# FIFTY-THIRD DAY

(LEGISLATIVE DAY OF APRIL 2)

## MORNING SESSION.

TUESDAY, April 9, 1912.

The Convention met pursuant to recess, was called to order by the president and opened with prayer by the Rev. T. L. Lowe, of Columbus, Ohio.

The gentleman from Noble [MR. OKEY] was recognized.

Mr. OKEY: I shall endeavor to make my remarks on this subject brief.

I am in favor of the Peck proposal, with some of the amendments that have been offered. It has been the sincere desire of your committee to correct by this proposal some of the objectionable features of our present judicial system. I believe that this proposal, if adopted, would be beneficial to the people and remove some of the evils that now exist in our judicial procedure. There is much complaint about the law's delay and it does not require one of deep discernment to see that such complaint is well founded. The end of all judicial investigation is the ascertainment of truth and the wise and just determination of the rights between litigants. Long delays are not conducive to the correct determination of the legal rights of parties, nor are the number of courts through which parties must pass in order to have their rights finally and authoritatively adjudicated a criterion of justice. Neither is the number of courts an evidence that the legal rights of parties will be better or more accurately determined than if there was only a designated number of courts to pass on the same question.

In passing on a proposition of this character we should consider what will best subserve the interest of the people as a whole, and not what will best please a class. It is doubtless true that there are some in the legal profession who look with jealousy upon any attempt to adopt an innovation in our legal procedure or to limit the jurisdiction of any court. But if by adopting a change in our courts we can best meet the ends of justice and at the same time have the rights of litigants determined more expeditiously and reach a finality quicker, then all true lawyers who want to exalt the profession and ennoble the calling will hail such a change with delight. It is only those who look upon the profession of the law as a purely financial business and not as a high calling, and who look upon a trial for the adjudication of right a trick, who will oppose measures tending to correct defects and evils in our judiciary. The more courts through which they can drag their clients, the more fees.

Is the financial question the governing question in determining whether we will adopt a change in our judicial system? What is the best system for the people? What will correct the delay in the trial of cases and prevent litigants being dragged from court to court before the matter is finally determined? These are matters that we ought to wisely consider. It is necessary that there be a court of last resort and it would seem that the sooner parties can reach that tribunal the better. It is designed by the proposal before us to bring a court of last resort down close to the people and clothe it with the powers of a court of last resort, except as to certain expressly excepted matters. Under the proposal now under consideration, we will have a trial court, and one court of review, called a court of appeals, with power to hear cases on appeal or upon the evidence de novo as amended.

It seems to me that this proposal would be of great benefit to the people in our smaller counties, where a great majority of the cases involve a small amount. While the rights involved in this class of cases are just as sacred as when large amounts are involved, yet the burden in this class of cases is too great on the litigants if they can be taken from court to court in order to get a final determination of the rights of the parties. The great bulk of the litigation among the people is of such character that it ought to be finally determined in two courts. The people would be satisfied with this and the ends of justice would be better subserved than they now are. As soon as the people would know that there was one court only above the trial court clothed with power to finally adjudicate their rights that court would meet with favor among the people, because they would then see an end to litigation. The circuit court as now constituted is a court through which every one must pass in order to get to the supreme court, the court of last resort.

The people in general would be satisfied with the court of appeals as is provided for in the proposal. They are not asking for more courts; they are asking that justice may be administered more expeditiously. Now what would be the situation if this proposal were adopted and become a part of the organic law of this state? There would be two courts for the trial of cases. In the trial court we would have a judge and twelve men who would hear the evidence and pass upon the law and facts; the jury to pass upon the facts, and the court to announce the law. We would have in this case in effect the judgment of thirteen men upon the controversy in question. If the case should go to the court of appeals it would there be heard by the three judges. So that before the case would be finally determined it would have been passed upon by sixteen men. It would seem that every phase of any case would be sufficiently considered after it has passed in review and been heard and considered by four judges learned in the law and the twelve laymen. Litigation ought to stop there; there must be a limit somewhere to the end that delays in litigation may be reduced to the minimum.

As a matter of fact seventy-five per cent of the cases stop in the circuit court even under our present system. This shows that the people as a rule are content to stop at this intermediate court, although it is not a court of last resort. And a very large per cent of the cases that go to the supreme court are affirmed in that court. If

we would take the time to examine the class of cases that are taken to the supreme court we will find that a large majority of the cases concern corporate rights and big interests and the questions involved do not concern or grow out of the common transaction of the people in common life.

It seems that there are some bar associations who do not indorse this proposal. However, I take it that we have not met here to please a bar association, but to adopt a judicial system that will be beneficial to the whole people. Our present judicial system has existed, with slight modifications, for sixty years. Conditions then were different from what they now are. The world has moved since then and new conditions exist today, but our judicial system has remained the same. The people demand that our system of court procedure be changed to meet the new order of things, and if the bar is not willing to move, the people will. Seventy-five years ago the farmer reaped his grain with the sickle, later on he cut it with the cradle, but today he reaps it with the reaper. The farmer has accepted the improved machinery and has utilized it in his business.

Is the bar to be a barnacle upon the body politic? I take it that this does not meet the approval of the great body of the legal profession in this state. I believe that the great bulk of lawyers in this state are in favor of a reform in our judicial system.

Now we come to one more phase of the proposition that I wish to discuss before I close. This proposal provides that no statute adopted by the general assembly shall be held unconstitutional and void except by the concurrence of all the judges of the supreme court sitting in the case. To this provision there seems to be some objection. I am in favor of this provision of the proposal for the reason that a court in declaring a law unconstitutional is nullifying a legislative act that presumably expresses the will of the people acting through their chosen representatives. The effect is to defeat the will of the people.

Another reason for favoring the concurrence of all the judges in declaring a law unconstitutional is that a court in so doing is exercising an assumed power and one that has not been given to it by the constitution.

Let me remark that there is not a civilized country upon earth that ever permitted its judiciary to declare a legislative act unconstitutional, and yet we, the boasted nation of freedom, where we say the government rests upon the consent of the governed, have permitted our courts to exercise and assume power that was never given them under the constitution.

Mr. LAMPSON: Is not the constitution a higher expression of the will of the people than an act of the legislature?

Mr. OKEY: I think it is. I think that is true.

Mr. NYE: Suppose the legislature, both senate and house, pass a law by a bare majority of one in each body; does it give the law any more authority than simply of that bare majority and why should not the supreme court by a majority declare it unconstitutional?

Mr. OKEY: I will touch on that as I go on.

Mr. HALFHILL: Do you think the reasoning in the case of Marbury vs. Madison, 1 Cranch, 137, has ever been answered by anybody who opposes or sustains the position you take?

Mr. OKEY: I will admit that it is a great argument; as to whether it has ever been answered would, of course, be a mere matter of opinion.

Mr. FACKLER: What would be the purpose of a written constitution if acts of the general assembly could not, under any circumstances be set aside?

Mr. OKEY: I would not see any use for it.

Mr. LAMPSON: Is it not one of the very highest functions of a court to sustain the will of the people as proposed in their constitution?

Mr. OKEY: I think it is. Personally I do not believe a court has the right, and I am quite sure it has no inherent right, to declare an act of the legislature null and void, but if the assumed power is to be retained by our courts it ought to be guarded as much as possible. You know they have told us here, some of them, when we ask that the people be given a right to govern themselves, that that right ought to be safeguarded. Now, if we are to give the supreme court of our state authority to declare a statute null and void, I believe that the same right, the same guarding of power, should be imposed upon the court that they ask to be imposed upon the people, and for that reason — that the exercise of the power may be guarded — I want a unanimous decision before they can say that an act of the legislature is null and void.

Even after John Marshall had assumed the power — that is where they got it — John Marshall was the first judicial legislator in this country —

Mr. FACKLER: Is it not a fact that Alexander Hamilton was arguing in the Federalist directly for the existence of this power, that it must be lodged some place, with somebody to declare that something passed by the legislature was against the constitution, and the place to lodge it was with the judiciary? Was not that Hamilton's original position and argument?

Mr. OKEY: He may have been the originator, but John Marshall is the judge who was the first to exercise that power. I say even after John Marshall had assumed the power to nullify legislative acts, great judges and jurists regarded the annihilation of a law as an exceedingly grave act. Justice Chase in 1796 said:

> If the courts have such power I am free to declare that I will never exercise it but in a very clear case.

Mr. NORRIS: Is not that the rule now?

Mr. OKEY: It ought to be the rule, but I think there have been many decisions made without observing that rule. I do not believe they have given the benefit of doubt to the law.

Justice Waite in 1878 said:

> Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a reasonable doubt.

That is the rule, is it? It ought to be, but the question is, is it observed? One branch of the government can not encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. Listen to the voice of the great jurist of modern time, Justice Harlan, who in 1905 said:

> If there be doubt as to the validity of the statute that doubt must therefore be resolved in favor of

its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.

Mr. Jefferson, in a letter to a Mr. Jarvis in 1820, said:

You seem to consider the judges as the ultimate arbiters of all constitutional questions, a very dangerous doctrine indeed, and one that would place us under the despotism of an oligarchy.

The courts have gone too far in declaring laws unconstitutional.

Now these are the opinions of some of the great jurists in this country upon the question we have been considering.

Mr. NORRIS: I understand that you oppose anything but the unanimous opinion of the court on constitutional questions?

Mr. OKEY: Yes.

Mr. NORRIS: If there are six judges of the supreme court and five of them want to declare a statute unconstitutional, you would have it so that the five could not declare it unconstitutional?

Mr. OKEY: I would.

Mr. NORRIS: Then the tyrant you speak of is the sixth man, is he not?

Mr. OKEY: No, sir; not at all. The reason for my position —

Mr. NORRIS: The opinion of the sixth judge outweighs the opinion of the other five, and he is in fact arbitrary.

Mr. OKEY: No; that is not true.

Mr. PECK: Behind that sixth judge, do you not have the general assembly and the governor and all the other officers?

Mr. OKEY: Yes; we have that law considered by a great number of men before it comes up to the court of last resort. I was going to say that my reason for insisting on unanimity is that I believe there has never been any man who has been able to explain why the court declares a law unconstitutional unless it has assumed power; and they all admit it. Justice Marshall admitted it himself, and I say, therefore, you have one department of government legislating — a judicial body nullifying the laws, having the same effect as if the legislature were to repeal the law. It is repealing a law that has been enacted by the legislature, whose sole function was to enact the law — a repeal of that law by another branch of the government.

Mr. KNIGHT: Is it not true that no enactment of the legislature is law unless it is in accordance with the constitution under which that legislature is proceeding?

Mr. OKEY: That is true.

Mr. KNIGHT: Then it is not the law if it is in conflict with the constitution?

Mr. OKEY: It is the law until declared unconstitutional.

Mr. KNIGHT: Is it not true that the judges are nullifying something which is not and cannot be the law if it is not in accordance with the constitution?

Mr. OKEY: It is a law until it is otherwise declared. Every law provides that an act of the legislature shall take effect at a certain time and if it has taken effect, the people act under it and it is a law whether it is in accordance with the constitution or not.

Mr. PECK: Does not the presumption of validity always accompany every law?

Mr. OKEY: Yes, the assumption of validity accompanies every law.

Mr. KNIGHT: I grant that, but if there be a conflict betwen a statutory law and the constitution is it not evident that somewhere in every constitutional government there must be a power lodged to reconcile that conflict or to declare the inferiority of the statute law?

Mr. OKEY: Yes, but we are not trying to take away that power under the proposal.

Mr. KNIGHT: But haven't you said "nullify the law."

Mr. OKEY: They do.

Mr. KNIGHT: No; they simply declare that certain so-called enactments are things which the legislative body had no right to enact to start with. Is not that true?

Mr. OKEY: No.

Mr. KNIGHT: Why not?

Mr. OKEY: You are assuming the law was nullified from the beginning.

Mr. ELSON: Is it not true that the men who make the laws are possibly as familiar with the constitution as the judges who sit in judgment on the law?

Mr. OKEY: They may be.

Mr. ELSON: Is it not true that this is the only country in the world in which the highest court can pronounce a law unconstitutional?

Mr. OKEY: That is right.

Mr. ELSON: And it did not originate with John Marshall and Alexander Hamilton, but in the colonial courts presided over by British judges?

Mr. OKEY: I did not know it went back that far.

Mr. DWYER: But the court is vested with the authority now to declare the law unconstitutional?

Mr. OKEY: Yes.

Mr. HARRIS, of Hamilton: The practice in criminal cases is that a man is arraigned on a criminal charge and his innocence is presumed until he is proved guilty?

Mr. OKEY: That is the law.

Mr. HARRIS, of Hamilton: Then the presumption of innocence does not make him innocent any more than the presumption of the validity of the law makes it valid.

Mr. OKEY: No.

Mr. PECK: But the presumption must be beyond reasonable doubt.

Mr. FACKLER: Would you give the court power in case of conflicting laws to decide which one should prevail?

Mr. OKEY: In case of conflicting laws — what do you mean by that?

Mr. FACKLER: Suppose there are several laws passed by the general assembly and one conflicts with another, what we call conflicting laws, or conflict of laws. Would you give the supreme court authority to decide which law applied in cases of conflict of law?

Mr. OKEY: Yes.

Mr. FACKLER: Then you give that authority to the court in case of a conflict of laws, but you would not give it in case of a conflict between a law and a constitutional provision?

Mr. OKEY: I might not.

Mr. WATSON: Suppose that the supreme court of the United States had been held down by the unanimity

rule, would we have had fastened on us the legality of the patent cases?

Mr. OKEY: No.

Mr. ANDERSON: Does not the history of the acts, where they have been declared unconstitutional, prove beyond any doubt that if all of the judges had been required to agree before an act of congress or an act of the legislature should be declared unconstitutional that the whole country would have been away ahead of where we are now in progress? As a matter of fact has not progress been stopped along the lines of humanity and along the lines of individuals by reason of a divided court declaring acts of congress and of the legisalture unconstitutional?

Mr. OKEY: I think that is right. You will notice, as I believe Mr. Thomas, the gentleman from Cuyahoga, showed me last night, that the supreme court of Ohio in the last seven years has declared fourteen statutes unconstitutional. And the sad part of the whole thing is that many of those decisions related to matters that primarily affect the people, and those laws might have been beneficial to the people had not the judiciary, growing with that power, encroached, as it has continued to encroach, on the right of the people. As Thomas Jefferson said, it moves like gravity, a little here today and a little there tomorrow, and it would go noiselessly and noiselessly as the tread of a thief at midnight until it was spread all over the fields of jurisdiction, and that is so with our courts at the present hour.

Now I believe in courts. I believe in the dignity of courts. I am not one of those who want to rail out against courts, but I only want courts so constituted that the high and the low can approach those tribunals on an equal footing, but I do not want them so constituted that the great common people can not approach them as the rich approach them. I want justice handed out from them in the same way and with the same degree of equality that it is handed out to corporations of this country, and I believe that this proposal that Judge Peck and this committee have considered and now present to this body will be the means, as Mr. Anderson has said, of bringing the supreme court down to the people's door, and then the people will have their rights adjudicated at home and in that way the rights of the people will be subserved better than they are now subserved.

Mr. LAMPSON: Suppose that some selfish interest — some powerful corporate influence — should secure the passage of a law which nullifies some important provision of the constitution. Would it not be much easier for the same influence to control one member of the supreme court than to control a majority and thus maintain the unconstitutional provision?

Mr. OKEY: Well, of course, you are putting an assumed case —

Mr. LAMPSON: I am putting the other side of the case.

Mr. OKEY: Yes, on the other side.

Mr. ANDERSON: Is not this the fact, that every constitutional provision in every constitution — the federal constitution and every state constitution — is in favor of the people as drawn and put in, and have they not been made against the people by the interpretation of some court, some times a divided court?

Mr. OKEY: Yes, a judicial construction.

Mr. ANDERSON: And does not that answer the question of the delegate from Ashtabula [Mr. LAMPSON]?

Mr. HALFHILL: If I understand you correctly, you said this was the only country in the world where the supreme court had the right to declare an act of the legislature unconstitutional. Did you make that statement?

Mr. OKEY: As I understand it, that is so.

Mr. HALFHILL: Do you not know that the British North American act, which permitted the creation of the federation of Canada as a constitutional branch of the English parliament — that the high court of Great Britain can and does declare unconstitutional any act of the Canadian parliament which conflicts with the British North American act?

Mr. OKEY: I did not know that. I am not disputing it; I simply do not know.

Mr. HALFHILL: I will say that is the fact. Now do you not know that from the very theory of the creation of written constitutions, in which this country undoubtedly excels, it is a necessary power to reside somewhere to declare laws unconstitutional?

Mr. OKEY: Personally I do not think so. Of course this proposal allows them to declare laws unconstitutional, but personally I do not favor such a power. I do not think there is any written constitution in all the governments of the world where they have permitted courts to assume legislative powers.

Mr. HALFHILL: Then where would the restrictive powers of a constitution be, and what would be the prime purpose and function of a constitution as fundamental law if there were not powers somewhere in the government to declare unconstitutional statutes and legislative acts which transgress the constitution?

Mr. OKEY: The constitution is to prescribe the limitations upon legislative bodies.

Mr. HALFHILL: That being so, is it not true and does it not follow as a logical consequence that there must be some power in the government which can say when the legislature does transcend the constitution?

Mr. OKEY: No, sir; it amounts to this: The way we have it under our present system we have the legislature enacting a law, that is, the people enacting a law through their representatives, and after that law is enacted the people say "Here is our law." The supreme court comes along and says "That is not your law. It is not a law at all. You don't know what you are doing. Your chosen representatives can not enact such a law and they never did enact such a law. It was null and void from the beginning."

Mr. HALFHILL: Is not the fundamental law of the constitution the highest expression of the people's will?

Mr. OKEY: Undoubtedly it expresses the will of the people.

Mr. ANDERSON: I want to ask if the gentleman will permit me to ask a question of the gentleman from Allen [Mr. HALFHILL]?

The PRESIDENT: Does the member from Allen [Mr. HALFHILL] yield to a question from the member from Mahoning [Mr. ANDERSON]?

Mr. HALFHILL: Yes.

Mr. ANDERSON: Is it not true that practically every law before the passage of the so-called Norris law that was passed for the protection of the individual was nullified by the interpretation of our supreme court?

Mr. HALFHILL: It is not true.

Mr. ANDERSON: Name one.

Mr. HALFHILL: I can not name you one now, but I know your statement is not true.

Mr. ANDERSON: You are very radical.

Mr. HALFHILL: I know by the records of the supreme court that your statement is not true.

Mr. ANDERSON: I hate such statements as "not true."

Mr. HALFHILL: Oh, I merely used that word because you used it in your question.

Mr. ANDERSON: I will challenge you to produce one that I can not show has been nullified by the supreme court.

Mr. HALFHILL: I only used that word "not true" because you used it in your question, and my belief is that the supreme court of Ohio has decided those questions in accordance with the law, and if there were anything wrong with the law the legislature or the people should rectify it.

Mr. KNIGHT: If the governors have gotten through with their discussion I would like to ask the speaker a question, perhaps a series of questions, and the first is this: Does not the constitution of every state stand as the highest expression of the people of the state as to their government?

Mr. OKEY: Yes.

Mr. KNIGHT: Did you not make the statement a moment ago that the people in framing that constitution put in it certain limitations upon the power of their own legislature?

Mr. OKEY: Yes.

Mr. KNIGHT: Now if the legislature oversteps those limitations which the people have put there, what are you going to do about it according to your theory?

Mr. OKEY: Would you have a court that did not enact that law tell the people the legislature overstepped the boundary?

Mr. KNIGHT: Did not the people elect the court?

Mr. OKEY: Yes.

Mr. KNIGHT: Did not they put them there for that purpose?

Mr. OKEY: Did the people elect the court as judicial officers or legislators?

Mr. KNIGHT: They elected them to decide when the administration of any other department oversteps the power given to that department.

Mr. OKEY: Did they not elect them to do a little interpreting once in a while themselves?

Mr. KNIGHT: That is what they are doing when they declare an act of the legislature unconstitutional—they have to declare that the legislature oversteps a constitutional limit.

Mr. ELSON: I want to ask a question of the member from Franklin [Mr. KNIGHT].

Mr. KNIGHT: The member from Franklin is himself only questioning. He has not the floor.

Now I want to ask the speaker a question, if I may, and it is this: Ought you not, to be perfectly consistent, to require that the legislature in enacting a statute should enact it by a unanimous vote?

Mr. OKEY: No, sir.

Mr. KNIGHT: It often happens, does it not, that a minority, amounting almost to a majority of the legislature, vote against a proposed measure because in the judgment of that minority it is unconstitutional?

Mr. OKEY: It sometimes happens.

Mr. KNIGHT: The record of congress shows that over and over again. Therefore, you have a divided legislature on questions of constitutionality to start with.

Mr. OKEY: That is true.

Mr. KNIGHT: Then is it proper to say that you have the whole legislature behind you affirming the constitutionality of a measure when it may have been passed by a mere majority?

Mr. OKEY: No, sir; and nobody is claiming that.

Mr. WATSON: Is it not a fact that the province of a court is to apply the law to adjudicated cases?

Mr. OKEY: Yes.

Mr. WATSON: Is it not a fact that the constitution is applied to the general assembly in the enactment of law? Is not that for their guidance rather than for a court overturning what a legislature may do?

Mr. OKEY: Yes.

Mr. NYE: If this Constitutional Convention proposes a constitution to be submitted to the people and the constitution submitted to the people is adopted by the people, is it not of more force than a legislative act?

Mr. OKEY: Oh, yes; it is the supreme law of the land.

Mr. NYE: Is there any qualification for a member of the legislature as to his legal ability or any other ability?

Mr. OKEY: None that I know of.

Mr. NYE: Then would you not say that a law passed by the legislature was inferior to a constitutional provision adopted by a constitutional convention and passed upon by the people?

Mr. OKEY: I think so.

Mr. NYE: What tribunal is to determine those questions if it is not the supreme court?

Mr. PECK: Will you let me ask you a question, Judge Nye?

Mr. NYE: Yes.

Mr. PECK: I think this whole discussion is academic. This bill does not provide for anything of the kind suggested. It provides a mode of passing on constitutional questions and does not forbid the court from passing upon them. But to come to your question, To whom shall the question be left? Suppose your supreme court decides wrong? "Quis custodiet ipsas custodes?" Who will guard the guardians? Who will take care of the supreme court?

Mr. NYE: If the supreme court elected by the people for their supposed ability and legal learning—

Mr. KING: I rise to a point of order.

The PRESIDENT: The delegate from Erie [Mr. KING] will state his point of order.

Mr. KING: The gentleman from Noble [Mr. OKEY] has the floor, and this discussion between two members not on the floor is out of order.

The PRESIDENT: The point of order is sustained.

Mr. PECK: I think this whole discussion is off of the proposal under consideration.

Mr. THOMAS: Will the gentleman from Noble [Mr. OKEY] yield for me to ask a question of Judge Nye?

The PRESIDENT: Does the gentleman yield?

Mr. OKEY: One more time.

Mr. THOMAS: I want to ask—

Mr. DOTY: I rise to a point of order.

The PRESIDENT: What is your point?

Mr. DOTY: The president just ruled on a point that this same thing was out of order, that the member from Noble [Mr. OKEY] has the floor.

The PRESIDENT: The point of order is not well taken. The president did not so rule.

Mr. DOTY: You ought to have so ruled then.

Mr. THOMAS: I want to ask Judge Nye a question.

Mr. FESS: I would like to ask the speaker as to a matter before the Convention. It seems to me that none of these questions that have been asked are in order. All the questions seem to be that the supreme court has no right to pass upon the constitutionality of a law. Is that question before the Convention?

Mr. THOMAS: Yes.

Mr. FESS: I didn't ask you, but the speaker.

Mr. OKEY: It was not before the Convention until Mr. Thomas offered an amendment to that effect.

Mr. THOMAS: The last amendment was an amendment offered by me of that character and that is the subject before the house.

The PRESIDENT: The member from Cuyahoga has been recognized to ask a question.

Mr. THOMAS: I want to ask a question of Judge Nye.

Mr. DOTY: I ask a ruling on the point of order as to whether this cross controversy is to be allowed or are we to have a regular debate by the man at the desk? I think we are a little off of the subject under discussion.

Mr. OKEY: We are somewhat off of the subject, I admit.

The PRESIDENT: The president will rule that this is the way we have been doing and the speaker has yielded to the member from Cuyahoga [Mr. THOMAS] to ask a question of the member from Lorain [Mr. NYE] and the question is in order and the member from Cuyahoga [Mr. THOMAS] will put his question.

Mr. THOMAS: Is there any legal requirement now for the election of judges of the supreme court?

Mr. NYE: There is not, but it is in the power of the people to elect the judges if they choose and it has been the universal custom to elect judges upon the supreme court who are learned in the law, and it is up to the people of Ohio to elect men distinguished in their profession and that has been the practice in Ohio.

The PRESIDENT: Now the member from Noble [Mr. OKEY] will proceed.

Mr. THOMAS: Mr. Kramer, of Cleveland—

Mr. OKEY: Gentlemen, I want to close. There has been a good deal of outside discussion.

Mr. ROCKEL: Will the gentleman yield to let me ask him one question?

Mr. OKEY: No, no more. I just want to say in conclusion that the courts of this country have gone entirely too far in declaring laws and statutes of the legislature null and void, and for that reason I want to see the matter guarded well, as is done in this proposal. If you will examine the decisions of the supreme court you will find that very frequently courts have nullified laws for the alleged reason that the laws were in conflict with some provision of the constitution, but that was not the real reason that caused them to declare for the unconstitutionality. The real reason was that they didn't like the policy of the law and were not bold enough to come out and say they didn't like the policy of the law and they found an easier way by simply saying it conflicts with certain provisions of the constitution. That thing has gone entirely too far, and it has given far too much power to the court to nullify an act of the legislature, and therefore I hope the proposal of the eminent jurist from Cincinnati, Judge Peck, will be adopted with such amendments as will be necessary to make it suit a majority of the delegates to this Convention.

Mr. DOTY: I move that discussion during the remainder of the time be limited to ten minutes on each substitute and five minutes on each amendment.

The motion was carried.

The chair recognized the gentleman from Erie.

Mr. KING: Mr. President and Gentlemen of the Convention: This proposal has been so ably discussed that at one period in the discussion I thought I would best serve my position here by remaining quiet, for I am in accord with most of the provisions of the proposal, but I was not able in committee nor am I now able to agree that it shall require a unanimous decision of all the judges of the supreme court of Ohio to declare that an act of the general assembly is in conflict with a provision of the state constitution, nor am I able to agree with the proposition that a case appealed from the trial to a reviewing court must receive the assent of all the judges of the reviewing court in order to reverse or modify the judgment of the trial court. Still these objections of mine would not have been deemed by me important enough to break silence in this discussion had it not been for some of the notions expressed, which are peculiar to this day and age and based, I believe, on woefully false premises, and I believe I shall not have performed the duty which devolves upon me as a delegate if I do not express my emphatic protest against these arguments. More particularly I refer to the speech of the gentleman from Cincinnati that in his judgment the judicial authority of the state or nation had no power to decide that an act of the legislature was in violation of the supreme law of the land. That statement has been made repeatedly in this Convention by gentlemen who have been invited to express their views upon constitution making. Some of these gentlemen are very able; for instance, I recognize the ability as a scholar and lawyer of the distinguished mayor of the great city of Cleveland, and he gave forth the opinion that courts could not interfere to determine whether the constitution or a law of the general assembly should prevail where the two were in direct conflict. I can not understand the education or environment that produced that kind of state of mind in an educated lawyer. I do not believe that the history of this country for more than one hundred and ten years has all been at fault, and yet it is grievously

at fault if the statements of these gentlemen are to be taken as sound argument. The gentleman from Hamilton county made the statement that courts had usurped the right to decide upon these questions. The most efficient argument that has ever been made upon this subject and the most efficient answer that can be made to the remarks of the gentleman from Hamilton county are found in a quotation which I shall make from the opinion of the greatest judge and chief justice of the supreme court of the United States when and where he asserted the existence of this power.

A gentleman has been nominated by the president of the United States and his appointment made by that president by and with the advice and consent of the senate to an office provided by law, which, under the provisions of the federal constitution, it was the duty of the president to fill. His commission had been prepared and signed and executed by the president, so that all steps had been taken to give the office except the delivery of the commission, when the secretary of state of the United States, an executive officer appointed by a president of the United States, refused to deliver the commission in question and suit was brought in the supreme court of the United States to compel the delivery of this commission. This is the preliminary statement of the great case of Marbury vs. Madison, decided in February, 1803, and reported in 1 Cranch, page 137. Chief Justice Marshall decided the case and he held that the questions to be decided were:

> First, Has the applicant a right to the commission he demands?
>
> Second, If he has a right and that right has been violated, do the laws of his country afford him a remedy?
>
> Third, If they do afford him a remedy, is it a mandamus issuing from this court?

Having found the first two in favor of the plaintiff, he said that there remained the question of whether he was entitled to the remedy which he sought, and this he said depended upon, first, the nature of the writ applied for, and second, the power of the court. The court squarely decided that the case was one for mandamus, either to order the delivery of the commission or a copy of it from the records, and that there only remained to be decided whether it could issue from the supreme court; and having further discussed the question, they found that the act of congress establishing the judicial courts of the United States provided the power in such courts to issue writs of mandamus to public officers, but that the authority was not given by the constitution to the supreme court to issue such a writ, and the question arose whether the act of congress conferring jurisdiction upon the supreme court was sufficient to authorize the supreme court to issue such a writ notwithstanding that the provision of the constitution as to jurisdiction provided that "the supreme court shall have original jurisdiction in all cases affecting ambassadors or other public ministers and consuls and those in which a state shall be a party. In all other cases the supreme court shall have appellate jurisdiction." So that the question appeared in this way: The constitution had defined the original jurisdiction of the supreme court and had also gone further and said that in all other cases its jurisdiction should be appellate. The definition of its original jurisdiction excluded writs of mandamus and congress had undertaken to provide that all federal courts should have the right to issue writs of mandamus, and upon this Chief Justice Marshall gave forth his great decision, which has never been disputed or denied authoritatively, but has been followed by both federal and state courts since its utterance, in the following language:

> The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.
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> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designated to be permanent.
>
> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.
>
> The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those interested to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
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> Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative is true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation,

and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

That is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and the equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his govern-

ment? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

It is not true that the foregoing decision was the first utterance of a court upon this subject, for the same doctrine was enunicated in Van Horn vs. Dorance, 2 Dallas 304, in 1795, and Chief Justice Marshall mentions in his opinion in the foregoing case, page 171, that the circuit courts had held an act of congress unconstitutional in 1792, and it is laid down in every work on constitutional law to which I have had access, without question or limitation, that the right and duty of the judiciary to take jurisdiction and decide cases when constitutional questions are presented, are both imperative and inseparable. I presume a thousand cases can be cited in the different courts of the United States and of the various states of this Union unqualifiedly supporting that doctrine, and I make the assertion that no well-considered case can be found to the contrary. I therefore deny that it was a usurpation. It arose from the very nature of litigation, as the sacredness of the legislative power is not greater than that of the executive. The three departments of the government are in some respects independent of each other and in other respects interdependent, but if the governor of a state shall violate a plain constitutional provision shall not the court be called upon to decide the question where one's rights have been impaired in an unconstitutional manner, determine whether the act of the governor was constitutional or not? For instance, by section 2 of article III the governor is authorized to grant a pardon for all crimes and offenses except treason and cases of impeachment. Suppose that in a case of impeachment he grants a pardon and that act is called in question and it reaches a court for determination as to the validity of the pardon. Must the court dodge and refuse to decide because it involves a decision by the judiciary upon an act of the executive? But it is more a limitation of legislative power than it is of executive power. The provisions in relation to executive power are affirmative mainly; in other words, the powers of the governor are defined, but all through the constitution is written the limitation upon legislative power. Take the bill of rights; nearly all of its twenty sections are in some respect limitations upon legislative power. All kinds of cases might be imagined and cited as instances wherein the question would arise as to the conflict between a law and the constitution.

Suppose that the general assembly should provide that a certain offense, perchance not greater than a misdemeanor, should not be bailable when the constitution provides that all offenses shall be bailable except capital offenses in certain cases. A man is arrested for the commission of the particular offense defined in the statute and demands that he be given an opportunity to secure bail, tenders sufficient surety, and objection is made that the act of the general assembly prohibits bail; the accused makes up the formal parts of his case and brings an action in mandamus to compel the proper authority to accept his bail. Here is a very fundamental right which belongs to every citizen — whether he can be indefinitely confined in a prison before he is tried without an opportunity to give bail. This is the very fundamental principle of a despotism, or they shall provide for imprisonment for failure to pay a civil debt in plain violation of a section of the bill of rights, or, being unjustly imprisoned, one applies for a writ of habeas corpus which has been refused by an act of the general assembly. These are strong cases, but they only illustrate by their strength the proposition that these questions must necessarily arise in courts, where there is put the question whether the provision of the constitution or the provision of the state law shall prevail when the two are in direct conflict. It is, therefore, as true now as it was in the beginning of constitutional government in the United States that the determination of that is vested somewhere and that it is vested in the courts, because the courts are provided for the determination of private rights as well as the enforcement of public duties. A court would be no longer a court that would refuse to determine that question when properly presented before it, and I am astounded that any citizen of the United States, and doubly so that any lawyer presumed by the nature of his profession to have an education upon the principles of law, should assert that the legislative power and authority created by this constitution is higher than the constitution which created it, and that it can, in violation of the terms of the very charter which produced it, ignore it and violate it with impunity and there be no method by which an individual thereby injured orderly and in due course of law can have his remedy in the courts which that constitution provides "shall be open and that every person for an injury done him in his land, goods, person or reputation, shall have a remedy by due course of law." This being so, what legal or constitutional reason exists here when a court is created composed of more than two judges that their opinion on such a question shall be unanimous when not required to be unanimous on any other question? What is the ground of the distinction? No person discussing this question in this Convention has yet seen fit to tell us why this distinction should now for the first time be engrafted in the fundamental law of our state. It is not even argument, but a mere statement of a fundamental legal principle, that all acts of public authority, whether executive or legislative, are presumed to be regular and constitutional. It is but another axiomatic statement to say that they should not be held to be unconstitutional unless clearly shown to be such, or, as some courts have expressed it, shown beyond a reasonable doubt, which simply means that the conflict shall appear plainly and distinctly, in which event no court should hesitate to

declare the fact of the conflict, which is all that a decision of unconstitutionality means. So again when a case, involving any question of constitutional or other law is carried to an appellate court, consisting of three or more judges, for the review of the decision of a single judge in another forum, what reason exists for saying that the court, before it may even modify the judgment of the inferior of trial court, must be unanimous in its conclusion?

These arguments and these declarations which are proposed to be established in our amendment to the constitution are not based upon any legal reason in my judgment, and I shall not support them.

There is the direct grant of authority and no conflict as to the propositions, and that the conflict between the law and the constitution must be clear, must be plain, let me use the language of the gentleman from Mahoning [Mr. ANDERSON], as has been said in a number of well considered cases, it must be beyond reasonable doubt. All of those things mean practically the same thing, as very well suggested by a gentleman on the floor asking the question this morning. It is true that a man charged with an offense, from the stealing of a yellow dog up to the commission of murder, is presumed to be innocent until he is proved guilty and his guilt must be proved beyond a reasonable doubt, and that presumption of innocence surrounds him until finally the jury has brought in its verdict. So that same presumption protects the law and surrounds the law as it progresses. After all the English language is not so hard to understand that an ordinary individual may not determine this conflict, unless the legal principle is so deeply involved that it is not readily seen. You have to trust somebody to determine whether that conflict exists. If it is the courts, then it is the opinion and judgment of one man at least that determines that. I do not mean if a court is composed of seven or eight men that one could render judgment, but it rests upon the opinion of each individual judge. It ought not be true at least that one judge with somewhere in his mind a lesion, I might call it, that does not enable him to logically pursue an argument, should control the court and prevent a proper decision, where the conflict is plain and beyond a reasonable doubt.

As to the appellate court, there is no use arguing how many judges decided it before. That is an absolutely independent tribunal. If it goes to your appellate court and your constitution prescribes that that appellate court shall consist of three judges, no reason in the world exists why that court shall not act as all courts have hitherto acted in this country, by a majority, nor that two out of the three, constituting a majority, should not be entitled to render any decision, I care not what.

I have made this argument based only upon the proposition found in one or the other of these proposals, more particularly the Taggart amendment, which I am in favor of. I am willing to concede that for the argument in favor of clearness or plainness I would permit or require a decision of the unconstitutionality of a statute should be by a five out of six or seven vote of the court. I would not let one man determine its constitutionality alone in a court consisting of six or seven men. I said before the committee, without undertaking to find fault with this provision, and I still think, that there ought to be a loophole to let out our one crank on the court whose mind might not work right, but if five men agree as to the unconstitutionality there is no reason in law or morals why that judgment should not go into effect as the judgment of the court.

Mr. BOWDLE: I would like to ask a question.

The PRESIDENT: The time of the gentleman was extended to finish his speech, and in view of the limit and that others desire to speak I do not think that would cover questions to be propounded to him.

Mr. KING: I have finished, but with this appeal, that this Convention shall not from a desire for mere novelty overturn established judicial principles that have always and everywhere been recognized.

The delegate from Hamilton [Mr. HARRIS] was recognized.

Mr. HARRIS, of Hamilton: Before speaking the few words that I intend to say upon this subject I would ask indulgence of the Convention to obtain indefinite leave of absence for Judge Worthington, who is detained at home on account of illness.

The leave was granted.

Mr. HARRIS, of Hamilton: I shall say a few words to you on this subject from the view point of a layman. You have heard much from the lawyers and it might be interesting to you to know what the merchants think of the Peck proposal.

In the last month whenever I have gone home I have made it a point to ask the merchants what they think of the proposal, and I am glad to report that I do not find a single banker or business man who takes any exception to the fundamental proposition of Judge Peck's proposal, namely, that the circuit courts shall be made courts of appeal, courts of final jurisdiction.

There has been considerable difference of opinion as to the advisability of compelling a unanimous decision of the court of appeals in overruling a decision of the lower court, and there was also considerable opposition to the demand that the supreme court of the state shall be unanimous to declare unconstitutional a law passed by the legislature.

With the first proposition I am in hearty accord, and I believe it will be the experience of this Convention that business men—the average man on the street—will accept the fundamental principle of Judge Peck's proposal, because it will expedite justice and it will lessen the cost of securing justice.

With the second proposition, and I am now addressing only the laymen of the Convention and I can speak only in lay terms to them, I disagree entirely.

We are supreme within the walls of this Convention, but, gentlemen, the moment we step beyond these walls we cease to be supreme. We are dependent on the point of view that the people outside of the walls of this Convention take, and I believe it is a safe proposition to say that the people outside of the walls of this Convention will be exceedingly slow to accept such a fundamental and radical change in the administration of the civil law as requiring a full court to overrule a lower court. Is not that contrary to our theory of higher courts? It may be a violent presumption, but nevertheless it is a presumption, that the higher court represents a higher degree of intelligence than the lower court. Therefore, when you say that you demand a unanimous decision of the circuit court to overrule one of the judges

of the common pleas court—because if you do not do so, it leaves two judges on the circuit court disagreeing with one of the circuit court judges and one of the common pleas judges—it seems to me the scales are not evenly balanced, because those two judges of the circuit court are supposed to have more learning proportionally than the judge of the common pleas court plus the one judge of the circuit court, just as the judges of the supreme court are supposedly picked out by reason of their superior knowledge and training in the law.

Now it is a serious matter to us laymen when you make us think that somehow or another you are depriving us of our civil rights under the law. A lawyer, with his trained legal mind, of course may quickly determine that there is no material hardship, that the scales are finally equally balanced, but you have not to do with the lawyers, you have to do with the average man in the street and the average man on the farm, and the moment he begins to think that the lawyers have proposed something which takes away some of his rights (and one of his rights is that it shall only require a majority of the upper court to determine the justice or injustice of his cause), you are arousing suspicion and distrust. I concede that the average business man will be governed by the advice of his lawyer, but it is the vast mass of people who will not come in contact with their lawyers who, in my judgment, will question the wisdom of this proposition.

In reference to requiring a unanimous supreme court to override a statute, I must think that is fraught with great danger. We are all here agreed that no special interest would attempt to get anything through a constitutional convention if for no other reason than that the work of the convention must be submitted to the people as a whole, and the people are Argus-eyed when they have an opportunity to use their eyes. Therefore you will never find special legislation secured through a constitutional convention any more than you will ever find special legislation secured through the initiative and referendum. Where will special legislation be secured? You do not dream for a moment that any action of this Convention will change human nature. You do not suppose for one moment that the special interests will become virtuous merely by laws or proposed fundamental laws suggested by this Convention. The fight will go on between the special interests and the public interests hundreds of years after the youngest member of this Convention has been buried and has been forgotten. Where can the special interests secure their advantage? The question answers itself. In the legislature. There you may expect to find special legislation. There you will find it. Now this provision requiring a unanimous supreme court to override a legislative statute gives "special interests" all the advantage, and it has been so clearly explained by other speakers who have preceded me that it is not necessary for me further to detail it. One judge out of the seven, I will not say corrupt, but with a "lesion in his brain" as Judge King calls it, can declare some special act constitutional by refusing to agree with the other six judges. That I consider an element of great danger. I cannot see why you want to give such sanctity to a legislative act when the whole theory of what you have done in the last few weeks is against trusting the legislature. If you trust the legislature you do not need the initiative and referendum. The whole theory of the initiative and referendum is based on mistrust of the legislature. Now to show you how strongly that is the opinion of some of our greatest authorities on the subject I am going to read you a few lines from Dr. Borgeaud's remarkable work "Formation and Amendments of Constitutions," edited by Professor Vincent, of Johns-Hopkins University. Ordinarily you would not find a professor of law in Johns-Hopkins University charged with ultra radicalism, but listen to what Professor Vincent said in 1896 in editing this book:

> Dr. Borgeaud might have pointed to the state constitutions of the American Union as eminent examples of the mixture of statute fundamental law. The reasons for this will not be found in European influences, but in the gradual resumption by the people of powers formerly delegated to the legislative or executive branches of the governments. The people have become afraid of their legislatures. The full representative functions, which in earlier times were granted to the delegate, have been little by little withdrawn. Legislatures no longer elect the executive and judicial officers, but are even restricted in legislative duties, for many states fix in the constitutions the earliest possible date for adjournment.
>
> To counteract the mistakes of the lawmakers the governor has been given the power to arrest temporarily the progress of legislation by means of the veto, and the people obtain indirectly an opportunity to express their opinion.

In the original proposition requiring a unanimous court to override or overrule statutory law you ride right in the teeth of Professor Vincent's wise observations.

The time of the delegate here expired and on motion of Mr. Halfhill was extended.

Mr. HARRIS, of Hamilton: You ride right in the teeth of this declaration, and, as I have said before, right in the teeth of that principle which you adopted here two weeks ago by a vote of 97 to 21, or something like that, in which you declared for the principles of the initiative and referendum, which are based mainly on distrust of the legislature. In my judgment the benefit of the doubt in every instance should be given to the courts that construe an act of the legislature. I recognize the fact, however, that if we want to succeed outside of the walls of this state house when we go to the people we must take into consideration the mental attitude of those people, and, rightfully or wrongfully, I am not able to determine which, the people generally have a prejudice against "four to three" decisions that affect their political rights. It does not seem to affect them when only their civil or personal rights are concerned, but the conviction seems to be firmly fixed in their minds that a greater number of the supreme court should unite in a decision overturning statutory law than in a decision affecting purely personal rights, and in deference to that feeling I accept the amendment of Judge Taggart requiring five members of the supreme court out of seven to unite in declaring a statute unconstitutional, and I call the attention of the lay members of the Convention to the fact that if you vote away your sacred rights by demanding a unanimous decision of the supreme court to overturn a statutory law, you may be chaining your-

selves and your posterity to something you do not dream of now. It is not difficult to foresee that in the not far distant future some particular sect may be dominant in the legislature and may secure the enactment of a statute which deprives all other sects of certain rights or burdens them, and yet by this original proposal you would make it impossible, unless you were strong enough to get a constitutional amendment by means of the initiative and referendum, to shake off those fetters. That point of view has not been carefully considered and you ought to consider it. You ought to know whether or not you are possibly forging chains for yourselves and your children.

Mr. BOWDLE: I would like to ask the gentleman a question.

Mr. DOTY: I rise to a point of order.

The PRESIDENT: State the point.

Mr. DOTY: The gentleman's time was extended for him to conclude his remarks.

The PRESIDENT: As the time has been fixed to vote upon this matter and as the gentleman's time was extended to conclude his remarks the point is well taken.

Mr. HARRIS, of Hamilton: In view of the short time left for further discussion and in recognition of the rights of others I shall finish my remarks now. I thank you.

Mr. EARNHART: Mr. President and Gentlemen of the Convention: May I presume to speak for the farmers of the state of Ohio? It is well that lawyers shall take the lead in this matter because they are better able to determine rights, but at the same time I believe that the farmers of the country, being amenable to the laws, should have some opportunity at least to give consideration to what they believe is right in the matter.

In the first place permit me to say I believe there should be a greater affinity between all classes. Now I have no objections to the lawyers whatever. I am glad to know that the difference is fast passing away between persons of different avocations. I believe that cases should be determined upon right and justice and not so much upon the ability of counsel to take advantage of and enforce technicalities of a complex law. That being the case, laws should be made more plain by the legislature and more simple, so that the courts would not differ so much in their interpretation of them. Most cases should be settled in the common pleas court. If judges are incompetent to determine the rights of the people we should elect better judges. That in my opinion would diminish litigation, because it would eliminate technicalities and would engender a greater respect for the court. It is a lamentable fact that the most of the people do not hold the court in as high esteem as they should because there have been cases where individuals have not secured their rights. The whole trouble is with the great corporations. Individuals are intimidated by the corporations sometimes and will not sue for damages. It is a well known fact that farmers having animals killed on the railroad often conclude that they had best not enter suit at all because of the delay and of the many questions that corporations every now and then are able to interpose and the corporation will wear them out before they can ever get a judgment. That is altogether wrong. The citizen should have his rights inviolate. I believe the courts should have more respect for legislative enactment. That is, I am in full accord with the Peck proposal that no legislative enactment should be declared unconstitutional by less than the unanimous consent of all the judges. The argument may be produced in the case of an individual who has carried a case up to the highest court that one judge may be corrupt and now and then the individual not get his rights, but taking the whole matter and all the cases the argument certainly holds good, and a unanimous decision should be had at all times. I am in full accord with the Peck proposal to allow the court of appeals to settle matters finally and not go on to the supreme court. I believe it will simplify matters and it will insure justice, and, as the venerable judge said, if a man cannot get justice in the appellate court he never will get it anywhere.

I have no objection to the supreme court deciding upon the constitutionality of acts of the legislature; that is their province, and I do not think anybody here has even by inference attempted to show that they should never do that, but I want them to go slowly and carefully so that justice may prevail between individuals at variance in the courts. I think we can safely depart from the old rule because of new conditions that have taken place in the last few years.

Therefore, I want to say in conclusion, and I intend to be brief on everything, that it is my firm conviction that this is a long step in the right direction, and I ask every farmer in the Convention to take the matter seriously and see if he cannot reconcile his views with those that I have expressed in the matter.

Mr. DOTY: A matter of business. If we recess until one o'clock there is only one hour left for consideration. There are four or five members yet to speak and there is no desire to crowd anybody out, and I move that the time for voting upon this proposal and pending amendments shall begin at half-past three instead of two o'clock.

The motion was carried.

Mr. ANDERSON: I suggest that we commence to vote on the amendments at two o'clock and pass on those. Of course nobody is trying to take advantage of anybody else in this matter. There is not very much disagreement. For instance, Judge King is in favor of the Taggart amendment. So am I. I believe that the whole thing can be worked out in a friendly way to the satisfaction of everyone so that there won't be ten votes registered against it, and that is an end to be desired, but it cannot be done under parliamentary usages as it is now.

The PRESIDENT: The gentleman from Mahoning wants the time to be two o'clock to begin voting on the amendments and three o'clock on the proposal.

Mr. ANDERSON: And that half an hour be given for the discussion of each amendment offered after that.

Mr. DOTY: The member from Mahoning [Mr. ANDERSON] and I are trying to arrive at the same results. I think if you will let the discussion go on and let those who desire to talk, speak until three-thirty that we can then handle the matter.

Mr. ANDERSON: I will withdraw my amendment.

Mr. DOTY: It is merely a matter of getting some place where we will start on the finish. I think three-thirty will accommodate everybody.

The motion of the gentleman from Cuyahoga [Mr. DOTY] was carried.

The member from Auglaize was recognized by the president and yielded to a motion by Mr. Doty.

Mr. Doty moved to recess until one o'clock.

The motion was carried.

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## AFTERNOON SESSION.

The Convention met pursuant to recess and was called to order by the president.

On motion of Mr. Knight a recess was taken until 1:15 o'clock p. m., at which time the Convention again met and was called to order by the president.

Mr. HOSKINS: I demand a call of the house.

The PRESIDENT: A call of the house has been demanded and the secretary will call the roll and the sergeant-at-arms will close the door.

The roll was called; when the following members failed to answer to their names:

| | | |
|---|---|---|
| Antrim, | Hahn, | Norris, |
| Brown, Lucas, | Halfhill, | Partington, |
| Cassidy, | Henderson, | Peck, |
| Cody, | Jones, | Price, |
| Crites, | Keller, | Rorick, |
| Doty, | King, | Stewart, |
| Eby, | Kramer, | Wagner, |
| Evans, | Kunkel, | Walker, |
| Fackler, | Leslie, | Weybrecht, |
| Fluke, | Marriott, | Worthington. |
| Fox, | Mauck, | |

The president announced that eighty-seven members had answered to their names.

Mr. KNIGHT: I move that further proceedings under the call be dispensed with.

The motion was carried.

Mr. HOSKINS: Mr. President and Gentlemen of the Convention: What I want to say upon this proposition I can say in a very few minutes and it is just upon one or two phases of the proposition.

Before talking upon the questions that have already been discussed I want to state that at the proper time, on my own initiative and at the suggestion of several other members, I am going to offer an amendment to strike out of section 1 the words "justices of peace." While that probably is not an important matter in connection with general principles involved in the proposition, I would like to explain to the members of the Convention—I presume all will understand it, but it will bear repetition, at least—that the office of justice of peace has been since 1852 a constitutional office. There is a general demand for the abolition of this office over the state. I think it is fair to assume that in many counties the office of justice of peace, as it now exists, is considered more or less of a nuisance. By offering this amendment and striking it out of the constitution, it would not have the effect thereby of instantly dispensing with the office in the state. The office would remain, but it would be taken out of the constitution, so that future legislatures may hold or create an inferior court or keep the present system if they so desire, but they would not be compelled to keep it because it is a constitutional office. The office itself, or a court of that description, can be created by the legislature under the provisions of section 2, that provide for the creation of inferior courts. A great many persons practicing law believe instead of having this system of justices over the state divided, two or three to a township, and many of those elected being persons not well qualified to administer the provisions of the office, that the jurisdiction should be given to some other court either to the probate court in the country counties or by the creation of a county judge, or something of that sort. I have no proposition along that line, but I desire to take this out of the constitution and let the legislature create an inferior court of that kind in which this jurisdiction may lodge. In more than half the counties in the state this jurisdiction could be lodged in the probate court and in more than half the country counties that would be the proper place to lodge this jurisdiction.

Now upon the main proposition, I think this is the most important proposition that this Convention has probably had before it. Some have assumed that I am opposed to the proposal. I am not opposed to it, but there are some changes in the original proposition that I feel ought to be made in the interest of making this constitutional provision a workable provision. I want, however, in the face of all this denunciation, more or less severe of the processes of the court to say this: That many of the evils complained of in the administration of justice, and particularly in personal injury suits, have been and are gradually being cured by the law. We all know that the law of assumed risk and of contributory negligence and the rules of evidence relating to them have been changed so that the old arbitrary rules of the courts defeating actions for personal injury upon the ground of contributory negligence no longer prevail. The question of damages, etc., is a matter for the jury. Just that much in passing.

Now one other proposition on the question of the delay. Much complaint has been made about the delays, but that has been cured by the statutes in the last three years by which all of these personal injury cases in the supreme court are, upon motion, advanced for hearing and they don't await their regular call or turn upon the docket as they did in former years. So that to a very great extent that will cure the complaint about the long delays of the court.

I do not believe, gentlemen of the Convention, that we ought to dispose of this proposition from the standpoint of the personal injury cases alone, or from the standpoint of delays that may have occurred in personal injury cases. In most counties of the state personal injury suits are the very smallest percentage. We do not have two of them per year in the county from which I come. The great mass of litigation is between individuals, although once in a great while someone is injured upon a railroad passing through a county or some one is injured in a manufacturing establishment, and we have a personal injury suit, but that is an exception and not the rule. I do not think we ought to approach this proposition and judge it from a standpoint that may have heretofore prevailed in the personal injury suits and which difficulties I think have already been very largely removed.

The question for consideration here is, what should

be the jurisdiction of this appellate court? I feel that we must preserve to litigants the present powers of what we call the circuit court in this appellate court, and I mean by that we must preserve the right of trial in an equity suit de novo in that court of appeals.

What is the situation? I bring an action to set aside a conveyance of real estate on the ground of fraud, or for some other reason that invokes the jurisdiction of an equity judge. That case is tried by the common pleas judge. We have no right to have a jury pass on it. Only one man passes on it, the common pleas judge. He passes upon the fact and he makes his decision and it may be unsatisfactory to one or the other party. Most surely it will be unsatisfactory to one side. The person aggrieved by the decision of the common pleas judge has a right to appeal to the circuit court by which he can have that case tried upon its merits in the circuit court, and that is a right we exercise in all the country circuits. It was exercised during all the years that Judge Norris was judge. The aggrieved party exercises his right to appeal to the circuit court and there is a trial of that equity case de novo in that court, but here that right is taken away. Now we want the right to bring witnesses into that court upon the hearing of an equity case and have that heard as an original proposition in that court, and we want that trial not upon the cold transcript, not by that court as a reviewing court, but as a trial court, to decide the merits of that case from hearing the witnesses if the litigant so desires.

It is a well known fact, and I think one that will not be disputed by any one, that no man, be he judge or juror, can be a competent judge of facts unless he comes in contact with the witnesses, unless he observes their demeanor and is able to judge of their character from the statements they make. Some witnesses might be able to make a smooth statement that would read well in print, and yet if you heard the story from their lips you would not believe it for a minute, and we have a right, owing to the fact that we can not have a jury pass upon the fact in our common pleas court in equity cases, to insist on the right to have a trial de novo in the court of appeals.

I favor the provisions of Judge Taggart's proposition, and I favor the provision that says the court shall have such other jurisdiction as may be conferred by law. There is not a single thing in the Peck proposal, I believe, that could not be enacted into law now by the legislature. It is a mistake for this Convention to believe or to assume all future legislatures are going to be controlled by improper motives. We have no right to assume that. If we must assume such a proposition as that, our representative government is a failure. We ought not to presume it and we ought not to tie up the jurisdiction of our courts and fix the jurisdiction by any hard and fast rule.

I have no objection to the final jurisdiction of this appellate court in the ordinary cases if you will open the door wide enough, as provided in the Peck proposal, that exceptional cases may be taken care of and if these cases and some others I would like to suggest are incorporated in it I will agree to it.

Mr. BROWN, of Highland: I would like to ask the gentleman a question.

The PRESIDENT: We have not been allowing questions under this limited debate.

Mr. FESS: I want to echo what the member from Auglaize [Mr. HOSKINS] has said, that this is one of the most important questions that has come up before us for consideration.

I believe that this Convention will do nothing that will bring a warmer support to the work that it is doing for the general public than the reform of the judiciary. I notice when I have been in conversation with different people there seems to be a universal demand that something be done that will expedite a final ending of disputes in the courts and it has been suggested if that could be done it will meet with almost universal favor. I deplore that someone has read into this proposal an attack upon the judiciary. It certainly is not such. It certainly does not reflect upon the personnel of the courts. This proposal, as I read it, is simply to cure a bad system, to eliminate the faults that have made it impossible under our practice today for a litigant to see the end of a lawsuit, whether in two or twenty years. There is not anything today so certain as the uncertainty of the time of the ending of a suit and the expense of it. This proposal is not an attack upon the principle of the adjudication of cases, but simply to remedy the faults of our present system so we can see the end of a dispute or of a lawsuit. I would be the last man in this Convention to deny the right of the judicial department to sit upon the constitutionality of a legislative enactment, and if it finds that the enactment is not in keeping with the constitution to pronounce it unconstitutional.

I wonder whether you have noted that the one distinction between our own government and the governments of all the remainder of the world lies in the position we give the judiciary. It is not in the fact that our government has three departments and other governments have not, because all governments have three departments. All governments, whether they be monarchies, despotisms or limited monarchies, or whether they be republican or pure democratic—all governments recognize the three functions, intelligence to make the laws, good will to interpret the laws and power to enforce the laws. And in that respect we are not different from Turkey; we are not different from England. But wherein we differ from all the governments of the world is that we recognize the three departments as inter-dependent and yet in a degree independent. That is the difference between our government and any government in the world up to the time ours began. And we do not want to destroy that. We want to hold to that unique feature, and when a statute comes from the legislative department and there is a question of doubt as to its constitutionality in the opinion of someone suffering from its operation, that man should be permitted to take it to the court for final decision, and that court ought to be absolutely independent, sitting upon the case, to speak as to its constitutionality. The only point of difference is, should that decision be unanimous or may it be by a divided court?

So far as I am concerned I will vote for this proposal that it shall be unanimous rather than see the proposal defeated. I would much prefer a decision of five to one if I could have my own way about it.

It is not quite right to say it is one department setting

aside another, because every law that comes from the legislative department is by a divided vote. It is not unanimous. And so when it goes to the supreme court it may be divided up there. It would be a divided court passing upon the legality of a law that has been passed by a divided legislature, and it is not one department divided overcoming another department united.

I will vote for the Peck proposal requiring a unanimous concurrence rather than see it defeated, but if we keep the court as it is now I would rather have it five to one.

Now, in regard to the purpose of this proposal, I know you will all admit that we need something to prevent delays. There is nothing so abominable in our system as to allow a case to be drawn out until there is absolutely no end to it. That means that the poor man who has a case has no chance to fight it to the ultimate limit. He will simply be impoverished by a system that admits of delay made possible by appeals and writs of error and various motions of all sorts until he can see no chance of ending the thing. What we want today is to give to the least prominent individual citizen in our state just as much right to adjust his differences with another as it gives to the richest man or to the corporation, and you can not reach that until you make it possible for him not to be impoverished by continuances of his case that keep him in court until he is worn out by sheer force of not having enough money to keep on. Why can't the legal fraternity see that if you make it impossible for unlimited delays in cases that the lawsuits would be multiplied, for men then will not be afraid to go into court? As it is now men are afraid to go into court because they can not see the end of the litigation. What we want is to make even the common pleas courts' decisions final in some things. I do not feel that my friend from Auglaize has raised a question that is serious. If I had my way there would be a certain class of cases that never would go beyond the common pleas court. That court should be final in some litigation, and when we come to the court of appeals we must make its decision final in many cases. We don't want to abolish the circuit court, for that would make every man who has a case to be heard in the higher court come to Columbus, under heavy expense, to sit and hear all sorts of motions for delays and never know when his case can be heard. That would be unfair to him as much as the other. We want to supersede the system of circuit courts by a system of appellate courts which will have final jurisdiction, and which will sit not in Columbus, but at the door of the litigant, so that he can see the finality of his lawsuit right near his home. I have been told if this proposal passes at least forty per cent of the cases that now reach the supreme court will stop in the circuit court, and some say more than forty per cent.

What objection is there to such a plan, making the circuit court or its substitute, the court of appeals, final in certain matters? Some people say it will reduce the supreme court, it will leave them nothing to do and that court will be reduced in dignity and service. It certainly will not do either. The supreme court has an open door in this proposal and one that I was afraid of, until certain members assured me that there is no danger. That door is by writ of certiorari, by which the supreme court can order the record sent up from the court of appeals on certain cases for the review of the cases in the supreme court. I am sure there is a door that will open up to the supreme court much work.

Now I am a little afraid of the provision in Judge Taggart's plan, where it says "And such other appellate jurisdiction as may be prescribed by law." Gentlemen of the Convention, that is the proposition that in general terms I would support, but what we are trying to do in this Convention and in this proposal is to make that one thing impossible, viz., to increase unlimitedly appellate jurisdiction of the supreme court. What is the limit under this wording, and what will prevent the lawyers in the legislature from providing a law to send up all sorts of cases? My only plea is that we shall make it possible to stop cases near home; that we shall have final jurisdiction near home, instead of having to go to the supreme court except in cases involving constitutional law, cases arising under the constitution and the other cases defined as felony.

I would hesitate a long time to vote upon the proposition that gives to the supreme court jurisdiction of questions involving the interpretation of statutes. How many cases would not, and how many lawyers here could not convince the lower court that the case did involve the construction of a statute? If we are here to make it possible that a litigant without money can have a final hearing without having to go to the expense of trials without limit in the supreme court, why should we question the feasibility of giving this court of appeals or appellate court final jurisdiction? It seems to me that here is the most important measure that we shall have before us. I now recapitulate because my time is up.

I want to say in the first place, in my judgment, here is the most popular measure that the Convention will give to the people of Ohio.

Secondly, it is not an attack upon the judiciary. If it were I would vote against it, for I recognize the necessity of lodging that power in somebody. It is not an attack upon the personnel of the courts. It is simply trying to cure the faults of a bad system that are not corrected under our present system; and if we want to retain the respect of our judiciary which we must maintain if we hope to ever have the dignity in the law respected; if we want to maintain that respect, we must remove these faults and make it possible for the court to adjudicate cases without so much unnecessary expense. This proposal is not in the interest of a particular class. It is wrong to hold out that it is in the interest of any class or against the interest of attorneys. I respect the opinion of attorneys here in the Convention, because they have studied the technicalities of the law, but hear me, gentlemen of the Convention, it is the undue importance that is placed upon the technicalities of the law, rather than going to the merits of the case, that has brought us into disrepute. Is it not possible to make laws so free of technicalities that more importance and value may be placed upon the merits of a case? Then if that can be done I am sure this proposal will not hurt any lawyer, and it will not make it impossible for a litigant to have a case adjudicated fairly and with expedition.

I hope this proposal, with a few minor changes Judge Peck will offer, that have already been suggested and that do not especially go to the merits, will pass this Con-

vention by almost a unanimous vote. It will mean so much when it comes to the people that we are trying to place before them a measure that they should and will approve. Gentlemen, let us make every man equal under the law, and make it absolutely impossible that the poor man shall be under any disadvantage when he is trying to redress his grievances against a man of great power; and if we do that you will have the approval of the citizenship when we go to the people this fall.

Mr. ANDERSON: I have received a telegram that I believe by reason of the standing of the gentleman who has sent it ought to be made part of the record. The gentleman is an ex-judge of Cincinnati. The telegram reads:

Cincinnati, Ohio, April 9, 1912.

D. F. Anderson, Esq.,

Constitutional Convention, Columbus Ohio.

I congratulate you upon your demand for justice to the poor man. Although the lawyers favor making it easy for courts of error to reverse, the people are against it. Except in extreme cases the legislative enactments should stand and the verdicts of juries should stand. Keep up the good fight.

WM. LITTLEFORD.

The delegate from Cuyahoga [Mr. THOMAS] was here recognized.

Mr. THOMAS: Mr. President and Gentlemen of the Convention: Coming from that class of citizenship of Ohio, the working class, which has suffered chiefly from the delay of the courts, from among the poor people who have been mentioned here so much in the discussion of this proposal, I will say on behalf of the workers and laboring men who are in this Convention that we are giving our hearty approval to Judge Peck's proposal for reform in our judiciary system. We believe that with the adoption of this proposal there will be an opportunity at least for getting justice for the poor man within a reasonable time. I am of the opinion that there is no necessity of increasing the supreme court to seven instead of six judges. Now that the work of the court has been cut down about one-half, it seems to me instead of increasing the number we should lessen the number to five, and if, as Judge Taggart and some of the other speakers suggested, we need a chief justice to have charge of the work of the supreme court, we are satisfied to vote for a chief justice.

Judge Nye, in answering my question a short time ago in reference to the qualifications necessary for a supreme judge pointed out the fact that these judges were elected by the people because of their legal attainments and qualifications and because of their exceeding ability to deal out justice from the supreme bench. The workers of Ohio have been in somewhat of a Rip VanWinkle sleep on that subject for about a quarter of a century, imagining really that our old party conventions were selecting judges because of the facts stated by Judge Nye, but we came to the conclusion some three or four years ago that instead of being selected because of their legal attainments they were picked by the corporate interests of this state who went to the conventions for the particular purpose of selecting judges who would serve them. And they have served them well, particularly in cases of personal injury, where the poor cripple or the widow and orphans have had no opportunity to contest with them because of the delay of the courts. And the reason we are in favor of this judicial reform is because of the impossibility now and in the past of the workers securing justice, because we have been unable to carry our cases up or present them properly in most of the appeals that have been made. We have had to depend upon that class of lawyers who out of their generosity to the workers and the poor men, if you like, were willing to take our cases on a percentage and maintain our widows and orphans and the cripples themselves, occasionally, during the periods when those cases were going through the courts, and where it has been impossible for attorneys to do these things for us our widows and orphans and cripples have had to stay in the poor house while trying to secure justice.

The delegate from Mahoning made reference in one of his answers to questions to the fact that the Ohio supreme court, previous to the passage of the Norris and Metzger acts, practically nullified every safety law made for the protection of the workers in this state by their decisions on assumed risk, contributory negligence and fellow-servant rule. As a verification of his answer all you have to do is to refer to the nullification of the Sanford act, passed in 1890, by the decision of the supreme court on the fellow-servant rule; the Dunlap law on assumed risk, that was practically nullified in the same manner; the provision of the miners' safety law referred to; the miners' right of action where laws are not complied with by the company, section 3365; the guarding of rails and frog safety laws; providing guards for machinery in factories and workshops; the Norman case; the law that no child can be employed around dangerous machinery; the Jacobs case.

In reference to other laws passed for the benefit of the workers it is only necessary to call attention to the fact that the eight-hour law for public work was declared unconstituional, the ten-hour law for train men declared unconstitutional, the law passed to regulate the sale of convict-made goods declared unconstitutional, the right of the poor litigant to attorney fees in appealed cases declared unconstitutional, the law weighing coal before screening for the coal miners; and the mechanic's lien law.

A bulletin recently issued by the New York state library shows that four hundred and sixty-eight statutes have been declared unconstitutional by supreme courts of various states in this country, fourteen of them in Ohio. Among those in Ohio were the ones I have just enumerated. In the campaign that the organized workers of Ohio undertook against some of the members of the supreme court — some of whom we didn't think fit to serve any more were defeated — we showed that there were some twenty-four personal injury cases that had been passed upon by the supreme court where the decisions had been secured by the individual in the circuit court and had been reversed in the higher court. There were also some eighty-seven unreported similar cases, within a period of a few years, that our investigators found in going over the record.

Mr. SHAFFER: How many of those were affirmed?

Mr. THOMAS: Our record does not show that. It simply shows the number of cases that were passed upon unfavorably.

My amendment provides that the supreme court shall have no right to pass upon questions of constitutionality of statutes enacted by the legislature, and it is the opinion of the workers that each department of government should be responsible for its own act, and that no department of the government should overlap or override the work of the other. We have provided in this Convention for the the initiative and referendum as a means whereby legislative acts that may be in contravention of the constitution shall be passed upon by the people, and no other power should have the right to determine that question other than the people themselves. The people elect the supreme court, the people elect the legislature, and in the legislature we have judiciary committees supposed to be composed of the best legal minds in those bodies, as we have them in this Convention, and I do not think any one here believes for a moment that there is any better legal ability on the supreme court than we have right here in this Convention to determine whether the work we are doing is within our powers or not. The same thing applies to legislative bodies.

Judge Wanamaker, of Akron, I understand a candidate for the supreme bench, according to his announcement in the papers, had this to say in a speech made not long ago in the city of Akron:

> There is too much judge-made law these days. When judges rightly understand and faithfully observe the law as it is, giving rightful force and effect to the plain, clear and complete terms and provisions of the act, in accordance, not merely within the letter, but the spirit of the law, they will add much to confidence in the courts, the safety of society and security of the state.
>
> Let them leave lawmaking, law-modifying and law-repealing to the legislative bodies, which are sworn to support the same constitution and laws the judges are sworn to support.

Abraham Lincoln said:

> If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the supreme court, the instant they are made the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of the eminent tribunal.

It seems to me that we have done just as Abraham Lincoln predicted, and it is time we were going back to those fundamental principles of our government in establishing three departments to do our governmental work.

Judge Taggart's amendment and both proposals submitted, for the first time in Ohio, in my opinion, and I think I am correct, write into the constitution of Ohio the right of the supreme court to pass upon the constitutionality of a law and it seems to me that the members should stop and consider that phase of the proposition, that you are giving rights now never given before by any constitutional convention.

The delegate from Franklin [Mr. KNIGHT] was here recognized.

Mr. KNIGHT: Mr. President and Gentlemen of the Convention: I am in a peculiar position with reference to the pending subject. Perhaps I may properly be classed as a layman who has had the advantage of a legal training; or as a lawyer who has never been a practitioner. At any rate I am one who has been a teacher of constitutional law for a decade and a half, attempting to train students, not as special pleaders, but to know the relationship of constitutions, state and national, to statutory law, and the proper functions of judiciary, legislature and people; above all I have always tried to inculcate in their minds the fact that the judicial department is one of the co-ordinate departments of government. It does not seem to me to be serving the people of the state or our own purposes here to bring into this question, directly or indirectly, attacks upon the judiciary. All such attacks in the last analysis come down to this, that we are making an attack upon human nature. No one supposes for a moment that judges placed upon the bench cease to be human beings. They are liable to error as the rest of us are. I do not know that we should impute it to our courts as a crime to commit an error which in the rest of us would be merely an error of judgment. No one for a moment supposes that our courts are omniscient or omnipotent. It seems to me that we shall best serve the people of this state by making such modifications in the judicial system as shall reduce to a minimum the liability to errors of judgment on the part of the court that work to the disadvantage or detriment of the rest of the people. That, it seems to me, is the real problem.

Now the pending proposal and the substitutes have many good features. In the main the Peck proposal is excellent, and this fact is recognized by the two substitutes, for each of them accepts the frame work of the Peck proposal and modifies that proposal in a few particulars. I may say parenthetically that the Franklin bar, at a meeting which I understand unofficially was not attended by more than a small percentage of the membership, resolved against the Peck proposal, but as the fifteen or twenty men who attended the meeting are only a small minority, I beg leave to represent the majority of this county and I am in favor of the Peck proposal with modifications.

The important features upon which there is division and upon which I wish to speak are —

1. What shall be the constitution of the supreme court? Shall it consist of five, six or seven judges?

It seems to me there is a decided advantages in an odd number, and a decided advantage in having a chief justice elected as such for the entire term for which he is elected. On this point I am distinctly in favor of the modifications contained in both the Taggart and the Worthington substitute providing for a supreme court of seven with a chief justice elected as such. I do not regard the fact that it requires one additional judge above the number now constituting the court as an objection that should have weight if thereby we make a more valuable court, and one whose opinions will command the respect which seemingly in the minds of some of us it does not now.

2. Shall the supreme court have authority to declare laws unconstitutional? Yes, emphatically, unless we are to break down the barrier between statutes and constitu-

tion. The constitution is the supreme law of the state. Under it we have the legislature and the courts and the executive department. It is a rule of conduct by which we are to live together and by which we are to know what each of our agents has a right to do. By that same organic law we put in the hands of the judiciary the power to act as umpire and hold the rest of us to our duties. I am distinctly opposed to taking from the courts that power.

3. If the supreme court has the power to declare a law unconstitutional, by what proportion of its membership shall this be done?

It seems to me that all purposes and all interests, personal and individual, large and small, are sufficiently conserved by a provision, having a court of seven, that no law shall be declared unconstitutional by less than five of those seven judges. I do not think it is wise to require the unanimous opinion of the court upon this subject, for reasons that have been more than once explained here in the last few days.

4. What should be the general jurisdiction of the supreme court? It seems to me that this ought to be fixed absolutely in the constitution. Therefore, I am distinctly opposed to the provisions of lines 18 and 19 of the Taggart substitute which add "such other appellate jurisdiction as may be conferred by law." If there comes a time when we are obviously at a disadvantage because the supreme court has no jurisdiction in some matter, we have a way of amending the constitution; and there are few cases that are so vital that we, for the sake of those few cases, should leave the door as wide open as it is now so that the legislature may confer all jurisdiction on the supreme court. If the emergency arises we can handle the situation in two ways, by the initiative and referendum, and, second, through the legislature, for I apprehend an easier way will be provided for us to amend the constitution without resort to the initiative and referendum. It seems to me that the Taggart substitute takes us back and holds us where we are on that point.

5. As to revisory jurisdiction of the proceedings of administrative officers, it seems to me that this should be added, and in this regard the Worthington amendment, lines 17 and 19, is distinctly wise, that the supreme court should have such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. The public utilities commission and other commissions now undertake to make rates on matters under their control. Those bodies are not courts, and therefore the legislature can not under the present constitution, nor can it under this proposal unless we provide it here, confer appellate jurisdiction on the supreme court over what is not a judicial body. Therefore, the provision must be inserted here so the supreme court can have that jurisdiction and that we may have speedy decisions of matters promulgated and announced by these administrative officers.

6. In the next place, line 27 of the Worthington substitute proposes that the supreme court may have jurisdiction in cases involving the construction of a statute. I am distinctly opposed to that. That is another door by which we shall get back to the situation where we now are. Under this the supreme court would acquire appellate jurisdiction over almost every subject, for there are very few cases that can not be made to involve the construction of a statute.

7. As to the appellate court it seems to me to be wiser to keep the number of districts at eight rather than to increase to nine, as provided for by the Taggart substitute, as that would necessitate a rearrangement of the districts and would add one more court, perhaps necessary and perhaps unnecessary; but the same thing would be accomplished by giving to the legislature power to increase the number of districts if it becomes necessary rather than fix it by the constitution. As to the jurisdiction of the appellate court, it seems to me, at present at any rate, that the reversal of the decision of the common pleas court should be allowed by a majority vote of the court rather than that it should require unanimity of the court.

8. Lastly, I am very strongly of the opinion that an amendment should be introduced somewhere into these proposals before one is finally adopted, requiring that every case heard in court, both supreme court and court of appeals, shall be reported. That can not be left to the legislature because if the legislature were to undertake to enact a statute upon that subject the court would rightly say it was an invasion of the territory of the court, whereas if in the constitution we confer the power upon the legislature to order that cases shall be reported such objection can not be raised, and we shall have a proper provision on that subject. I wish to offer an amendment when the time comes that the decisions in all cases of the supreme court and court of appeals shall be reported, together with the reasons therefor.

It seems to me we are in a situation where neither proposal is exactly right and therefore it may be necessary for us to override our technical rules a little to whip one of these proposals into such form as to embody the best in all, and I agree most heartily that there should not be, and I do not believe there will be, any difficulty in the way of our getting together and giving practically an unanimous vote in this body on the main principles on which the report is based, of which the substitutes are merely modifications.

Mr. SHAFFER: Mr. President and Gentlemen of the Convention: It is with extreme diffidence that I arise to address you on this proposal. Because of the learned jurists who are present and who have spoken upon and who have lent a hand in the making of this proposal and the amendments thereto I feel that I speak as a layman. However that may be, I desire to raise my voice in favor of the general principles and the ideas that are embodied in this Peck proposal. I take this position without casting any reflections on the past history of the courts of Ohio, and without finding any fault with the decisions of the courts or with the courts themselves. In the development and progress of civilization there comes a time when all minds meet on the proposition that there should be a change. We live in such an age of evolution and development. While the principles of justice and righteousness are eternal and remain always, the application of those principles must meet the requirements of our present environment. All agree that there is too much technicality in the administration of justice. All of us realize this. All agree that there is too much delay in the administration of justice. We all realize this. And to that end this representative body

is practically of one mind, that the judiciary system of Ohio should be changed, and it should be changed in such a way that while the principles of justice and equity shall remain the same as they always have been, courts should be so provided by this Constitutional Convention that they can administer those principles with celerity and with justice to all who come before them. I hold that this is the most important proposal this Convention has considered. As the last resort, as the final arbiter of the rights of the people of the state of Ohio, the courts must be respected. All of us have that in our make-up, in our very nature, which makes us willing to submit to an impartial tribunal the determination of our rights. We are here to try to remedy the defects of our judicial system and to get together on something that will restore to the courts and to all the officers of the courts that dignity and respect which they deserve.

Now, I make these introductory remarks with the idea of going over this proposal of Judge Peck and reviewing with you the different amendments and suggestions that have been made so it will conform with the idea which all of us have, but upon which we are somewhat at sea as to the way they should be expressed.

Now I will ask your attention to this Peck proposal and to the suggestion made by Judge Worthington and Judge Taggart in their substitute proposals presented to this Convention.

Section 1 is practically the same all the way through, except that Judge Worthington changes the words "court of appeals" to "appellate courts," and — perhaps I had better read it:

> Section 1. The judicial power of the state is vested in a supreme court, appellate courts, —

Instead of courts of appeals as in the original Proposal No. 184

> —courts of common pleas, courts of probate, justice of the peace, and such other courts inferior to the appellate courts as the general assembly may from time to time establish.

I think that change is wise and should be adopted.

Now, going on to section 2, Judge Worthington suggests that there be a chief justice. Therefore I suggest that section 2 be amended so as to read:

> The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges and the judges now in that office shall continue," etc.

I think it is the consensus of opinion of the conservative as well as the radical members of the Convention that while we do not want to change the present number of judges, there should be an uneven number of judges of the supreme court. The election of the chief justice would remedy that difficulty, besides giving to the chief justice, elected as such, the responsibility for the execution and administration of that court. There is no other suggested change in the section except the writ of prohibition. I do not think there is any question but that word should be added. It seems to be agreed upon.

Then there is a more important change at the end of the period in line 17, where provision for added jurisdiction of the supreme court is made in the words "and such revisory jurisdiction in the proceedings of the administrative officers as may be conferred by law."

We are, as stated in the beginning of my remarks, in an age of evolution and it seems that in the legislation of other states they have evolved the idea of commissions having charge of public utilities, taxes and other matters in which we are all interested. Those are all administrative officers of the state, and those administrative officers are getting to be very important officers; in fact, the most important we have in the state today, and the suggestion is that the supreme court should have supervisory and advisory power over them.

Mr. TAGGART: Revisory.

Mr. SHAFFER: It is the same thing. Wherever a commission makes a ruling, if anybody is aggrieved he can take it to the supreme court and the supreme court would revise or modify the judgment of the commission on that question. I hope that will be adopted.

If we adopt the chief justice idea, suggested in line 26, I would strike out the language that no statute should be held unconstitutional except by a concurrence of five judges of the supreme court, eliminating the word "all" and striking out the words "sitting in the case." I take the middle ground on this much disputed question as to the court having authority to declare an act of the legislature unconstitutional and to answer Mr. Thomas' objection that there never was such a provision in any constitution I refer him to our present constitution of Ohio section 2, which provides for dividing up of the court into two divisions for the adjudication of cases, where he will find the following language:

> A majority of each division shall constitute a quorum, and such an assignment of the cases to each division may be made as such court may deem expedient, but whenever all the judges of either division hearing a case shall not concur as to the judgment to be rendered therein, or whenever a case shall involve the constitutionality of an act of the general assembly or of an act of congress, it shall be reserved to the whole court for adjudication.

That has been the law in Ohio since 1883, so that this is not an innovation to put this provision in the constitution.

In line 28 we have brought up to us the much mooted and much argued question as to the requirement of unanimity in the reversal of a judgment of a common pleas judge.

The time of the gentleman here expired and on motion was extended.

Mr. SHAFFER: Mr. Jones offered a suggestion in his argument which appealed to a great many of us. It was to the effect that we add to the cases of public and general interest which the supreme court might affirm, modify or reverse, cases where the decision of the court of appeals is not unanimous, in which, upon the application of either party, the supreme court shall direct the court of appeals to certify the record up to the supreme court, which may review, affirm, modify, etc.

Mr. HALFHILL: Which proposal are you quoting that language from?

Mr. SHAFFER: The original Judge Peck proposal, and this is a suggestion in line 29. No amendment was

offered, but Mr. Jones, who is now absent, asked me at the proper time to present an amendment covering that ground. However, he has modified his original suggestion. His original suggestion was that in cases where the decision of the court of appeals is not unanimous the supreme court shall upon application of a party of interest direct the court of appeals to certify its record to the supreme court. He has changed that to read "in all cases where the decision of the court of appeals is not unanimous for reversal of the judgment of an inferior court." That would set out a class of decisions where the court was not unanimous in affirming the decision of the courts below. This amendment has merit and I shall introduce it at the proper time as an amendment to this proposal.

Another amendment that was practically agreed upon in the wording of the proposal is in line 39. This was a change of the word "after" to "before" and was accepted by the committee. Now we come down to line 45, at the end of the word law, "the court of appeals shall hold one or more terms in each year at such places in the district as the judges may determine upon." That I approve of and I think a majority of the delegates do.

In Judge Taggart's amendment, at line 50 of the Peck proposal, that the general assembly shall provide for the rotation of such judges throughout such districts, I do not know anything that will add uniformity to the decisions and certainty to the law upon different questions more than by a visit of one circuit judge to another district, thus getting the views, not only on questions of law, but on questions of practice. It seems to me it is of the utmost value, not only to the judiciary of the state, but to the litigants and to the lawyers, that that should be embodied in this proposal.

Now there is but one more suggestion that I wish to make and that is also embodied in a suggestion by Mr. Jones that the provision at the end of the word "case" in line 65 of the present proposal should be added to the end of line 31, so that it would read that in all cases where the judgment of a court of appeals is in conflict with the judgment pronounced by another court of appeals of the state upon the same question, the supreme court shall upon application of a party in interest, made within such time as may be prescribed by law, direct such court of appeals to certify the record to the supreme court for review, final determination, etc. That is in line with Judge Worthington's proposal and also with Judge Taggart's proposal, so as to give jurisdiction to the supreme court in all cases where there is such conflict of decisions between the different courts of appeals of the state. Then the period after the word jurisdiction in line 63 should be stricken out and the words "and in cases hereinbefore excepted" inserted. That makes it logical, so that the jurisdiction of the supreme court will all be contained in section 2. I thank you for your attention and sincerely hope that this proposal will go through substantially as it has been offered.

M. BROWN, of Highland: I want to serve notice on the Convention now of an amendment which I have written which I believe will cure some of the objections to the original proposal. I do not know that the amendment will be in order now, but I think a notification of the fact that the amendment will be offered will not be out of order.

The PRESIDENT: It may be proper to call attention to it.

Mr. BROWN, of Highland: There seems to be a difference of opinion between Judge Peck and other members of the legal profession regarding the restraint upon the circuit court or court of appeals in trying cases de novo under this proposal. It has occurred to me that all of that should be cured by inserting after the word "procedendo" in line 57 these words: "And the right to try de novo any case not tried by a jury sent up from the lower court." Then let it proceed just as it does, defining the jurisdiction and the final judgment of the appellate court. I believe this amendment would relieve the apprehension of many of the lawyers about the injustice that this proposal would impose on litigants who might not be satisfied with the judgment of the lower courts.

Mr. TALLMAN: Mr. President and Gentlemen of the Convention: I am in favor of a great many things that have been said and a great many of these amendments, but I am heartily opposed to others. I do not think there is any question in the minds of this Convention as to the supremacy of a constitutional provision over an act of the legislature, and I shall not discuss that at all. I think it is a matter of detail largely for the legislature instead of the Convention to define questions as to the number of supreme judges and the number it would require to reverse or affirm. I am not particular about that, but I do think there is one matter that has escaped the observation of this Convention and one that is material, and the reason why I allude to it is that the member from Mahoning [Mr. ANDERSON] made it a special ground of attack in one of his very able speeches made to this Convention. I might not have mentioned it had it not been for the further fact that it was given emphasis and importance by the member from Franklin [Mr. KNIGHT]. It is that in no case should the court have jurisdiction to declare the meaning or pass upon the meaning, of an act of the legislature —not as to its constitutionality, but to pass upon or determine the actual meaning or construction of that act of the legislature.

Now, gentlemen, I want to point out to you some of the difficulties there are in that rule if adopted. It is true that under the section here defining the judges of the supreme court and defining their authority it says "such other jurisdiction that may be given by law," but Judge Worthington of Cincinnati, has insisted that it was important to provide—in the constitution itself—that in every case involving the construction and meaning of a statute, the supreme court should have jurisdiction to determine its construction in every case where its construction is involved. I want to illustrate and explain to you the importance of this.

In 1908 there was a commission appointed consisting of three miners, three operators and the chief mine inspector of Ohio. Previous to that appointment the members appointed to frame the General Code—to codify our statutes—put all of the mining laws together, and the next legislature, in getting out volume 101, repealed every section of the act that was in the General Code but re-enacted it largely, with some changes. Now, bearing that in mind, I want to make another statement for the benefit of the lay members of this Convention, and

that is that under the common law in a personal injury case there was no right of recovery except to the person injured.

The common law was adopted in this country and it was only by means of legislation that the right of action was extended to the wife or children or next of kin of a person killed. Now, without an extension of that right by statute, the rule of construction would be that the damages for an injury would be confined to the party injured. I want to call your attention to one section of the law adopted by the mining commission, section 972, page 86 of volume 101, which in substance reads as follows:

> In case of an injury to person or property occasioned by a violation of the provisions of this act, or any willful failure to comply with any of the provisions of this act by the owners or operators of a mine, a right of action shall accrue to the person injured for any direct damage he may have sustained thereby, and in case of loss of life by any such willful negligence or failure a right of action shall accrue to the widow and lineal heirs of the deceased.

That means, in the first place, the right of action shall accrue to the person injured. That is all right. Second, in case of death it will accrue to the wife and to the children who are the lineal heirs. But it does not give any right of action to the next of kin of an unmarried man who is killed in a mine, who has no wife or children.

Now I want to call your attention to another thing. In the common pleas court of Belmont county an action was brought by a mother as administratrix of her son, a minor sixteen years of age, who was killed in the mine by a violation on the part of an operator of some of the provisions of this mining law. I have not the time to tell you what they were, but it was a violation of the mining law. The minor had no wife or children. The common pleas court there said, he being dead, and having no wife or children, there was nobody on earth that had a right of action and sustained a demurrer to the petition.

Now I want to call your attention to another thing, and right here I want to give a little credit to my worthy friend from Mahoning county [Mr. ANDERSON].

He claims to have had much to do with the employers' liability act. That is a good act. Remember now, before the passage of this mining act the law had been for thirty or forty years that in case a person was killed in a mine his administrator had a right of action, and that right of action would be for the benefit of the next of kin, who was his wife and his children if he had any, and if he didn't have any his next of kin would be his father and mother and his brothers and his sisters. Therefore the law for forty years before this mining act was passed was that a party injured could recover, and if he died his wife and children could recover, and if he had none, then his father and mother and his brothers and sisters as next of kin could recover. The construction of this section of the mining act by the court deprived the father and mother and brothers and sisters of any right to recover because they were not named in the statute.

The time of the delegate here expired and on motion of Mr. Redington was extended.

Mr. TALLMAN: Now in the passage of this employers' liability act, remember that the general act giving the right of recovery to the next of kin had been in force for forty years, and it was very properly repealed in this employers' liability act, volume 101, page 194. The employers' liability act, passed after the miners act, repealed the old law that had been in force forty years, but reenacted it in practically the same terms, thereby putting it out of the power of the court to say that the old statute had been repealed by implication, because it was repealed by the legislature and reenacted later in the same session, showing that the legislature intended to give a right of action to the next of kin in case there was no wife or children surviving the decedent.

That being the case, after the passage of the mining act and the passage of the employers' liability act, on August 23, 1910, a boy sixteen years old, a trapper, was killed in the mine by reason of a violation on the part of the mine owner of some of the provisions of the mining act, and a suit was brought in the common pleas court of Belmont county in the name of the administratrix, who was his mother, to recover the damages sustained by the next of kin—herself and husband, who was an invalid, and some children, some younger than the boy who was killed and some older, but the boy who was killed was her chief support. She brought an action, after the passage of both statutes alluded to, to recover. A demurrer was filed to that petition and for the benefit of the laymen in the Convention I will say that a demurrer raises a question of law—that is, even if all said in the petition is true, there is no right to recover. The court, admitting that everything in the petition was true, yet, under the mining law framed by three miners, three operators and the chief inspector of mines of Ohio, and passed by the legislature, refused a right of recovery to that mother for the death of her child, her only support, because the son had no wife and children.

Now, gentlemen, the case went very promptly to the circuit court. It went there on the 4th of December, 1911, and on the 8th of December, 1911, the circuit court affirmed the decision of the court below sustaining that demurrer, and the case is now in the supreme court. I want to ask my neighbor from Mahoning [Mr. ANDERSON], or I want to ask any other lawyer in the Convention, under those circumstances, if there were no appeal by petition in error or otherwise to the supreme court where a demurrer has been sustained to the petition by the common pleas court and circuit court or court of appeals, as it may be, asserting that the law gave no right of recovery to the mother and her other minor children, and that case could not be taken on review to the supreme court, I ask you what remedy have we? I ask you if we would have any remedy? Absolutely none whatever. This demurrer involved the construction of a statute.

Now, gentlemen, you heard the gentleman for Mahoning [Mr. ANDERSON], and the principal part of his speech was made in favor of preventing the court from passing upon the construction of or meaning of any law. Here they passed upon the construction and meaning of not only one but two laws, and they held that the law passed after the mining law had no force or effect. The liability law reads that when a death of a person is occasioned by wrongful act or negligence for default, there is a right of recovery in the next of kin, which in-

cludes father, mother, brother and sister if there is no wife or children. Then it says such action shall be for the exclusive benefit of the wife or husband and children, but if there be neither of them, then the parents or next of kin. Taking those two statutes together, the common pleas and the circuit court held that the mining statute as passed, although in direct violation of the language of the statute that was last passed, gave no right of recovery to the father, mother, brother or sister at all.

If the supreme court has no right to declare the construction or meaning of a statute you cannot go there by petition in error in cases like this, no matter whether your case is important or not. It may not be important to the general public, but it may be immensely important to you. Are we going to permit this folly? I remember when the gentleman from Mahoning [Mr. ANDERSON] was urging eloquently and earnestly that the supreme court should not have the right to construe or determine the meaning of any law, that when he finished you clapped your hands and cheered the sentiment expressed by him. Now why don't you clap your hands and cheer when this widow and her minor children are deprived of the right to recover for the death of that minor boy?

Mr. WINN: If the supreme court sustains the judgment of those two lower courts you will still be convinced that they are all wrong?

Mr. TALLMAN: There will simply be no remedy.

Mr. WINN: Then your argument would be that all the courts are wrong?

Mr. TALLMAN: It would amount to that.

Mr. WINN: Then you will be in favor of going on to the supreme court of the United States?

Mr. TALLMAN: It might amount to that, but it would not amount to what you contend for, giving the poor a quick and speedy justice.

Mr. WATSON: If the supreme court sustains that, it would have been better for the case to have stopped below?

Mr. TALLMAN: I leave that to you. I have given an instance and that is a case that I have a record of. There is a case where the poor were deprived. That widow had other minor children. They might all work in that mine and all be killed and there would be no remedy under the law if the supreme court has no right to construe or interpret the statute where it has been wrongly construed by the lower courts.

Mr. HAHN: Mr. President and Gentlemen of the Convention: In substance I approve of the proposal of Judge Peck, of Cincinnati. I consider it a masterpiece of judicial provision.

I am glad to find reproduced in it my two proposals that the present circuit courts be abolished and that the supreme court be required to report its opinions. Both amendments were at first recommended for indefinite postponement. Our present circuit courts have no respectable law—that is to say, their decisions need not be respected everywhere in the state; the decisions of one circuit court may be disregarded by any other court.

Judge Peck's proposal, if adopted by the state of Ohio, will not only make the law of the circuit court respectable, but it will, at the same time, do away with a great many delays that have been the objects of so many complaints, and it will remove many an obstacle in the way of the present administration of justice.

A remark was made here that if we had so many circuit courts of final jurisdiction no work will be left for the supreme court of Ohio. Last week a gentleman, not a member of this Convention, in his address before you claimed that cases of procedendo do not exist in Ohio. We do not use the term "procedendo," but we have mandamus proceedings, meaning in the state of Ohio the same thing that procedendo means in England. Look up the reports of the state of Ohio and you will find that our supreme court resorted several times to such proceedings, but even if the supreme court of Ohio should not have to be so busy under a new constitution as it has been heretofore, it stands to reason that in a commonwealth consisting of eighty-eight counties there will always be constitutional questions and other litigation enough to necessitate a supreme court. We must have a supreme court of our own. We cannot send our cases for decision to Michigan, Kentucky or any other state.

There is another question before us: Shall the decisions of the supreme court be unanimous, or shall an uneven number answer better the purpose? That question implies a great principle. Those members of this Convention who think that the decisions of the supreme court should be unanimous, start with pre-supposition of the principle that a general assembly is fully equal in judicial qualification to the supreme court, and, therefore, only a unanimous supreme court should be authority to the legislature, while they who are in favor of an uneven number of judges in the decisions of the supreme tribunal cherish the idea that a supreme court is supreme eo ipso, even if not unanimous.

I am in favor that the supreme court's decisions should not be required to be unanimous. My first reason is that the supreme court, like any other court, must have occasion to correct or reverse itself. No court is expected to be infallible. It is the privilege of any court to err.

Now, gentlemen, if the court has to be unanimous, will it not be more difficult for the supreme court to correct or reverse itself than if there be only a majority required? My second reason is, I am not afraid that the supreme court will allow itself to be influenced by politics. Every supreme court finds it a matter of dignity and duty to repress politics as much as possible, and if a judge through his past connections should—and I say that with the highest regard and respect for the judiciary in general and the supreme court in special—have something to do with politics, will it not be better in such a case if unanimity is not required? The necessity of unanimity often makes the issue a matter of one man's power and would block the course of justice. Thirdly, let me say the supreme court is always expected to be the highest body in point of knowledge of law. It was here remarked that there are in any general assembly men fully as able and learned as supreme court judges are in general. Gentlemen, I am not positive of that. In this Convention we have lawyers and judges that might be an ornament to the supreme court of any state, but you must not forget that this assembly is an exceptional body of men. It is above the average, and is at the present time, while in session, the most august body in the state, but can we say as much for the average legislature? Some times there may be a legislature of

men, excellent in character, excellent in talent and excellent in knowledge, but a supreme court must always have men great and profound in the knowledge of law. There may be a great many in a general assembly who have knowledge of law, but in many cases the fine points of law, the higher spirit of jurisprudence, comes with the experience on the supreme court bench.

Remarks were here made to the effect that a supreme court often decided in favor of the plutocracy and the interests. Gentlemen, I am not aware of any such cases, and I am, therefore, very careful in criticising the supreme court's decisions concerning modern questions and problems not definitely provided for in the old constitution.

Fifty years ago, when the present constitution was made, a great many burning questions of the present day, connected with labor, private and public corporations and other movements of the modern age, were unknown. It is our duty to first make provisions for such questions; and such amendments are expedient, necessary and imperative in the new constitution that is to be furnished by us. Such a work on our part will enable the supreme court of Ohio to decide more in accord with the present social, commercial and economic conditions of the state.

I repeat, as to the appellate court I approve of Judge Peck's proposal, but I dissent from it regarding the unanimity of the supreme court in its decisions.

Mr. NYE: Mr. President and Gentlemen of the Convention: I had not intended to speak on this proposal until my name was unfortunately brought before the Convention because I asked some question. I believe the question that is before the Convention at the present time is one of the most important questions, if not the most important question, that has been or will be brought before the Convention during its session.

I regret very much that there has been so much reflection cast upon our courts. I believe the courts and personnel of the judges of the courts as a general rule are above reproach. I believe that the judges as a rule have been honest, upright men, men who wanted to do what is right as they saw it. Though we may have had some men that have been elected to the bench who could be justly criticised, the great body of the judges of the courts throughout the state have been honorable, upright, intelligent men.

In speaking now on this question, there has been so much said about corporations and the advantage that a corporation may get over the individual that I want to say I am not now and never have been an attorney for corporations. I have at times represented a bank, but corporations that are sued for personal injuries I have never represented. It has been said in this Convention and by my friend from Cuyahoga [Mr. THOMAS] that the rights of the people are taken from them because of the great power of the corporations. I am afraid the gentleman has forgotten that the individual may be the one sometimes that may want to take his case to a higher court. To adopt this Peck proposal would, in my judgment, put a millstone about the necks of the poorer classes so they could not take their cases to a higher court and get the wrong that has been done them righted. My friend from Greene county[ Mr. FESS] argued at some length that it was important to have cases decided quickly and ended. If the gentleman, or any one upon this floor, will tell me what advantage it is to a man who has had his case tried in a court to find, when it is tried and decided wrongly and he has no remedy, that it is ended, he will confer a favor upon this Convention. If the case is decided rightly it may be well to have it ended, but the poor man is just as liable to have the case decided against him wrongly in the lower court as the other side, and if he is cut off from a review in the higher court he is deprived of the right he ought to have. When you put into the constitution a provision that prevents a litigant from reviewing his case in the court of last resort you are doing a thing that will do injustice, in my judgment, to the poorer classes as well as to the corporation or the richer class. The proposal provides a court of appeals for final jurisdiction in almost all cases. In my opinion that will give you as many supreme courts or courts of last resort as you have courts of appeals in the state. It will be more difficult for the litigant, be he rich or poor, to get his just rights if a case is decided wrongly than it would be if you had the old rule or the one proposed by Judge Taggart's substitute.

It has been said upon this floor that it might be for the interest of attorneys to have the constitution one way or the other. I want to say in behalf of the attorneys in this Convention that the attorneys are the servants of the litigants. The only interest they have in a case is to have the case of their clients decided rightly, and if not decided rightly in one court to take the case to another court and have it reviewed. I say this in behalf of the farmers and laboring man and every other known business man in the state of Ohio. The very fact that you now have many cases taken to the supreme court and reviewed by that court and reversed is an indication that at least some cases have been decided wrongly. It is at least an indication that somebody has been wronged in the lower courts. I know, as has been said by men upon this floor, that courts are human. I concede that they are, but they try to do right and they are as apt to make a mistake against a corporation as they are against a poor man. Again, I say, if there is a tendency upon the part of courts to favor corporations, you are just as apt to find it in the lower courts as in the higher courts, and if the lower courts deprive the individual as against the corporation of his rights, the individual ought to have a right to appeal to the next court, and if it is not decided rightly there, let him have a right to go to the highest court. Let the poor man have a right to have his case decided by the highest court in the state.

I am in favor, as has been said here by others, of having a right to review an equity case tried in the common pleas court in the court of appeals de novo, so that the court of appeals may hear it upon the evidence and decide whether the one man acting as judge and jury decided it rightly or wrongly.

It has been argued that you have a right to review the decision of the jury on the evidence. The common pleas judge reviews the case on the weight of the evidence that was given to the jury. The litigant ought to have the right to have the court of appeals review the equity case on the weight of the evidence when it is decided by one man instead of twelve men.

Mr. PECK: Why can't you review it upon the record?

Mr. NYE: The reason you can't review it upon the record is this: The higher court frequently says that if they had the case originally to decide they would have decided it the other way from which the lower court decided it, but the decision is not so manifestly against the weight of the evidence that they ought to disturb it. I remember very distinctly of having a case after I left the bench where the common pleas court decided an equity case one way, and I took the case to the circuit court on appeal and they were unanimously of the opinion that it should have been decided the other way on the evidence and so decided. I think you farmers and business men and everybody who has a lawsuit have a right to have your case decided in the court of appeals on the weight of the evidence.

Now, just another question. If you will look over the records of the trial cases you will find that very few men ever have more than one lawsuit. That lawsuit is very important to that man, and if he is unjustly beaten he ought to have a right to have it reviewed in the highest court of the state.

The gentleman's time here expired and on motion of Mr. Stilwell was extended five minutes.

Mr. NYE: I will only take a minute. I am in favor of the Taggart substitute with one or two changes. We ought to have the right to review cases in the circuit court or courts of appeals on the evidence in equity cases. We ought to have an odd number of judges on the supreme bench so they cannot evenly divide in the supreme court. It seems to me that with these changes the courts will be perfectly satisfactory to all the people, the litigants of the state and to the bar generally. The Taggart substitute, with these changes would meet with the approval of the people.

Mr. DOTY: It is now three minutes to the time when, according to the rule adopted, we will vote. Judge Peck wants fifteen minutes to close and I move that the time for taking the vote be extended to 3:45.

The motion was carried.

Mr. PECK: Mr. Chairman and Gentlemen of the Convention: I want to say at the outset that I am very much pleased with the spirit in which this proposal has been received and discussed by the Convention. The friendly spirit in which it was received and thoroughly discussed by my colleague from Hamilton [Mr. WORTHINGTON] was a delight to me. The same with reference to Judge Taggart. He, too, took hold of the matter in a kindly and friendly way, and both of these distinguished gentlemen so far agreed with the original proposition of the Judiciary committee that there really is not a great deal before us to discuss. There are three or four points around which all the discussion has been turning and about which we have been differing, and they are points of some importance, but they do not touch the essence of the bill. The essential thing in this bill is the proposition to make what is now the circuit court a court of last resort for the great bulk of litigation. That is the important point. That is the reform which I regard as essential and of great importance to the people of this state.

Mr friend who has just taken his seat, Judge Nye, seems to think it will be something of a hardship to the bar to be denied the right to take their cases up to the supreme court. Of course you cannot have a right to continue litigation unless the other party to the case has the same right, and you may know that in a great majority of the cases that right is going to operate in favor of the longest purse, as the one best able to endure continuous litigation, so that the man with the short purse is the man who wants a speedy trial and a prompt conclusion of his case. The conditions are not equal and call for a change.

The first question is whether the supreme court shall decide a law unconstitutional and void by a mere majority of the court. When we were considering that matter in the Judiciary committee it struck us all that it was a remarkable thing that one or two men in a court could upset a law passed with all the due solemnity with which a law is usually passed. Assuming the court is divided and you have a majority of one or two in favor of declaring a law unconstitutional, perhaps two or three more judges on the other side viewing that situation, it struck us as remarkable that one or two persons under such circumstances should have that power, and everybody agreed that no court ought to declare an act unconstitutional without great consideration and perfect certainty of mind that what they are doing is correct.

There is a presumption in favor of every law put upon the statute book. Every lawyer knows that. Any act passed by the general assembly is presumed to be valid, and the man who attacks it must show the invalidity so plainly that there is no logical escape from the conclusion.

Now when the judges of a court who hear an argument upon that question differ among themselves, and if they are pretty evenly divided, it seemed to us that it indicated a doubt as to the propriety of the reversal and that it would be better to require unanimity than to allow a reversal under such circumstances.

I admit the custom has been otherwise, and it is now the fixed law of the country that the supreme court of any state can decide a statute unconstitutional whenever they conclude that it conflicts with the constitution of the state, but there has been a good deal of murmuring and discussion about it. Yet it is a part of our system and we are not trying to take it away by this proposal. I would not take the power away and that has not been advocated here. There was a good deal of academic discussion this morning, but that was not the real question. The question is, how many judges should it require in order to declare an act unconstitutional? Judge Worthington made a point against it that the action of the court is a unit, that the court is one, and the majority is like that which we used to say at common law, that man and wife were one and the husband was the one. His argument was that the court is one and the majority of the court is the court. It seems to me that is crowding a legal fiction too far. A court is one just as this Convention is one. There can be but one action by this Convention and that is controlled by the majority of the Convention, and what the minority thinks makes no difference after the vote is taken. So it is with each body that is acting as a unit by vote. It is presumed to be one, but that is nothing but a legal fiction. The court is composed of five, six or seven, whatever number is fixed. This Convention is composed of one hundred and nineteen members. So a corporate body is composed of a number of directors, but if you

consider it carefully you will find it is nothing more than a legal fiction, just as we say a corporation is a body created by law. An established doctrine with reference to legal fictions is that they shall not be pressed so far as to cause them to operate unjustly. When they are pressed beyond what is right they cease to be of use, and a court of equity will disregard them, as the supreme court of Ohio held in the Standard Oil Company case. They held that they would disregard the fiction of the corporation and would go back and take hold of the directors, the individuals. The fiction was sought to be interposed that the corporation did the thing, but the corporation can not act unless the people in it act, and whenever a corporation begins to break the law wilfully the fiction will be disregarded.

Now it seems to me pressing the legal fiction of a unit court too far to say you can not require unanimity with respect to anything done by that court. I do not see any more difficulty in requiring unanimity from a court than in requiring unanimity from a jury. Different ways can be devised so that the exact state of opinion of each judge can be shown, and there is no necessity for any concealment or mystery about it. And it is to be noted that when the court acts unanimously or by the required majority the court acts as a unit as clearly as in any other case, and the same is true in case of a failure to act for want of the necessary number.

Mr. FACKLER: I want to ask one question?

Mr. PECK: Certainly.

Mr. FACKLER: Suppose a case has been decided by a court of appeals and judgment has been rendered for the defendant, the basis of which judgment is that an act is unconstitutional, and that case comes to the supreme court; would you allow one of the judges of the supreme court to reverse the court of appeals?

Mr. PECK: Yes, if they are so equally divided on that—if the court is so equally divided as to be only a majority, I would.

Now there is another proposition of somewhat kindred character. Judge Taggart has in his proposition changed a little as to this constitutional question and he requires five-sixths of the court to declare a law unconstitutional. There is very little difference between unanimity and five-sixths, but as a matter of principle Judge Taggart disposes of the claim that the court is a unit in his proposition as much as does mine. There is not a great deal of difference between them, but I hope the original proposition rather than the modification proposed will be adopted.

Another proposition is as to appeals in equity cases. I do not see why a man should have the right to two trials in an equity case any more than a case at law. I simply can not understand that. Under our practice in the state courts equity cases are always promptly and easily handled. The judge hears the testimony and the testimony can be taken down in shorthand and used in that court or in the court above. It is heard by the judge himself, and in that respect it differs from the practice in the federal court, where a case is sent to a master commissioner and the commissioner takes the testimony and after a while reports to the court. This is often a source of delay and expense. The master commissioner has to be paid. But under the practice in our courts we do not do that very often. Occasionally a case which is very elaborate may be referred in that way, but it can not be avoided in cases which are very long and involve voluminous accounts.

Mr. HOSKINS: On the question of the right of appeal in equity cases, in view of the fact that in an equity case we only have the judgment of a single man, the common pleas judge, upon the fact, and after being prevented from having a trial by a jury ought we not have a right to present the original facts in an appellate court?

Mr. PECK: You have a right to have your questions of fact tried by a judge of the common pleas court and they are so tried, and if they are tried with as much care as you try a case before a jury your evidence will be all presented and reported, and it can be carried up just as easily on a record as a jury case is carried up on a record.

Mr. HOSKINS: Do you contend that the appellate court can get a true view of the facts of the case from a cold typewritten record as well as from witnesses?

Mr. PECK: It can get quite as true a view of the facts as in a jury case.

Mr. HOSKINS: But in the jury case you have had the judgment of twelve men on the facts, and in the other case you have only had the judgment of one.

Mr. PECK: There has never been a time since law was practiced in England or this country that an equity case was tried before more than one judge. It is so in England, it is so in the federal court and should be so in Ohio, except about the rules of appeals which Judge Worthington has shown to be an anomaly that does not exist in any other state, and which is a tremendous stumbling block in the administration of justice, if carried out as you want it carried out. But some of the circuit courts avoid it by adopting a rule that has been spoken of, and other courts which have not adopted it as a rule are practically operating on the same line and nobody seriously objects. Lawyers try their cases in that way right along.

Mr. HOSKINS: By what right do you say nobody seriously objects? Is it not a fact that the circuit court has no right to adopt such a rule?

Mr. PECK: If anybody seriously objected they would carry it to the supreme court and not work under it. That is the reason I say nobody seriously objects. Nobody objects because nobody cares enough to take it up.

Now I have not much time to talk and I would like to be allowed to talk without interruption.

About this matter of appeals in equity cases, they are tried before a judge sitting as a chancellor. The testimony is heard by him. He makes his finding and the testimony is in writing. What objection is there to that? In England the testimony is taken by a master and no judge ever sees the witnesses in England or in the federal court here. The testimony is all taken in writing and all courts decide upon that testimony in England and in the federal court, but here in the first court our judge sees the witnesses and hears their testimony and his hearing is certainly as good or better than that of a master or commissioner.

Mr. DWYER: And may not the important matters of fact be sent by a judge in the chancery court to a jury if he desires it?

Mr. PECK: Certainly. Judge Dwyer calls my attention to the fact that the chancellor can frame an issue and send it out to be tried by the jury. That is not infrequently resorted to. I have participated in several such trials. It is not at all unusual where there are questions requiring consideration which involve conflict of testimony such as we have in cases at law, that they are sent to a jury for a trial of those issues of fact.

Equity cases do not generally involve the fierce conflict as to facts that are generally involved by cases tried by a jury.

Mr. PETTIT: I have not been here during the discussion and I would like to ask this question: Is it not a fact that in equity cases, after the proofs shall have been taken, there is often newly discovered evidence that changes a case entirely?

Mr. PECK: Not very often.

Mr. PETTIT: Is it not frequently the case?

Mr. PECK: I don't think I ever knew of any case, either in law or in equity, in which newly discovered evidence changed the result. I have known counsel to come into court and claim it might, could or would, but when we came to consider the newly discovered evidence it nearly always frittered out and turned out to be a new witness who knew something that was stated by other witnesses, and under the rule that a court will not consider merely cumulative evidence it is ruled out. I would not think there was much in that newly discovered evidence of matter any more than in a law case.

I call your attention to the fact that that may happen in any case after it is tried and determined by a jury, and it is the misfortune of the party who did not get the evidence or it is due to the neglect of himself or his attorney.

This matter of taking the time of three judges to sit on the bench and listen to the taking of testimony in an equity case from day to day when they ought to be considering questions of law and deciding real questions is to me very wrong. It is a great waste of time and it is one of the drawbacks to practicing law in Ohio, and it has been. When a man comes here from an outside state he can not understand it. He will say "We don't have anything like that in our state," and you have to explain it to him to get him to understand what you mean by an appeal of that kind. It is a matter peculiar to this state and one of the stumbling blocks that we want to get rid of.

Judge Worthington called your attention to the fact that this is one of the most beneficial reforms in the proposal. A man can try a case and try it properly. The trouble is that where they have this appeal as we have it now they do not try their cases properly the first time. They skim around the trial in the case below and they rely upon the trial in the circuit court as their real trial. If they tried the case properly in the common pleas court they would not have to do that. Equity cases, since the earliest institution of law, have been matters on paper instead of oral testimony largely.

Mr. DWYER: Will you be willing, when the time comes, to change the organization of the court if it is the wish of the Convention?

Mr. PECK: My own idea is that it had better be left alone. We are cutting down the jurisdiction of the supreme court and we are relieving it of a lot of work, and what is the use of increasing the personnel? If they have not enough work now, why put another judge in there?

Mr. SHAFFER: Then reduce it to five.

Mr. HALFHILL: I am a little in doubt as to the meaning of this proposal so far as it relates to raising a constitutional question. Can we raise a constitutional question in the common pleas court or in the circuit court?

Mr. PECK: You can raise it anywhere.

Mr. HALFHILL: In the appellate court can we raise a constitutional question and have it decided?

Mr. PECK: Yes, of course; but the final decision is the supreme court. That gives the supreme court jurisdiction of the case—the very fact that there is a constitutional question involved.

Mr. HALFHILL: But if it is a question of statute do you think you could raise a constitutional question in the trial court?

Mr. PECK: Certainly; why not? But nobody would agree that an act should be merely decided unconstitutional by the common pleas court. Nobody would agree that that is conclusive. Nobody would be bound by it. It is only the decision of the supreme court in a case of that kind that is effective as to anybody but the parties in the particular case.

Mr. WINN: Suppose there is a suit pending in the common pleas court involving the constitutionality of some act of the legislature and the law is held to be constitutional and it is affirmed by the circuit court and that comes up to the supreme court; how many judges in the supreme court must agree to affirm the judgment of a circuit court?

Mr. PECK: You said that the law was held to be constitutional?

Mr. WINN: I mean unconstitutional. Suppose the law is held unconstitutional in the common pleas court and affirmed by the circuit court and taken to the supreme court; how many judges of the supreme court must agree to affirm that case?

Mr. PECK: All of them under this, five-sixths under the Taggart proposal. This last brief of this paper includes some of the Taggart proposition and several of the minor amendments. It includes the Halfhill amendment about holding a court in each county and the amendment of Mr. Jones and one or two others suggested by Judge Worthington. It will be offered when the opportunity comes as a substitute for all.

Mr. KING: It is rather late to start a discussion on a new subject, but I fear your answer to the gentleman from Defiance was not in accordance with anything in either of those proposals. Is it possible that if a law has been held unconstitutional and the rights of the parties determined by the court of appeals and then the case is taken to the supreme court and all but one of the judges there are for affirming that judgment, simply because one of the supreme court judges does not concur in the opinion that affirms the case—in other words, that it requires the entire supreme court, under circumstances like this, to declare a law unconstitutional?

Mr. PECK: I don't quite understand you.

Mr. KING: I will put that question in another form. Suppose five judges of the supreme court vote to reverse a judgment of the circuit court on the ground of the unconstitutionality of the law and one of the supreme

SECTION 2. The supreme court shall, until otherwise provided by law, consist of six judges, and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the supreme court shall be necessary to constitute a quorum or pronounce a decision, except as hereinafter provided. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, procedendo and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state and in cases of felony on leave first obtained, also in cases which originated in the courts of appeals and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The judges of the supreme court shall be elected by the electors of the state at large for such terms, not less than six years, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law.

Whenever the judges of the supreme court shall be equally divided in opinion as to the merits of any case before them and are unable for that reason to agree upon a judgment that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the court below.

No statute shall be held unconstitutional and void by any proceedings in this court except by the concurrence of five of the judges of the supreme court.

In case of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct the court of appeals to certify its record to the supreme court and may review and affirm, modify or reverse the judgment of the court of appeals.

SECTION 6. The state shall, until otherwise provided by law, be divided into appellate districts of compact territory and divided by county lines in each of which there shall be a court of appeals consisting of three judges. The judges of the circuit courts now residing in their respective districts shall continue to be judges of the respective courts of appeals in such districts and perform the duties thereof until the expiration of their respective terms of office. Vacancies caused by the expirations of the terms of office of the judges of the courts of appeals shall be filled by the electors of the appellate districts respectively in which such vacancies shall arise and the same number shall be elected in each district. Laws may be enacted to prescribe the time and mode of such election and to alter the number of districts or the boundaries thereof, but no such change shall abridge the term of any judge then in office. The court of appeals shall hold at least one term annually in each county and such other terms at a county seat in the district, as the judges may determine upon, and the county commissioners of any county in which the court of appeals shall hold sessions shall make proper and convenient provisions for the holding of such courts by its judges and officers. Each judge shall be competent to exercise his judicial powers in any district of the state.

The respective courts of appeals shall continue the work of the circuit court and all pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the courts of appeals, subject to the provisions hereof, and the existence of the circuit court shall be merged into and its work continued by the courts of appeals.

The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus prohibition and procedendo and such other appellate jurisdiction to review, affirm, modify, or reverse the judgments of the courts of common pleas and superior courts within the district as may be provided by law, and judgments of said courts of appeal shall be final in all cases, except such as involve questions arising under the constitution of this state, or the United States, or cases of felony, or cases of which it has original jurisdiction, or cases of public or great general interest in which the supreme court may direct the court of appeals to certify its record to that court. No judgment of the court of common pleas and superior courts shall be reversed except by the concurrence of all the judges of the court of appeals on the weight of the evidence and by a majority of such court of appeals upon other questions and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

The decisions in all cases in the supreme court and courts of appeals shall be reported, together with the reasons therefor.

Mr. WINN: I do not believe we should vote on this proposition until it has been printed. If I heard this correctly and if I understood the reading there are no districts provided for the courts of appeals and there is to be one term in each district each year, and that notwithstanding there are no particular districts.

Mr. PECK: It says one in each county.

Mr. WINN: It says one term in each county each year and then there shall be many more terms in some of the county seats. It seems to me that the whole thing is considerably uncertain, and I therefore move that the further consideration be postponed until tomorrow at ten o'clock and also that this be printed and that it be placed at the head of the calendar for that hour.

Mr. DOTY: I move to amend the motion by striking out the period and adding "and the limitation regarding debates adopted today shall be continued tomorrow."

The amendment was accepted by the maker of the motion and the motion was carried.

Mr. DOTY: I desire to make a report from the committee on Rules on a resolution introduced some time ago relative to a matter of some importance.

The PRESIDENT: If there is no objection the report can be made.

The report was read as follows:

> The standing committee on Rules, to which was referred Resolution No. 89—Mr. Doty, having had the same under consideration, reports it back and recommends its adoption.

The resolution was read as follows:

> *Resolved,* That any resolution providing for sine die adjournment of this Convention shall require for its adoption a vote of not less than a majority of all the members elected to the Convention.

Mr. DOTY: This resolution is adopting a rule of the Convention and it requires a yea and nay vote.

The PRESIDENT: The president does not know of any reason why this should require a yea and nay vote.

Mr. DOTY: Then I demand the yeas and nays.

The yeas and nays were regularly demanded; taken, and resulted—yeas 107, nays none.

Those who voted in the affirmative are:

| | | |
|---|---|---|
| Anderson, | Hahn, | Nye, |
| Antrim, | Halenkamp, | Okey, |
| Baum, | Halfhill, | Partington, |
| Beatty, Morrow, | Harbarger, | Peck, |
| Beatty, Wood, | Harris, Hamilton, | Peters, |
| Beyer, | Harter, Huron, | Pettit, |
| Bowdle, | Harter, Stark, | Pierce, |
| Brattain, | Henderson, | Read, |
| Brown, Highland, | Hoffman, | Redington, |
| Brown, Lucas, | Holtz, | Riley, |
| Brown, Pike, | Hoskins, | Rockel, |
| Campbell, | Hursh, | Roehm, |
| Cassidy, | Johnson, Madison, | Rorick, |
| Cody, | Johnson, Williams, | Shaffer, |
| Collett, | Kehoe, | Shaw, |
| Colton, | Keller, | Smith, Geauga, |
| Cordes, | Kerr, | Smith, Hamilton, |
| Crites, | Kilpatrick, | Solether, |
| Crosser, | King, | Stalter, |
| Cunningham, | Knight, | Stamm, |
| Davio, | Kramer, | Stevens, |
| DeFrees, | Kunkel, | Stilwell, |
| Doty, | Lambert, | Stokes, |
| Dunlap, | Lampson, | Taggart, |
| Dunn, | Leete, | Tannehill, |
| Dwyer, | Leslie, | Tetlow, |
| Earnhart, | Longstreth, | Thomas, |
| Elson, | Ludey, | Ulmer, |
| Evans, | Malin, | Wagner, |
| Fackler, | Marshall, | Walker, |
| Farnsworth, | Matthews, | Watson, |
| Farrell, | Miller, Crawford, | Winn, |
| Fess, | Miller, Fairfield, | Wise, |
| FitzSimons, | Miller, Ottawa, | Woods, |
| Fluke, | Moore, | Mr. President. |
| Fox, | Norris, | |

The resolution was adopted.

Mr. DOTY: We didn't have regular business on Monday night, and I therefore move that the order of the business for the remainder of this session be the same as on Monday night, beginning with the order: "Motions and Resolutions."

The motion was carried.

## MOTIONS AND RESOLUTIONS.

Mr. ANTRIM: I offer a resolution.

The resolution was read as follows:

Resolution No. 100:

> *Resolved,* That the following bills which have been filed with the secretary of this Convention be allowed and ordered paid:
>
> Anna L. Bower, to extra compensation for reporting sessions of the convention from January 9 to February 6, inclusive, fifteen days,..... $75 00
>
> Minnie Rodgers, to extra compensation for reporting sessions of the Convention from January 9 to February 6, inclusive, fifteen days, ..... $75 00

On motion of Mr. Antrim the resolution was referred to the committee on Claims against the Convention.

## REPORTS OF STANDING COMMITTEES.

Mr. Hoskins submitted the following report:

> The standing committee on Corporations other than Municipal, to which was referred Proposal No. 72—Mr. Stokes, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:
>
> Strike out all after the resolving clause and insert the following:
>
> ARTICLE XIII.
>
> SECTION 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.
>
> Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stock and securities, and over the business and sale of the stock and securities of foreign corporations in this state, as may be prescribed by law.

The report was agreed to. The proposal was ordered to be engrossed and read the second time in its regular order.

On motion of Mr. Doty the proposal, as amended, was ordered printed.

Mr. Hoskins submitted the following report:

> The standing commitee on Corporations other than Municipal, to which was referred Proposal No. 127—Mr. King, having had the same under consideration, reports it back, and recommends that it be indefinitely postponed.

The report was agreed to.

Mr. Hoskins submitted the following report:

> The standing committee on Corporations other than Municipal, to which was referred Proposal No. 87—Mr. Evans, having had the same under consideration, reports it back with recommendations for indefinite postponement.

The report was agreed to.

Mr. Hoskins submitted the following report:

> The standing committee on Corporations other than Municipal, to which was referred Proposal No. 265—Mr. Dunn, having had the same under

consideration, reports it back, and recommends that it be indefinitely postponed.

The report was agreed to.

Mr. Stilwell submitted the following report:

The standing committee on Labor, to which was referred Proposal No. 298—Mr. Hoffman, having had the same under consideration, reports it back and recommends its indefinite postponement.

The report was agreed to.

Mr. Johnson, of Williams, submitted the following report:

The standing committee on Legislative and Executive Departments, to which was referred Proposal No. 164—Mr. Thomas, having had the same under consideration, reports it back and recommends its indefinite postponement.

Mr. Thomas submitted the following report:

The minority of the standing committee on Legislative and Executive Departments, to which was referred Proposal No. 164—Mr. Thomas, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out sections 2, 3, 4, 5, 6 and 7 and renumber the succeeding sections.

HARRY D. THOMAS.

The PRESIDENT: The question is on agreeing to the minority report.

Mr. WINN: I move to lay that on the table.

The PRESIDENT: The question is on laying the minority report on the table.

Mr. THOMAS: A point of order. I had the floor and I had not yielded.

The PRESIDENT: The point is well taken; the president was in error.

Mr. THOMAS: If you will look at Proposal No. 164 you will see it is a proposal similar to the one that Mr. Elson offered providing for one legislative body.

Sections 5, 6 and 7 contain the initiative and referendum and the minority report strikes these sections out. The other sections are amended to provide for one legislative body. That this matter is getting some consideration other than by the delegates in this Convention, and that it is something that not only is being considered in this state but in other states, is evidenced by the fact that since the discussion of this matter has been taken up in the daily papers I have had letters from nearly every state in the Union and from men in different walks of life and from different newspapers commenting on the subject in favor of one legislative body. I have been here at the sessions of the legislature for the past four or five years, and in all these years my experience proves to me that one legislative body can do the work as successfully as two, and better, in my opinion, because it costs less to the state. Those of you who are acquainted with legislative matters know that important measures are considered before one house. The consideration there determines largely whether it should be adopted or not. Take our women's fifty-four hour law at the last session. That matter was discussed in the senate and whatever amendments or changes were made were made in the senate, and they were agreed to almost without any change whatever in the house. The workmen's compensation law, the Green bill, passed the house and was adopted by the senate with the change of but few words. It has been the general experience that one house does the work on important measures. Just to show to what extent this matter is being taken up by the public I want to read a comment from the Springfield Republican, Springfield, Massachusetts:

> The Ohio Constitutional Convention, which convened last week at Columbus, is the fourth one in the state's history. A radical movement among the voters is responsible for it and apparently there is a majority of radicals in control. Innovations too numerous or too extreme, however, would cause a reaction among the voters when the amended or revised constitution was sent to them for approval, and this danger will tend to modify the aspirations of too zealous reformers. The initiative, referendum, recall, short ballot, woman suffrage and single tax are among the items on the radical program, while the liquor question may assume prominence in the Convention's work. It is somewhat surprising that American radicals do not take advantage of such opportunities to establish the state legislatures on a single chamber basis, but not even in Oregon, California or Arizona, not to mention Ohio, has an effort been made to effect this change. In municipal government the old bicameral legislative assembly has had its day; that it is really necessary to state governments may be disputed. Indeed, it may be argued that the bicameral system is somewhat or even largely responsible for the inefficiency and corruption of many states.

Now, here is something from the Pittsburg Sunday Post. It ridicules the idea of bicameral legislation:

> Ohio is now having a constitutional convention on her hands, and if she wants to do something novel, and at the same time something that will commend itself to a large number of thinking people, she will provide for a single instead of a double-barreled legislature. There is no more sense in having two legislative bodies to do the same thing than there would be to have two executives to decide whether they would sign the bills.
>
> Our double-headed system was borrowed from England, where one body was for the high and well-born and the other for the common people. In this country, however, we are not supposed to have any classes and to call the senate a higher body is an insult to our citizens, for we are all supposed to stand on an equality. If our senates are composed of wiser and better men than the lower houses, as they are falsely called, then why not have two senates, for the wisest and best are none too wise or too good. If they are not superior, then why not abolish them?
>
> If the two bodies agree, one is sufficient, and if they disagree then both might as well be abolished. They tell us that one serves as a check on the other; but oftener than otherwise the check is placed just where the people do not want it and

where they would not have it if they had a single legislature. Half the time the two houses are in a deadlock and can do nothing.

Besides, it enables members to shift the responsibility for their neglect of duty. As an illustration: In a Western Pennsylvania county a few years ago a certain statesman, now in congress, wanted to go to the assembly. He told the farmers if they would elect him he would see that a fence law was passed, compelling railroads to fence their lines. They took him at his word and elected him. The bill passed the house, but he took good care to see that it was killed in the senate.

At the next election he asked to be sent to the senate on the ground that he had the fence bill pass the house, and if in the senate he would have it passed in that body. He was elected and the bill passed the senate, but was killed in the house.

If a single body can make a constitution, the fundamental law of the state, why cannot a single body legislate under that constitution by which it is to be guided? Ben Franklin was about as level-headed as any man who has had anything to do with our government, and he ridiculed the idea of having a bicameral legislature.

It appears to me that argument is sufficient to convince most any man that the time has arrived in Ohio when, instead of following other states in progressive legislation, we might try to start something new ourselves. Here is an opportunity for starting something new and progressive.

Mr. WINN: I move that the minority report be laid on the table.

Mr. THOMAS: On that I demand the yeas and nays.

The yeas and nays were regularly demanded; taken, and resulted—yeas 62, nays 38, as follows:

Those who voted in the affirmative are:

| | | |
|---|---|---|
| Anderson, | Fox, | Nye, |
| Antrim, | Halfhill, | Okey, |
| Baum, | Harbarger, | Partington, |
| Beatty, Morrow, | Harris, Hamilton, | Peters, |
| Beatty, Wood, | Holtz, | Pettit, |
| Brattain, | Johnson, Madison, | Riley, |
| Brown, Highland, | Johnson, Williams, | Rockel, |
| Brown, Pike, | Kerr, | Roehm, |
| Campbell, | Knight, | Rorick, |
| Collett, | Kramer, | Shaw, |
| Colton, | Lambert, | Smith, Geauga, |
| Crites, | Lampson, | Solether, |
| Cunningham, | Leete, | Stewart, |
| Dunlap, | Longstreth, | Stokes, |
| Dunn, | Ludey, | Taggart, |
| Dwyer, | Marshall, | Tallman, |
| Earnhart, | Matthews, | Wagner, |
| Evans, | McClelland, | Walker, |
| Fackler, | Miller, Fairfield, | Winn, |
| Fess, | Miller, Ottawa, | Woods. |
| Fluke, | Norris, | |

Those who voted in the negative are:

| | | |
|---|---|---|
| Bowdle, | Elson, | Harter, Stark, |
| Cordes, | Farnsworth, | Henderson, |
| Crosser, | Farrell, | Hoffman, |
| Davio, | FitzSimons, | Hursh, |
| DeFrees, | Hahn, | Kilpatrick, |
| Donahey, | Halenkamp, | King, |
| Doty, | Harter, Huron, | Kunkel, |
| Leslie, | Read, | Tetlow, |
| Malin, | Shaffer, | Thomas, |
| Miller, Crawford, | Stamm, | Ulmer, |
| Moore, | Stevens, | Watson, |
| Peck, | Stilwell, | Wise. |
| Pierce, | Tannehill, | |

So the minority report was laid on the table and the report of the committee was agreed to.

Mr. Leete submitted the following report:

The standing committee on Public Works, to which was referred Proposal No. 313—Mr. Leete, having had the same under consideration, reports it back and recommends its passage.

The report was agreed to. The proposal was ordered to be engrossed and read the second time in its regular order.

## REPORTS OF SELECT COMMITTEES.

The historian and reference librarian, to whom was referred Resolution No. 83—Mr. Dunn, begs leave to submit the following report:

The Ohio News Bureau Co., of Cleveland, Ohio, submits the following proposition to the Fourth Constitutional Convention of Ohio:

It will preserve and compile in volumes, newspaper records containing all the leading editorials and all important items appearing in the Ohio papers and in all the leading papers of the United States. This record will be arranged chronologically with the date of publication and the name of the paper stamped on each item; this record to begin on January 1, 1912, and continue until thirty days after the final adjournment of the Convention. This arrangement may be continued by vote of the Convention before final adjournment from thirty days after the adjournment of the Convention, so as to cover the period between its adjournment and its special election at which the constitution and the amendments thereto shall be submitted. Said clippings or records shall be furnished in volumes of 125 sheets each, making a total of 500 pages to the volume, which shall be bound in loose-leaf ledger style, and in as many volumes as may complete the work. For this work, labor and material up to thirty days after the final adjournment of the Convention, this body shall pay the Ohio News Bureau Co. of Cleveland, Ohio, the sum of fifty ($50.00) dollars per month, beginning January 1, 1912; and for thirty days after the adjournment of the Convention. The latter may continue the arrangement until ten days after the election at which the proposed constitution and proposals submitted therewith shall be held, at the same figures. The volumes shall be furnished from time to time as completed, and the work shall be under the general direction of the historian and reference librarian as to the class of items preserved after the first volume is submitted. The Ohio News Bureau Co., of Cleveland, Ohio, shall also furnish under this proposition a suitable blank index for the entire number of volumes at the close of their publication.

The foregoing proposed contract between the Convention and the Ohio News Bureau Company of Cleveland, Ohio, is herewith submitted with the recommendation that it be approved.

NELSON W. EVANS,
*Historian and Reference Librarian.*

The report was received.

By unanimous consent Mr. Evans offered the following resolution:

Resolution No. 101:

*Resolved, by the Fourth Constitutional Convention of Ohio,* That the report of the historian and reference librarian of this body, as to the proposed contract with the Ohio News Bureau Co., of Cleveland, Ohio, is hereby approved, and said historian and reference librarian is directed, on behalf of this Convention, to execute this contract.

The resolution was laid over under the rule.

By unanimous consent Mr. Peters offered the following resolution:

Resolution No 102:

*Resolved,* That when this Convention adjourns at the end of this week, that it be to meet on Tuesday morning, April 16, at 10 o'clock.

Mr. DOTY: What is the reason for that?

Mr. PETERS: That the members may attend the Jefferson banquet.

Mr. BROWN, of Highland: I didn't hear what the object of that resolution was.

The PRESIDENT: The president will state that the resolution introduced provides that there be no Monday night session next week and the purpose as stated is to give the members an opportunity of attending the Jefferson banquet Monday night. The question is on suspending the rules to consider the resolution.

The motion was lost.

The PRESIDENT: The resolution goes over under the rule.

Resolution No. 90—Mr. Beatty, of Wood, relative to the adjournment of the Convention sine die, was then taken up and read as follows:

*Resolved,* That this Convention, when it adjourns on Friday, April 26, 1912, shall adjourn to Monday, May 6, 1912, at 10 o'clock a. m. at which time the standing committee on Arrangement and Phraseology shall report upon such matters as shall have been referred to said committee.

*Resolved,* That the calendar of business for May 6, 1912, and thereafter, shall consist only of proposals for third reading and questions appertaining thereto,and no other business shall be considered except that which shall pertain to the concluding work of the Convention.

*Resolved,* That this Convention shall adjourn sine die, at 12 o'clock noon, Saturday, May 11, 1912.

Mr. EVANS: I move to table that resolution.

Mr. BEATTY, of Wood: You cannot make the motion to table because I am on the floor.

We have a custom in the legislature of introducing a resolution some six weeks ahead of adjournment and working to that adjournment, and this was introduced with that in view. If we don't adopt some similar resolution to adjourn we will be here until Christmas. We have loitered away considerable time in the last two or three months. We are simply not working. Last Thursday I counted and there were only seventy-eight members in the Convention in the forenoon. A week before that we had only sixty-eight. We are not working as we should work. We need something to stimulate us, and I think this will be the proper stimulant.

Mr. HARRIS, of Hamilton: Do you include yourself in that statement that we are not working properly?

Mr. BEATTY, of Wood: Yes; I include all of us. We have been elected here to represent the people and we ought to represent them and we ought to work. I don't have any idea of trying to force an adjournment, but if we adopt a resolution of this character we will try to work up to it and if we can't get ready to adjourn by the time fixed in this resolution we can then fix the time farther ahead. If we keep going on the way we have and introducing new matter we will never get through. In thirty days from now we will have just as much work on the books as we have now and we will have just as much in sixty days. It is a never ceasing flow of new proposals.

Mr. ELSON: A point of order. How can all this debate go on when there was a motion to lay on the table?

The PRESIDENT: There was no motion to lay on the table. The gentleman who made the motion to lay on the table was not recognized. The gentleman from Wood [Mr. BEATTY] has the floor.

Mr. BEATTY, of Wood: As I have said before, I am willing to stay as long as anybody, but we ought to make some effort to get through. We ought to fix some time to adjourn and to work up to it, and if we are not ready to adjourn then we will postpone the time a little.

Mr. DOTY: The object is to set a time when we shall adjourn. We have plenty of work for the committee on Arrangement and Phraseology to work on, and, as the member said, if we set a time for adjournment and we are not quite ready then we can postpone the adjournment a few days longer.

I have seen the general assembly make all sorts of endeavors to adjourn. This plan is the one that has been found to work best in the general assembly.

We have adopted a resolution setting forth the manner of submitting our work to the people. It provides for a separate submission of a number of amendments to the people instead of the submission of a complete constitution. Having decided upon our plan and having gone through two-thirds of our work, so far as importance is concerned, there is no reason in the world why we cannot adjourn by the 26th of this month. The trouble is a number of you won't stay here and work. We all know that a number of fellows are going to duck out on Thursday and we ought to stay here and work six days in the week and complete our work on the 26th day of this month. It can be done if we will attend to business.

There is no trouble about adopting this resolution. We are not in any trouble like the house and the senate are when they adopt a resolution fixing adjournment. Then to change it both sides have to agree, but here there is no

house at the other end. We can adopt this resolution and if we are not ready to adjourn at the time fixed, we can simply adopt another one or postpone the time set in this one.

Mr. LAMPSON: I am willing to adopt this resolution and try to work up to it and if we can't we will just simply postpone it.

Mr. KNIGHT: There are nineteen proposals that have been reported favorably by the committees. They are on the calendar, and there are at least two or three others extremely important and the twenty-sixth of April covers just eleven legislative days from now.

Mr. DOTY: Eleven possible legislative days?

Mr. KNIGHT: Eleven days under the rules.

Mr. DOTY: Well, the rules are not like the laws of the Medes and Persians; they can be changed.

Mr. ELSON: I don't think that we can possibly get through by that time.

Mr. DOTY: We can try.

Mr. ELSON: I am willing to support the motion and try to work up to that date, but I am not nearly so sanguine of being able to adjourn at that time as the member from Cuyahoga [Mr. DOTY] seems to be.

We have been sent here to do a very important work and we should take time enough to do it right, and I don't think we can work six days a week. Most of us have some duties at home, and I don't think it is right to begin to work six days in the week right now, although I am willing to support this motion.

Mr. HALENKAMP: When April 26 comes and we find we have more proposals on the calendar than possibly we have now and that we can't get through, what will be the method of going on with our work? Will we have to reconsider the vote by which this resolution is adopted?

Mr. DOTY: Simply a resolution rescinding that specific date and setting some other date. It just takes a majority.

The resolution was adopted.

Resolution 91 — Mr. Rorick, was taken up.

The resolution was read as follows:

> *Resolved,* That hereafter debate upon all questions shall be limited as follows:
>
> Author of a proposal or chairman of the standing committee to which it was referred, thirty minutes upon the second reading of the proposal and five minutes upon any amendment thereto. Other members fifteen minutes upon the second reading of the proposal and five minutes upon any amendment thereto.
>
> Upon resolutions upon questions of adoption, five minutes for any member.
>
> Upon all debatable subsidiary motions five minutes for any member.
>
> No member's time shall be extended except on two-thirds vote.
>
> Provided, however, that this special rule shall not apply upon the second reading of any proposal reported to the Convention by the standing committees on Taxation and Municipal Government.

Mr. RORICK: I move that that be referred to the committee on Rules.

DELEGATES: No; consider it now.

The motion to refer was withdrawn and the resolution was adopted.

Resolution No. 94 — Mr. Knight, was then taken up and read as follows:

> *Resolved,* That the secretary be authorized to send to public libraries and, on application, to other educational institutions in the state of Ohio, copies of the pamphlets and other printed matter issued by this Convention.

Mr. KNIGHT: As worded this resolution might include the bound volumes of the debates, and I therefore move to amend by inserting the words "except the debates and proceedings of the Convention."

The amendment was agreed to and the resolution as amended was adopted.

Mr. DOTY: Doesn't that require a roll call? It will involve an expenditure for postage.

Mr. KNIGHT: I don't think so. We haven't been considering things in that way.

Resolution No. 96 — Mr. Fess, was taken up and was read as follows:

> *Resolved,* That the select committee having supervision of the official reporter and reportorial staff of the Convention be authorized and directed to have the reports of the debates of the first fifteen days of the Convention, prior to the appointment of the official reporter, edited and put into proper form for preservation and publication at a cost not to exceed $125.

Mr. DOTY: The member from Greene is not present and probably the member from Franklin [Mr. KNIGHT] ought to explain that.

Mr. FESS: I am just called to the telephone and I will ask the member from Franklin [Mr. KNIGHT] to make an explanation while I answer the call.

Mr. KNIGHT: As the members of the Convention know, our official reporter was not appointed until fourteen days of the Convention had expired. Down to that time we had done the best we could under a special resolution by having the stenographers on the regular staff of the Convention detailed to take the debates. They have not undertaken and do not feel that they can undertake to put them in proper form to conform to the debates from the day the official reporter began his work. The amendments are not copied in and the roll calls are not designated, and as this is the first part of the debates that is to be printed it is necessary that they be put in form to correspond with the rest, and this is simply a motion to authorize the committee to expend that amount of money to have it done. I want to say that this was strictly at our solicitation and not at the request of Mr. Walker, who says that he does not care whether it is done or not, or by whom it is done. We want the thing in uniform shape and we prefer it to be done by the reporter, so that at the end of the Convention he can certify to the general correctness of the debates. The amendments and the resolutions are not put in. In other words, every page has to be read over with the journal and put in proper form and recopied.

Mr. STILWELL: Is not there some clerk of the Convention who can do that?

Mr. KNIGHT: I am informed that there is not, but if there is we are perfectly willing to have that

clerk do it. So long as it is done the committee does not care how it is done. The committee, after looking over the situation, decided that the proper way to have it done would be to have the same official stenographer who has reported the debates do the work so that he will be in a position to certify as to the essential correctness of the work for those fourteen days.

Mr. FESS: Professor Knight has given exactly the situation. The only question is shall our record begin on the fifteenth day or shall it begin the first day. We want it to begin the first day and be uniform. If there is any way by which that can be done other than as provided in this resolution we are perfectly willing to pursue the other way, but we do not know of any other.

Mr. DOTY: In answer to the question of Mr. Stilwell whether some other clerk could do the work, the clerks of the Convention already have their hands full. Then this is a matter that cannot be done by anybody. I doubt if there is a member in the secretary's office who could do this work properly except the secretary, and that is not reflecting on the ability of any one there, but the secretary hasn't the time. He is charged with important duties and he has to attend to them and he cannot take the time to attend to this.

Mr. STILWELL: The only objection I have is to the matter of expense. Here we have two complete reports, one by the stenographers, which the delegate from Franklin [Mr. KNIGHT] informs us has to be written all over again, and we have the journal and the work is to make these two uniform. I don't see why it is worth $125 for fifteen days' work. That amounts to $8 a day for simply joining the two in proper form. I am opposed to the motion in the present form.

Mr. FESS: Can the gentleman from Cuyahoga [Mr. STILWELL] suggest any other way by which it can be done so that we will have a proper record?

Mr. STILWELL: It is certain that the present stenographer cannot authenticate the correctness of something done before he came here. He didn't take charge until the fifteenth day. Anybody else could do the work just as well as the stenographer can. I believe the entire matter ought to be referred to the secretary with instructions to him to have this work done, and I offer that as an amendment to the present pending motion.

The amendment of the delegate from Cuyahoga was put in writing and was read as follows:

> That the secretary of the Convention shall be authorized and directed to have the reports of the debates of the first fifteen days of the Convention, prior to the appointment of the official reporter, edited and put into proper form for preservation and publication.

Mr. HARRIS, of Hamilton: It is not fair to charge the secretary with this increased duty. He has already voluntarily agreed to assume duties that could not properly be considered his, and it is absolutely out of the question to suppose that an unskilled person can take the journal and the debates in the form they are and put them into proper form any more than you could expect an amatuer artist to finish up a painting begun by a master. We have been told that the official reporter does not desire to do this work, but will do it if the committee wants him to do it, and the only thing for the Convention to do is to take advantage of his kindness and let the work be put in proper shape.

The amendment was not agreed to.

The PRESIDENT: The question is on the adoption of the resolution and on that the secretary will call the roll.

The yeas and nays were taken, and resulted — yeas 78, nays 22, as follows:

Those who voted in the affiirmative are:

| | | |
|---|---|---|
| Anderson, | Fluke, | Miller, Crawford, |
| Antrim, | Fox, | Miller, Ottawa, |
| Baum, | Hahn, | Norris, |
| Beatty, Morrow, | Halfhill, | Nye, |
| Beyer, | Harris, Hamilton, | Okey, |
| Brown, Highland, | Harter, Huron, | Peters, |
| Brown, Pike, | Harter, Stark, | Pierce, |
| Campbell, | Henderson, | Read, |
| Cody, | Hoffman, | Redington, |
| Collett, | Holtz, | Riley, |
| Colton, | Hoskins, | Roehm, |
| Cordes, | Hursh, | Shaffer, |
| Crites, | Johnson, Madison, | Smith, Geauga, |
| Cunningham, | Johnson, Williams, | Stalter, |
| Davio, | Kerr, | Stamm, |
| Doty, | King, | Stevens, |
| Dunlap, | Knight, | Stewart, |
| Dunn, | Lambert, | Stokes, |
| Dwyer, | Lampson, | Tallman, |
| Earnhart, | Leete, | Tannehill, |
| Elson, | Leslie, | Ulmer, |
| Evans, | Longstreth, | Walker, |
| Fackler, | Ludey, | Winn, |
| Farnsworth, | Marshall, | Wise, |
| Fess, | Matthews, | Woods, |
| FitzSimons, | McClelland, | Mr. President. |

Those who voted in the negative are:

| | | |
|---|---|---|
| Beatty, Wood, | Kramer, | Stilwell, |
| Bowdle, | Kunkel, | Taggart, |
| DeFrees, | Malin, | Tetlow, |
| Donahey, | Moore, | Thomas, |
| Farrell, | Pettit, | Wagner, |
| Harbarger, | Rockel, | Watson. |
| Kehoe, | Shaw, | |
| Keller, | Solether, | |

The resolution was adopted.

Resolution 97 — Mr. Bowdle, was then taken up and was read as follows:

> *Resolved, by the Constitutional Convention of the state of Ohio,* That Hon. William H. Lewis, assistant attorney general of the United States, is hereby extended an invitation to address the Convention before adjournment in behalf of the colored citizens of the state of Ohio.

Mr. BOWDLE: I shall take your time for just a moment. I introduced that resolution in the utmost possible seriousness. It is a difficult thing in these days of conspiring politics for people to attribute anything like disinterested motives to a person in introducing a resolution like this. However, I beg leave to say that in this instance while the accusation is ordinarily true, my introduction of this resolution was a very disinterested one. We have heard in this Convention by invitation from a variety of prominent men, and cudgel my brain as best I can I cannot think of one single novel or illuminating thing that fell from the lips of any man who has had the honor of occupying that rostrum.

Mr. DOTY: Agreed.

Mr. BOWDLE: Therefore I voted against any of them coming, but it seems to me that an exception might be made in the case of this distinguished colored man, whose name is mentioned in this resolution. We have here among us a race of people which has done as much work as any race of men on the edifice of our material civilization, a race of men which has received but little recognition. They are unctiously talked to in all political campaigns, but when the campaign is over the best reward they get is janiterships, bootblackships, and some other menial ships not worth talking about. And meanwhile, between campaigns, we exercise the right of suspending all the criminal laws applicable to ourselves by hanging them and by occasionally burning them. It seems to me, therefore, that it is a proper thing, as the race is not represented on the floor of this Convention, that we step aside for a moment and spend a half hour listening to one of the most distinguished representatives of the colored race.

Mr. ELSON: May I ask the gentleman a question?

Mr. BOWDLE: Yes.

Mr. ELSON: How many colored voters are there in your district?

Mr. BOWDLE: About six thousand in the first congressional district. I see the purpose of that question, but I should like to say for the benefit of the member from Athens [Mr. ELSON] that I have in my hand a watch which is sixty-five years old. It is a watch that is intimately connected with the anti-slave movement in this country. I know we have reached the time in the history of the United States when pretty near everybody will claim the honor of having had a relative on the underground railway, but most people who tell you that they were there were there as brakemen. This watch comes to me from my grandfather, Daniel Bowdle, who himself was an engineer on the underground railway, with Achilles Pugh, of Cincinnati, another leader in the movement, who in his time had his entire plant destroyed by some white gentlemen from Covington, whereupon my grandfather loaned him enough money to equip his press and get new type and the result was that he returned the loan to my grandfather plus the watch which I hold in my hand. Therefore, I think it is not amiss for me to say that I have inherited some interest in the colored race, which is now being so terribly discriminated against in America. I was reading last night in Ben Butler's book about the fight at Big Bethel. Ben Butler said that the most conspicuous service of the war was rendered by colored men; that after the fight at Big Bethel, on the morning after, when he was riding his horse among the corpses, he was struck with the astounding number of black men who were dead on the field, and that brought about a strong feeling for the colored man and he there made up his mind that among the finest soldiers in the Civil War, were the colored men.

This letter concerning the matter says:

> Mr. Lewis is a graduate of Harvard and former coach on the Harvard eleven. He is a resident of Boston and was formerly United States district attorney for Boston until recently appointed assistant attorney general of the United States.
>
> I sincerely trust the friends of the colored race among the Constitutional Convention will cooperate and grant our only request in behalf of four hundred thousand colored citizens of Ohio.
>
> Grant me permission further to state in behalf of the negro press of Ohio and the United States in the passing of the resolution the Ohio Constitutional Convention will have done more towards encouraging the colored citizens of Ohio than all the acts of lynch law and mob rule can accomplish from now to eternity. Mr. Lewis' talk will be along the lines of racial development and of great value to the colored citizens, the Constitutional Convention and the press and fellow white citizens.
>
> I therefore bespeak for Mr. Lewis a hearing.

Mr. DWYER: What office are you a candidate for?

Mr. PECK: I move that the resolution be tabled.

The motion was seconded.

Mr. BROWN, of Highland: On that I demand the yeas and nays.

Mr. FESS: After hearing the eloquent speech of Mr. Bowdle I wish you would withdraw the resolution.

Mr. PECK: I move that we adjourn until ten o'clock in the morning.

The motion was lost.

The PRESIDENT: The motion is to lay the resolution on the table and on that the yeas and nays are demanded.

The yeas and nays were taken, and resulted — yeas 42, nays 56, as follows:

Those who voted in the affirmative are:

| | | |
|---|---|---|
| Baum, | Fluke, | Moore, |
| Beatty, Morrow, | Harbarger, | Okey, |
| Beatty, Wood, | Henderson, | Peck, |
| Beyer, | Hoskins, | Peters, |
| Brattain, | Hursh, | Pettit, |
| Brown, Pike, | Kehoe, | Read, |
| Cody, | King, | Shaw, |
| Collett, | Kramer, | Stalter, |
| Colton, | Leete, | Stevens, |
| Crites, | Ludey, | Tallman, |
| Elson, | Malin, | Ulmer, |
| Evans, | Matthews, | Wagner, |
| Farnsworth, | McClelland, | Walker, |
| Fess, | Miller, Crawford, | Worthington. |

Those who voted in the negative are:

| | | |
|---|---|---|
| Anderson, | Halfhill, | Riley, |
| Antrim, | Harris, Hamilton, | Rockel, |
| Bowdle, | Harter, Huron, | Roehm, |
| Brown, Highland, | Harter, Stark, | Shaffer, |
| Campbell, | Hoffman, | Smith, Geauga, |
| Cordes, | Holtz, | Solether, |
| Cunningham, | Johnson, Madison, | Stamm, |
| Davio, | Johnson, Williams, | Stewart, |
| DeFrees, | Keller, | Stilwell, |
| Donahey, | Kerr, | Stokes, |
| Dunlap, | Kunkel, | Taggart, |
| Dunn, | Lambert, | Tannehill, |
| Dwyer, | Leslie, | Tetlow, |
| Earnhart, | Longstreth, | Thomas, |
| Fackler, | Marshall, | Watson, |
| Farrell, | Miller, Ottawa, | Winn, |
| FitzSimons, | Norris, | Wise, |
| Fox, | Pierce, | Woods. |
| Hahn, | Redington, | |

So the motion to table was lost.

Mr. DOTY: I move to amend the resolution as follows:

> Strike out the words "before adjournment" and insert "on Wednesday evening, April 17, 1912."

By this amendment we arrange for an evening hearing and it will not break into any of our sessions.

The amendment was agreed to.

Mr. ELSON: I cannot support this resolution. We haven't invited anybody to come to this Convention and speak as a democrat or as a republican or as a white man. We have invited a few very promiment American citizens because we wanted to hear from them and because we thought they could instruct us some, but we did it for a perfectly good purpose and we must draw the line somewhere.

Mr. NORRIS: I understand you to say that we haven't invited anybody here as a democrat or as a republican or as a white man. We are not inviting this man here because he is a white man.

Mr. ELSON: No; we are inviting him because he is a colored man. He is not a very prominent citizen and he is not a man of national reputation. I don't know what good he can do this Convention and why we should invite him here merely to compliment a certain class of citizens is something I cannot understand. If the gentleman will change the name to "Booker Washington" I will vote for it. Booker Washington is a national character and I will vote for him to be invited any time, although we have very little time to fool away on those things. However, while I cannot support this resolution I will say that were I a colored man and lived in the sixth congressional district I would vote for Mr. Bowdle and I think I would as a white man.

Mr. FESS: I voted to table this motion because I thought we had voted down invitations to other people, and with the time fixed for adjournment we would need every minute of our time. That is the only reason I voted against it. I voted with my eyes open, but since the motion has been fixed so that it will not take a particle of time from our sessions, but will be in the evening, I will vote for it.

The resolution was adopted.

Indefinite leave of absence was granted to Mr. Weybrecht and Mr. Worthington.

Mr. BEATTY, of Wood: I move to recess until 7:30 o'clock p. m.

Mr. DOTY: I move to adjourn until tomorrow at 10 o'clock a. m.

The motion was carried and the Convention adjourned until tomorrow at 10 o'clock a. m.