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Printed herein for presentation, discussion and action on Friday, May 22nd:

REPORTS

ON

REVISING CITY VACANCY IN OFFICE PROVISIONS

(Municipal Measure No. 52)

The Committee: Dr. James Breedlove, Orren Brownson, Blake Byrne, Douglas DeHaan, Ronald A. Dunning, Howard Hilson, William S. McLennan and Robert W. McMenamin, *Chairman.*

REPEALS "WHITE FOREIGNER" SECTION OF CONSTITUTION

(State Measure No. 2)

The Committee: Stanley R. Loeb, Mark McCulloch, David P. Miller, Marvin S. Nepom, Oliver I. Norville and Garry P. McMurry, *Chairman.*

Also: President Samuel B. Stewart will give a brief report to the membership on the efforts of the Board of Governors, after consultation with the Law Enforcement Committee, to find a role for the City Club on the issue of protests and confrontations.

"To inform its members and the community in public matters and to arouse in them a realization of the obligations of citizenship."

PORTLAND CITY CLUB BULLETIN

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REPORT

ON

REVISING CITY VACANCY IN OFFICE PROVISIONS

(Municipal Measure No. 52)

Purpose: Charter Amendment permitting city officials to run for any elective office while holding city positions; fixing time when vacancy in city position occurs and revising provisions for filling vacancies.

To the Board of Governors,
The City Club of Portland:

I. ASSIGNMENT

The charge to your Committee was to bring to the City Club membership a recommendation on Portland Municipal Measure No. 52. Measure 52 would amend the City Charter by revising Section 2-206 of Article 2, Chapter II.

The major change under this amendment would allow the Mayor, Auditor, or a Commissioner to run for any elective position without first vacating his current position. It would also allow appointed city officials and members of boards and commissions to run for other offices without first vacating their appointive positions.

Other sections pertain to interim appointments to fill vacancies until elections, procedures for nomination and election to fill vacancies in offices, qualifying for office, and minor changes in the line of succession to fill council vacancies created by emergencies.

Your Committee determined that the revisions contained in most of this rewritten section were matters of housekeeping, and it therefore centered its study on the issue of allowing city officials to run for other elective offices without forfeiture of present office.

II. INTRODUCTION

Subsection (a) of Section 2-206 of Article II of the City Charter now reads, in part:

> "A vacancy in office shall occur whenever the mayor, a commissioner, or the auditor shall, during his term of office, become a candidate for any lucrative district, county, state or national office elective by the people . . ."

The proposed revision would read, in part:

> "A vacancy in office shall exist when the Mayor, [a commissioner, etc.] . . . is elected to a different office or is appointed to a different elective office and qualifies, takes and assumes the duties of such other office."

This proposed change, then, would vacate an office when and if its occupant is actually elected or appointed to a new office and assumes his new duties.

Under the present charter, elected city officials are permitted to become candidates for any other *city* elective position without vacating their current office. This would not be changed by the amendment.

The amendment would delete that portion of Subsection (a) which forces all other city officials (such as the city attorney, judge, engineer, treasurer, etc.) or any member of any city board or commission who had been appointed by the mayor or the council, to resign if he becomes a candidate for any elective position.

In 1968, in the case of *Ivancie vs. Thornton* et al, the Oregon Supreme Court was asked to declare the existing charter provision unconstitutional. In its opinion, the Court held[1] that the plaintiff's case raised a political issue to be decided by the voters and not by a court.

Your Committee, therefore, has studied this matter with a view to determining the more desirable political policy.

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[1] Oregon Supreme Court 1968, *Ivancie v. Thornton*, 250 Ore 550; cert. den. 89 Sup. Ct. Report, 623.

VIII. CONCLUSIONS

Your Committee feels that the amendment was originally adopted to prevent an alleged abuse but instead has had the effect of disfranchising city officials. Your Committee feels that fair play should permit an elected city official to have the same right as any other office-holder and the everyday citizen to become a candidate for any office of his choice. Your Committee is cognizant of the fact that not only will the amendment remove the disability of the City Commissioners, the Mayor, and the Auditor to file for other offices, but will also remove the same disability from other city officials and members of boards and commissions. The fact that currently even appointees to boards and commissions are prevented from filing for elective office outside city elections without vacating their appointive office would be sufficient reason alone for adoption of this amendment.

The minor changes in the line of succession to the Council in the event of an emergency or disaster, and the clarification of language to eliminate ambiguities and elaborateness are desirable improvements in the charter section, in the opinion of your Committee.

IX. RECOMMENDATION

The Commitee therefore recommends that the City Club of Portland go on record in favor of Municipal Measure No. 52 and urges a "Yes" vote in the election of May 26, 1970.

Respectfully submitted,
Dr. James Breedlove
Orren Brownson
Blake Byrne
Douglas DeHaan
Ronald A. Dunning
Howard Hilson
William S. McLennan, and
Robert W. McMenamin, *Chairman*

Approved by the Research Board May 7, 1970 for transmittal to the Board of Governors.

Received by the Board of Governors May 11, 1970 and ordered printed and circulated to the membership for consideration and action.

REPORT

ON

REPEALS "WHITE FOREIGNER" SECTION OF CONSTITUTION

(State Measure No. 2)

Purpose: Repeals Article I of Section 31 of Oregon Constitution which discriminates against non-white foreigners and purports to give the State of Oregon authority to regulate immigration. The purpose of this measure is to eliminate from the Oregon Constitution a provision which is invalid because it conflicts with the U.S. Constitution.

To the Board of Governors,
The City Club of Portland:

I. INTRODUCTION

The Committee was commissioned to examine the historical and legal basis for retention or repeal of Section 31 of the Oregon Constitution. Each member of the Committee initially felt that a simple legal analysis would show the need for repeal of the section. Further research revealed that part of the section may have merit and should be retained.

Article I, Section 31 provides:

"White foreigners who are, or may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native born citizens. And the legislative assembly shall have power to restrain and regulate the immigration to this state of persons not qualified to become citizens of the United States."

The questioned section of the Constitution covers two subjects. The first sentence provides that white foreigners have the same rights as citizens in the possession, enjoyment and descent of property. The second sentence empowers the Legislative Assembly to restrain and regulate the immigration to this State of persons not qualified to become citizens of the United States.

II. SCOPE OF RESEARCH

The Committee's research was undertaken in three parts:

(1) Historical background of Article I, Section 31.

(2) Constitutionality and legal effect of the first sentence relating to property rights of aliens.

(3) Constitutionality and legal effect of the second sentence relating to immigration of citizens to the State.

Persons interviewed were Representative Frank Roberts of Multnomah County, sponsor of the bill, and Robert Lundy, Legislative Counsel, whose office drafted the provision. Neither had considered whether the present section of the Constitution affords affirmative protection to resident aliens. They had considered only the obvious constitutional deficiencies in the section.

III. HISTORY

The Oregon Constitutional Convention met at the Salem Courthouse between August 17 and September 18, 1857.

The original draft of Article I, Section 31 read as follows:

"Foreigners who are or may hereafter become residents of this state shall enjoy the same rights in respect to possession, enjoyment and descent of property as native born citizens."

From this noble beginning, regression set in.

The section in question came up for discussion on September 10, 1857. From the vantage point of 113 years later, it is clear that the legal deficiencies of the present section were added by the Constitutional Convention itself. Quotation from the limited debate during that Convention on Section 31 of the Constitution follows:

"Mr. Dryer moved to strike out the word 'residents' and insert 'citizens.'

"Mr. Logan thought it would not be wise to restrict foreigners from holding real estate.

"Mr. Deady thought the word 'white' ought to be inserted before the word 'foreigners.'

"Mr. Dryer stated that many of the states in the Union required foreigners to declare their intention to become citizens before they could hold real estate.

"Mr. Bristo moved to amend so as to read:

" 'And the legislature shall have the power to restrain and regulate immigration of those persons to this state who are not qualified to become citizens of the United States.'

"Adopted.

"Mr. Deady's motion was carried and the word 'white' inserted before foreigners. The section was then adopted as amended." (Carey, *The Oregon Constitution,* State Printing Department, 1926)

IV. CONSTITUTIONALITY AND LEGAL EFFECT OF FIRST SENTENCE OF SECTION 31

First sentence:

"White foreigners who are, or may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native born citizens."

It is apparent that the classification made by the above provision on the basis of skin color or race constitutes a denial of equal protection of the laws, contrary to the 14th Amendment of the U.S. Constitution. The Oregon Supreme Court has so held in *Namba v. McCourt,* 185 Or 579 (1949).

The invalidity of the first sentence of Section 31, insofar as it discriminates against non-white aliens, does not invalidate the effect of the provision as it relates to all aliens irrespective of color. The Oregon Attorney General, in an opinion holding that Philippine citizens have the same right to engage in exploitation of the State's natural resources as do U.S. citizens, has accepted the invalidity of the sentence as it relates to non-white foreigners, but upholds the protection of the sentence, without its repugnant discrimination against non-white foreigners. (Opinions Attorney General 1966-1968, p. 306.)

The common law restricts property ownership rights of aliens. An alien can receive a grant of real property, but his title is not good against the State, and the State can cause the property to escheat by a proceeding called "Office Found" commenced prior to the alien's naturalization. (*Oregon v. Carlson,* 40 Or 565 (1902)). No alien, or one claiming through an alien, can take property by descent under the common law. While it may be questioned whether the common law principles outlined above meet modern notions of equal protection, the U.S. Supreme Court has never ruled on the constitutionality of these common law principles. Indeed, state laws restricting the rights of aliens to own property have been upheld. See *Terrace v. Thompson,* 263 US 197. A recently enacted Federal statute states that aliens cannot own land in the United States territories or the District of Columbia, 48 USCA 1501. The holding of *Terrace v. Thompson, supra,* has been questioned by several members of the U.S. Supreme Court but never has been overruled. Thus, there remains uncertainty as to the rights of aliens with regard to ownership of real property and descent of property under the common law.

While the first sentence of Section 31 insofar as it discriminates against non-white aliens, is unconstitutional, with the world "white" stricken from the sentence *(Namba v. McCourt)* it has constitutional vitality in protecting aliens' right to possession, enjoyment and descent of property within the State of Oregon, overriding the principles of the common law barring such descent. The problems created by the repeal of this section may not be resolved by passage of the presently proposed Revised Constitution measure on May 26, 1970.(1)

V. CONSTITUTIONALITY AND LEGAL EFFECT OF SECOND SENTENCE OF SECTION 31

Second sentence:

"And the legislative assembly shall have power to restrain and regulate the immigration to this state of persons not qualified to become citizens of the United States."

Unlike the first sentence of Section 31, this sentence is not self-executing but merely gives the State authority to legislate regarding immigration of non-citizens to the State. However, there are very few instances in which legislation enacted pursuant to the authority of this section would be constitutional.

Article I, Section 8 of the Constitution of the United States grants to Congress the power to regulate commerce with foreign nations and to establish a uniform law of naturalization. It is well established that the authority to regulate immigration, including the rights of exclusion and deportation, is vested exclusively in the Federal government, to be exercised either by treaty or by Act of Congress. See *Chy Lung v. Freeman,* 92 US 275 (1875). Since the authority of Congress over immigration is exclusive, any direct or indirect attempt at regulation by the individual states is generally unconstitutional and void. See *Henderson v. New York,* 92 US 259 (1875). Exceptions occur where the state has a legitimate interest to protect, such as would be served by limiting immigration of those with contagious diseases, pursuant to the state's police power. The authority granted by Article I, Section 31, however, is far broader in scope than the permissible ambit of state regulation because it applies to *any* alien not eligible for citizenship.

VI. ARGUMENTS FOR THE MEASURE

The Committee has discovered no group actively debating or discussing the pros and cons of this ballot title.

An argument in favor of repeal of the section is that insofar as it applies to immigration and naturalization by the State of aliens not qualified for U.S. citizenship, it is unconstitutional. Its limited constitutional effect is the protection of all aliens' rights to the possession, enjoyment and descent of property within the State. This protection should be the subject of state legislation or of a Constitutional amendment set forth in the language of the original draft of this section. The entire section should be repealed and the Legislature should then adopt statutory protection for aliens' enjoyment, possession and descent of property within the State.

VII. ARGUMENTS AGAINST THE MEASURE

The legal argument against repeal of Section 31 is that it presently provides protection for all aliens in the enjoyment, possession and descent of their property within this State. The unconstitutional discriminatory application of the section has been removed by Court decision. No effort has been made by the State, under the second sentence of the section, to restrain or regulate immigration or naturalization

(1) The proposed new Constitution provides that "a law shall not grant to any person or class of persons privileges or immunities that, on the same terms, do not belong equally to all persons." This language might be held to eliminate the common law disabilities of aliens with regard to ownership and descent of property. However, this lacks the certainty of the protection afforded by the more explicit Article I, Section 31.

SUMMARY OF BALLOT MEASURE COMMITTEE REPORTS AND CLUB ACTION

(for May 26, 1970 Primary Election)

Measures	Committee Vote	Club Vote	To Be Voted On:
STATE BALLOT			
#1: Capital Construction Bonds for State Government	Yes	Yes	—
#2: Repeals "White Foreigner" Section of Constitution	No	—	May 22
#3: Revised Constitution for Oregon	Yes	Yes	—
#4: Pollution Control Bonds	Yes	Yes	—
#5: Vote at 19	Yes	Yes	—
#6: Local School Property Tax Equalization	Maj: No Min: Yes	No	—
METROPOLITAN DISTRICT			
#7: Metropolitan Service District	Maj: Yes Min: No	Yes	—
CITY OF PORTLAND			
#51: Antipollution Aid Through Sewer User Charges	Yes	Yes	—
#52: Revising City Vacancy-in-Office Provisions	Yes	—	May 22

Note: The scheduled reports on City and Port District measures concerning merger of the Port of Portland and Commission of Public Docks have been cancelled inasmuch as both issues have been withdrawn from the May 26th ballot.

PORT COMMITTEE ALL READY FOR NEXT TIME!

The research committee studying Port Operations feels like it's just learned more about port mergers than it cares to know at this point.

Working under tight deadlines meant evening meetings until midnight these past weeks for the Port Committee which was given the added assignment of reporting on the two measures on the May 26th ballot concerning merger of the Commission of Public Docks and the Port of Portland.

As of May 14th, the two municipalities withdrew their measures from the ballot because it was felt they were incompatible. This removal was done at the joint urging of Mayor Terry D. Schrunk and Governor Tom McCall.

Measure No. 53 would have appeared on the city ballot and Measure No. 9 would have appeared on the ballot of the Port District (which duplicates Multnomah County in geographic area).

The committee has a husky file of facts and figures with which it can tackle any future ballot measures referred to the voters concerning port and dock amalgamation.

Hardy Myers, Jr., is Port Studies chairman.