change by your committee.

Respectfully submitted,

Lazar Dworkin

Constitutional Convention
Committee on Ordinances and
Transition
December 5, 1955

R. J. McNealy, Esq.
Chairman of the Committee
on Ordinances and Transition

Dear Sir:

Following the outline submitted in your Memorandum of November 28, 1955, I have carefully researched the numerous decisions affecting the subject matter embodied in your suggested list.

I have shepardized the decisions with the view of arriving at the ultimate findings indicating which of such decisions have been affirmed, reversed or modified.

The influx of litigation that followed the adoption of Constitutions in some of the States have brought about some very interesting opinions by the Judges and arose as a result of practical actual problems that came before the courts not theoretical or hypothetical questions but solely from litigation where either a direct attack was made on controversial questions or a collateral attack by litigants who elected to invoke some remedies with respect to the validity of the new provisions.

ORDINANCES

The word "Ordinance" has been interchangibly used with the word "Schedules" and has been referred to in Judges' opinions under the same definition.

In the case of Mann et al vs. Osborne et al, reported in 261 Pacific, page 146, Judge Reid, speaking for the Supreme Court of Oklahoma clearly defined the distinction between ordinances as

temporary provisions and constitutional provisions as fundamental laws embodied in such documents. Page 148

> "Ordinances and Schedules appended to a Constitution, as distinguished from the permanent and fundamental law embodied in the Constitution itself, are temporary enactments for the purpose of effecting a transition from the old government to the new, and of putting the provisions of the new Constitution into effect." 12 C. J. 696

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tion he says: "The convention has been created by the direct action of the people and has been by them vested with the power and charged with the duty to revise and amend the organic law of the State. The function with which it is thus charged is a part of the highest and most solemn act of popular sovereignty, and in its performance the convention has and can have no superior but the people themselves. No court or legislative or executive officer has authority to interfere with the exercise of the powers or the performance of the duties which the people have enjoined upon this, their immediate agent." And, again, in stating the nature of a constitutional convention, he says: "A constitutional convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its function is not to execute or interpret laws, but to make them. That the consent of the general body of electors may be necessary to give effect to the ordinances of the convention no more changes their legislative character than the requirement of the Governor's consent changes the nature of the action of the Senate and Assembly." And, again, in speaking of the importance of the independence of the convention, he uses this language: "It is far more important that a constitutional convention should possess these safeguards of its independence than it is for an ordinary Legislature, because the convention's acts are of a more momentous and lasting consequence, and because it has to pass upon the power, emoluments, and the very existence of the judicial and legislative officers who might otherwise interfere with it. The convention furnishes the only way by which the people can exercise their will, in respect of these officers, and their control over the convention would be wholly incompatible with the free exercise of that will." See Proceedings of the New York Constitutional Convention, 1894, pp. 79, 80.

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fulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayest and the legal doctrinaire, by which it is sought to be established that the expression of the will of the Legislature shall fetter and control the Constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a Constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers."

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TRANSITION

An interesting question arose in the State of Minnesota which was acted upon in the case of Secombe v. Kittleson, Treasurer reported in 12 Northwestern, page 519.

This matter arose on a restraining order attempting to enjoin the State treasurer from paying out of the funds of the State interest to become due upon the bonds of the State of Minnesota, alleging certain irregularities with respect to constitutional provisions, the Enabling Act, and the manner of admission into the Union. The court, passing on the question when a Territory ceases to be a state. In commenting on the importance of recognizing the sovereignty of the people stated as follows:

"The question as to when a territory ceases to be such and becomes a state, and as to when the constitution and governmental machinery of a new state goes into operation, is one upon which not even courts and constitutional lawyers are agreed. One theory is that a territory continues in all respects a territory until admitted into the Union by act of congress, and that until such act of admission the proposed state constitution cannot take effect, nor any part of the machinery of a state government go into operation. Another theory is that where, under an enabling act of congress, the people adopt a state constitution and form a state government, such constitution goes into effect upon its adoption by the people, and that the former territory thereby becomes a state although not in the Union, for the purposes of representation in congress, until formally admitted by congress. A third theory, which is really only an extension of the one last named, is that an enabling act operates as a constitutional act of admission, and that when a state complies with the conditions of that act she is a state in the Union for all purposes without any further action on the part of congress. See Scott v. Young Men's Society's Lessee, 1 Doug. (Mich.) 119; Campbell v. Fields, 35 Tex. 751."

"As ultimate sovereignity is in the people, from whom all legitimate civil authority springs, and inasmuch as in the inception of all political organizations it is this original and supreme will of the people which organizes civil government, a court has no right to inquire too technically into any mere irregularities in the manner of proposing and submitting to the people that which they have solemnly adopted and subsequently recognized and acted upon as part of the fundamental law of the state."

The revised constitution of 1879 for the State of California appended to it what they termed an ordinance or schedule with respect to "the laws continued in force, the obligations, rights, causes of action, and the judicial system."

That no inconvenience may arise from the adoption of the new constitution and to carry same into complete effect the schedule, ordinance decreed as follows, with respect to:

1. LAWS CONTINUED IN FORCE

Section 1. That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted. The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, 1880, unless sooner altered or repealed by the Legislature.

2. OBLIGATIONS, rights, causes of action, etc., unaffected.

Section 2. That all recognizances, obligations, and all other instruments, entered into or executed before the adoption of this Constitution, to this State, or to any subdivision thereof, or any municipality therein, and all fines, taxes, penalties, and forfeitures due or owing to this State, or any subdivision or municipality

thereof, and all writs, prosecutions, actions, and causes of action, except as herein otherwise provided, shall continue and remain unaffected by the adoption of this Constitution. All indictments or informations which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon as if no change had taken place, except as otherwise provided in this Constitution.

3. COURTS: ABOLISHMENT: TRANSFER OF RECORDS.

Section 3. All courts now existing, save justices' and police courts, are hereby abolished; and all records, books, papers, and proceedings from such courts, as are abolished by this Constitution, shall be transferred on the first day of January, 1880, to the courts provided for in this Constitution; and the courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein.

10. TERMS OF OFFICERS FIRST ELECTED.

Section 10. In order that future elections in this State shall conform to the requirements of this Constitution, the terms of all officers elected at the first election under the same shall be, respectively, one year shorter than the terms as fixed by law or by this Constitution; and the successors of all such officers shall be elected at the last election before the expiration of the terms as in this section provided. The first officers chosen after the adoption of this Constitution shall be elected at the time and in the manner now provided

by law. Judicial officers and the Superintendent of Public Instruction shall be elected at the time and in the manner that state officers are elected.

11. LAWS RELATIVE TO JUDICIAL SYSTEM CONTINUED IN FORCE

Section 11. All laws relative to the present judicial system of the State shall be applicable to the judicial system created by this Constitution until changed by legislation.

These provisions were upheld in the cases of People v. Bank of San Luis Obispo (1908) 97 P. 306, 154 C. 194 and the case of Fraser v. Alexander (1888) 16 P. 757, 75C. 147; Hastings v. Young (sup. 1888) 17P. 530; People v. Colby (1880) 54C. 184, 5 P.C.L.J. 14; Ex parte Toland (1880) 54 C. 344, 5 P.C.L.J. 182; and Learned v. Castle (1885) 7 P. 34, 67 C. 41.

May I take the liberty in suggesting to your committee that the research for proposed points shall be narrowed down to specific issues avoiding the necessity of going to far afield or going off into a tangent which may have no bearing on the subject matter.

In the absence of any specific instructions I was not certain as to whether the style followed by me is in accord with your method of procedure. I have therefore covered and analyzed only a part of the questions certified by your chairman. I shall cheerfully adhere to any suggested change by your committee.

Respectfully submitted,

Lazar Dworkin

Constitutional Convention
Committee on Ordinances and
Transition
December 5, 1955

R. J. McNealy, Esq.
Chairman of the Committee
on Ordinances and Transition

Dear Sir:

Following the outline submitted in your Memorandum of November 28, 1955, I have carefully researched the numerous decisions affecting the subject matter embodied in your suggested list.

I have shepardized the decisions with the view of arriving at the ultimate findings indicating which of such decisions have been affirmed, reversed or modified.

The influx of litigation that followed the adoption of Constitutions in some of the States have brought about some very interesting opinions by the Judges and arose as a result of practical actual problems that came before the courts not theoretical or hypothetical questions but solely from litigation where either a direct attack was made on controversial questions or a collateral attack by litigants who elected to invoke some remedies with respect to the validity of the new provisions.

ORDINANCES

The word "Ordinance" has been interchangibly used with the word "Schedules" and has been referred to in Judges' opinions under the same definition.

In the case of Mann et al vs. Osborne et al, reported in 261 Pacific, page 146, Judge Reid, speaking for the Supreme Court of Oklahoma clearly defined the distinction between ordinances as

temporary provisions and constitutional provisions as fundamental laws embodied in such documents. Page 148

> "Ordinances and Schedules appended to a Constitution, as distinguished from the permanent and fundamental law embodied in the Constitution itself, are temporary enactments for the purpose of effecting a transition from the old government to the new, and of putting the provisions of the new Constitution into effect." 12 C. J. 696

> "In order that no inconvenience may result by reason of changes arising out of the adoption of a new Constitution, it is the custom to adopt a Schedule which will set forth temporary regulations covering the interim before the new machinery of government is thoroughly established. The only office of a Schedule is to provide for the transition from the old to the new government and to obviate confusion which would otherwise arise during the transition period, and this fact may be material in determining the construction and effect to be given to provisions contained in schedules." 6 Ruling Case Law 36.

The preamble to the Schedule to the Constitution of this state fully defines its purpose and office in the following language:

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