

# SIXTY-THIRD DAY

## MORNING SESSION.

THURSDAY, April 25, 1912.

The Convention met pursuant to adjournment, was called to order by the president, and opened with prayer by the delegate from Knox [Mr. McCLELLAND].

The journal of yesterday was read and approved.

On motion of Mr. Miller, of Crawford, leave of absence for the remainder of the week was granted to Mr. Miller, of Fairfield.

### SECOND READING OF PROPOSALS.

Proposal No. 241 — Mr. Dwyer, was taken up.

The proposal had been read the second time. The question being "Shall the proposal pass?"

The yeas and nays were taken, and resulted — yeas 93, nays 2, as follows:

Those who voted in the affirmative are:

Anderson,	Fox,	Moore,
Antrim,	Hahn,	Norris,
Baum,	Halenkamp,	Okey,
Beatty, Morrow,	Halfhill,	Partington,
Beatty, Wood,	Harbarger,	Peters,
Beyer,	Harris, Ashtabula,	Pettit,
Bowdle,	Harris, Hamilton,	Pierce,
Brattain,	Hoffman,	Read,
Brown, Highland,	Holtz,	Redington,
Brown, Lucas,	Hoskins,	Riley,
Campbell,	Hursh,	Rockel,
Cassidy,	Johnson, Madison,	Roehm,
Cody,	Johnson, Williams,	Shaw,
Colton,	Kehoe,	Smith, Geauga,
Cordes,	Kerr,	Smith, Hamilton,
Crosser,	Kilpatrick,	Solether,
Cunningham,	King,	Stalter,
Davio,	Knight,	Stamm,
DeFrees,	Kramer,	Stevens,
Doty,	Kunkel,	Stewart,
Dunlap,	Lambert,	Stilwell,
Dwyer,	Lampson,	Stokes,
Eby,	Leete,	Taggart,
Elson,	Longstreth,	Ulmer,
Evans,	Ludey,	Wagner,
Fackler,	Marshall,	Walker,
Farnsworth,	Mauck,	Weybrecht,
Farrell,	McClelland,	Winn,
Fess,	Miller, Crawford,	Wise,
FitzSimons,	Miller, Fairfield,	Woods,
Fluke,	Miller, Ottawa,	Mr. President.

Mr. Earnhart and Mr. Malin voted in the negative. So the proposal passed as follows:

Proposal No. 241 — Mr. Dwyer. To submit an amendment to article II of the constitution.— Relating to impeachment of officials.

*Resolved, by the Constitutional Convention of the state of Ohio,* That a proposal to amend the constitution shall be submitted to the electors to read as follows:

SECTION 24a. Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this

method of removal shall be in addition to impeachment or other method of removal provided.

Under the rules the proposal was referred to the committee on Arrangement and Phraseology.

The PRESIDENT: The next order of business is reading of Proposal No. 325 — Mr. Anderson.

The proposal was read the second time.

Mr. MARSHALL: With the consent of the Convention, I rise to a question of personal privilege for just a moment. I have a statement that I would like to read to the Convention. I shall occupy only a few moments.

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

Mr. MARSHALL: I want to make a statement.

Mr. DOTY: I object to the statement.

The PRESIDENT: The member will state the matter about which he wishes to be heard.

Mr. MARSHALL: I want to say that when I was a boy going to school —

Mr. DOTY: I renew my point of order.

Mr. MARSHALL: I want to say something about the banquet next Wednesday.

The PRESIDENT: The member is out of order. That is not a question of privilege.

Mr. MARSHALL: I was going to say —

The PRESIDENT: The member is out of order. The gentleman from Mahoning is recognized.

Mr. ANDERSON: Mr. President: This proposal, Proposal No. 325, I regard as of great importance. The need of such a change has been discussed for many years. For years in our part of the state, at different times, the need of just such a change as this proposes to make has been recognized by both the bench and the bar, and it was at the urgent request of Judge Robinson, one of the best men who ever rendered a decision, and of other judges in our part of the state, that I introduced this proposal. As it was originally introduced it read "All acts of the general assembly in derogation of the common law shall be liberally construed." Judge Peck, the chairman of the committee, suggested the language, which I think is better than mine, "Statutes in derogation of the common law shall not be strictly construed." One is affirmatively stated, and the other is negatively stated, and I think Judge Peck's is better. "Derogation," in short, means "repeal." I wish to explain to those not members of the bar that the common law largely consists of customs that have come down through the ages. A custom, when it becomes crystallized thus into a law, has the force of precedent "whereof the memory of man runneth not to the contrary." If within the memory of any man something other than the custom existed, then it is not a law, or if there is even a legend when it did not exist, it is not a custom. Not only the customs whereof the memory of man runneth not to the contrary, but judge-made law, about which I spoke some days ago, constitutes the common law. What I mean by judge-made law is the laying down of a certain proposition years and years ago, which was added to by another judge and then by another, until it comes up to us with its accumulated additions. It seems that some

## Construction of Statutes in Derogation of the Common Law.

of the lawyers have not paid much attention to what constitutes judge-made law. In fact, it seems the first they ever heard of it was on the floor of this Convention. That which I have said in criticism of judge-made law is very mild indeed when you compare it with what President Taft and other men of national reputation have said in reference to it.

When the common law, which is the custom of ages, or the judge-made law, which is part of the common law, becomes a hardship, or fails to properly give the whole remedy that should be given, or for any reason there ought to be a change, you can have relief only through the legislature, because no judge-made law was ever repealed by other judge-made law. In other words, if you want to do away with judge-made law where it works an injustice or fails to give the proper remedy, you have to go into the lawmaking body and have a statute passed.

Now the rule of construction made by the judges is that when you try to remedy the ills of the common law by statutory enactment the construction then put upon that statute shall be strictly against giving the remedy. It always seemed to me a foolish proposition that when you have to go into the legislative body to get the change made the construction shall be that you did not intend to make any change.

Mr. LAMPSON: The point that occurs to me is that if authority by way of a constitutional mandate is given to a court not to construe a statute strictly, would not that operate as a mandate to the court to make judge-made law?

Mr. ANDERSON: No; I am afraid I have stated it awkwardly. The desire apparently to still keep judge-made law when, for the purpose of getting away from the ills of judge-made law you go into the general assembly and get laws passed, leads the judges to construe the legislative enactment strictly. In other words they say to the people who had this passed and to the legislature, "You shall not have a remedy under it, but we will keep the judge-made law."

Mr. LAMPSON: Construing a statute strictly would be in accordance with its meaning?

Mr. ANDERSON: You are forgetting the wording of this proposal. This only applies to statutes in derogation of the common law, where you repeal the common law by statutory enactment. That is the scope of this proposal.

Mr. NORRIS: Do you define the common law as what you call judge-made law?

Mr. ANDERSON: That is part of it.

Mr. NORRIS: What is the remainder of it?

Mr. ANDERSON: Customs whereof the memory of man runneth not to the contrary.

Mr. NORRIS: What is your definition of judge-made law?

Mr. ANDERSON: Do you really want a definition?

Mr. NORRIS: Yes.

Mr. ANDERSON: It is law which the judges have taken it upon themselves to make, law that is not found in the statutes. It is different from statutory or legislative law.

Mr. NORRIS: Are you not in your proposal endeavoring to establish a different rule from that which has always prevailed in Ohio concerning this?

Mr. ANDERSON: What are you going to read from?

Mr. NORRIS: Cooley's "Constitutional Limitations." A gentleman happened to have the book, and I just picked it up, and I will read the definition of the common law:

Common law consists of those maxims of freedom, order, enterprise and thrift, which have prevailed in the conduct of public affairs, the management of private affairs, the regulation of domestic institutions, and the acquisition, control and transfer of property, from time immemorial. Is not that a definition of the common law?

Mr. ANDERSON: Yes; I gave it—whereof the memory of man runneth not to the contrary. But that is only a part of the common law. That is the common law that comes to us from the ages, the part that is based on custom and custom alone. If there were a legend as to when that was not the common law, then it does not crystallize into law. It must be the kind of custom whereof the memory of man runneth not to the contrary, and by reason of the fact that it is so old—I am not criticising it on account of its age—but by reason of the fact that it is so old and that we have made so much progress and that there are so many things now that were not in existence or dreamed of at the time it became the common law, sometimes it is necessary to go into the legislature to have the common law changed. Now, when you do go into the legislature to have it changed this proposal, when it becomes a part of the constitution, says that you must not construe those legislative provisions strictly.

Mr. BROWN, of Highland: This proposal prohibits a strict construction being placed upon the statutes in derogation of the common law?

Mr. ANDERSON: Statutes repealing the common law.

Mr. BROWN, of Highland: And it says they shall not be strictly construed. That prohibits any court from construing a statute in conformity with this law.

Mr. ANDERSON: No; certainly not.

Mr. BROWN, of Highland: If it is not to be strictly construed, how is it to be construed? Is it to be construed according to the whim of the man construing it in any gradation of strictness. There is no limit how it can be construed.

Mr. ANDERSON: Will you not permit me to ask you a question: How do you define the difference between liberal and strict construction? What kind of statutes are construed strictly?

Mr. BROWN, of Highland: I do not know.

Mr. ANDERSON: I thought you didn't. Now I want to answer your question so that you may understand. Statutes are construed strictly or liberally. It has been found that certain common law defenses in certain kinds of cases have become obnoxious. So congress proceeded to do away with the common law rule by statutory enactment, to be able to give full relief. The supreme court of the United States had to change the rule of construction, because if it had followed the construction of the Ohio supreme court, the strict construction of the statutes repealing the common law, there would have been no relief. They decided those statutes

## Construction of Statutes in Derogation of the Common Law.

were remedial, and therefore should not be strictly construed.

Mr. BROWN, of Highland: This absolutely prohibits construction according to its terms. It says it shall not be construed according to its terms.

Mr. ANDERSON: That does not mean that to a lawyer.

Mr. BROWN, of Highland: It makes no difference whether you are a lawyer or not; it is a question of the meaning of the term.

Mr. ANDERSON: No, sir; it is not a question of the meaning of a term. Please remember the controlling part of that sentence is "the common law." If you will all the time have that in view when you are discussing this you will know what is aimed at.

Mr. BROWN, of Highland: You admit you are giving more power than now exists?

Mr. ANDERSON: No, sir; taking power away.

Mr. REDINGTON: Prefacing my remarks by the statement that I am asking for information only: Our legislature has codified some of the common law. For instance, as I understand, our legislature has codified the law in regard to notes and bills, and about warehousemen, consignors and consignees, fixing the liability of a maker of a note, the drawer of a bill and the indorser of commercial paper, etc. The query in my mind is what effect will this constitutional provision have upon such statutes when you say that the court must not strictly construe those statutes?

Mr. ANDERSON: Are the statutes you refer to in derogation or repeal of the common law? They have nothing to do with the common law at all.

Mr. REDINGTON: I assume when they have codified—

Mr. ANDERSON: The statutes you refer to have nothing to do with the common law at all.

Mr. REDINGTON: And they have codified others—

Mr. ANDERSON: But this has nothing to do with codification.

Mr. REDINGTON: The subject of commercial paper is a subject in the common law.

Mr. ANDERSON: This proposal only refers to cases where the common law does not give the proper remedy or there is hardship under it. Then you go into the law-making body and repeal the common law by a statutory enactment. That is the only thing to which this proposal applies.

Mr. BROWN, of Highland: I will ask you if under this proposal the criminal lawyer would not reap a considerable advantage?

Mr. ANDERSON: No, sir.

Mr. BROWN, of Highland: In other words, is it not to the interest of the criminal lawyer—

Mr. ANDERSON: I wish you would suggest that to the gentleman from Medina.

Mr. KING: I want to ask you whether the statute creating a crime or offense wholly unknown, previous to the passage of the statute, or wholly unknown in the common law, is a statute in derogation of the common law?

Mr. ANDERSON: I do not believe it is, but you are asking a difficult question. If it is not known to the common law it could not be in derogation to that, if it didn't exist before.

Mr. FACKLER: Do you think the negotiable instrument code is not in derogation of the common law, and does it not set aside the law commercial with reference to commercial papers?

Mr. ANDERSON: It does, but not in the instance he cited. In the codification of it?

Mr. FACKLER: Yes.

Mr. ANDERSON: Does this have any reference to codification?

Mr. FACKLER: Yes; the law in many instances in our country is different from statutory law.

Mr. ANDERSON: Yes, and they have statutory law because the common law did not give the proper relief. Now, I do not care to take up further time—

Mr. HALFHILL: I understand your proposition to be that you would apply to remedial statutes the same rule of construction?

Mr. ANDERSON: No; I said that in the instances I stated, where laws were passed because under the common law hardships were had, under the common law the judge-made defenses of assumption of risks, contributory negligence, fellow servants, etc., were so obnoxious that congress, so far as they could legislate in reference to interstate commerce, wanted to do away with such defenses, and consequently congress passed certain laws. Now the judges in some of the lower courts attempted to apply the rule of strict construction to these safety-appliance statutes and really nullified them, and I gave you many instances where that very thing was done in Ohio. Then the supreme court of the United States, wishing that those safety-appliance laws should prevail, called them remedial statutes, and said they should not be construed strictly.

Mr. DWYER: Remedial statutes are not strictly construed.

Mr. ANDERSON: No, sir; and the supreme court had to put these in the class of remedial statutes to keep from construing them strictly.

Mr. HALFHILL: Is it not possible for them to construe them broadly enough to cut off the common law?

Mr. ANDERSON: Yes, and that was done, but even with the doing of it, after congress, in section 8 of the appliance law, stated that the defense of assumption of risk should not be set up by the master, that very thing was done.

Mr. PECK: I have never been satisfied with this and I want to offer a few words.

Mr. KRAMER: This proposal sounds well, but I would like to know what the supreme court would do when one of these matters came to it?

Mr. ANDERSON: That is rather a difficult question. The effect depends largely on who constitute the supreme court.

Mr. KRAMER: That is what I think.

Mr. ANDERSON: But we should do what we can toward relief by causing a proper construction to be made of statutes passed for the one purpose of correcting the hardships which exist under the common law.

Mr. KRAMER: I didn't hear the answer to Mr. Lampson's question. If the courts are not construing the statute strictly, according to its meaning, does it not give the courts more power than they have now?

Mr. ANDERSON: Are you not getting interpretation and construction mixed?

## Construction of Statutes in Derogation of the Common Law.

Mr. KRAMER: I don't know.

Mr. ANDERSON: I think that is what Mr. Lampson had in mind, interpretation and not construction. This applies to construction and not to interpretation.

Mr. CUNNINGHAM: Commercial paper has been referred to, and the code, which is an interpretation or rule of construction. There are well-known rules governing commercial paper, and ought not statutes which change well-known rules receive a strict construction?

Mr. ANDERSON: They should receive a strict interpretation, but there is a difference between interpretation and construction. This applies to the general rule of construction and not interpretation.

Mr. DOTY: I desire to offer an amendment to this proposal.

The amendment was read as follows:

Strike out lines 4 and 5, and insert "No court of this state shall exercise any power not conferred by the constitution or by law.

Mr. DOTY: Of course I cannot enter upon a discussion of any legal matter without fear and trembling, but after all we laymen have been learning a good deal of law this year, and quite a little this morning. We had one class over there under a professor, and we had a de novo class over here under a doctor, and therefore it is impossible for any of us who have any degree of intelligence not to have absorbed some law.

Mr. BROWN, of Highland: Which law do you refer to, statutory law or common law?

Mr. DOTY: I do not think it is particularly necessary to point out which law — just law.

Mr. PECK: Any old kind.

Mr. DOTY: I read Blackstone once years ago. That was sometime back, but I was a reporter in police courts, justices courts and other courts, and I have absorbed some legal knowledge there. I have also attended several sessions of the general assembly, and this session, so far, of this Constitutional Convention, and I know I have absorbed in various ways, not very deep into the skin, but a large, though perhaps inexact, knowledge of the law.

Mr. PECK: I rise to a point of order. The amendment proposed is not germane to the proposal amended. It has nothing to do with that subject.

Mr. DOTY: May I be heard on that point of order? I have five minutes on the point of order.

The PRESIDENT: The president will rule the point of order not well taken:

Mr. DOTY: That knocks me out of five minutes. The member who has introduced this proposal has made some remarks here at various times in derogation — I believe that would be a good word — of the supreme court making law. As near as I can make out, this proposal says the court can make some more law. I may be wrong. If I am, that is the fourth mistake I ever made in my life. It looks to me as though that is what he is up to. That is what I want to stop. I want to stop the judges from making any more law. I think if that amendment that I have offered is made part of the fundamental law of the state of Ohio, it will have a tendency to prevent the judges from making any more law, and I therefore hope the amendment will prevail.

Mr. NORRIS: I want to compliment the gentleman.

I don't know anything about the amendment, but he struck the keynote in his speech.

Mr. DOTY: It was purely inadvertent on my part, if I did, Judge.

Mr. NORRIS: This proposal simply opens the door for judge-made law.

Mr. KNIGHT: I have been hoping that this Convention would not reach the silly stage before hot weather, but in this proposal we have the most concrete evidence that we have reached the silly stage already. Most of us have heard before the phrase "judge-made law." We had two hours of it some days ago. We had it rehashed and boiled down on a question of personal privilege. It fell down, flickered out, and we had hoped expired the other evening. Now we have it again before us.

It seems to me that the proposal itself is not worthy of the consideration of this Convention at the rate of \$300 an hour. I have noted that though the report of the committee recommended the adoption of this proposal with the amendment as presented, still the chairman of the committee does not sign it, and I have come to have a good deal of confidence in the judgment of the chairman of the committee on Judiciary and Bill of Rights.

Mr. ANDERSON: Will the gentleman yield to a question?

Mr. KNIGHT: No, sir; I have never asked the gentleman a question while he was speaking, and I prefer not to yield.

I object to amending the constitution of the state of Ohio to help the private practice of attorneys. It seems to me that this proposal has that principal object in view, that it will be especially beneficial to the private practice of attorneys in damage suits.

The common law of England, which underlies the law of this country, is good. It is the growth of custom, and custom which all of us, whether we know it or not, follow in our every-day business and in nearly all of the transactions of life. It does not need a lawyer to know many of the things which are the common law. Hardly a day passes in the life of a single one of us that we are not doing things that we have a right to do because that right has come down to us from time immemorial in the common law. It has been almost if not the invariable practice in all the states of this country that statutes enacted by the legislature undertake to modify customs, which customs have crystallized into the best kind of law, shall be strictly construed and just as little of these customs removed without our knowing it as is possible. This proposal undertakes to reverse the course of procedure which it is vital to us to have retained. Every law which seeks to change the common law ought to be strictly construed. Further, this proposal is a direct mandate to the courts to construe statutes—I apologize for having to use the phrase judge-made law—to authorize judge-made law of the worst kind, worse than we have ever had. It seems to me the proposal is one that can well be dispensed with, and I therefore move that the proposal and pending amendment be indefinitely postponed.

Mr. PECK: I assented to this proposal, and perhaps suggested the wording with some hesitation in the committee. I did not then and do not now feel certain

## Construction of Statutes in Derogation of the Common Law.

about the entire propriety of it, but I have seen some curious results worked out of statutory law by judges from the application of that rule. I have seen statutes beneficial nullified by a strict construction of that rule. The statutes were strictly construed until they were all frittered away. I do not believe in that sort of construction, and I have not much to do with what the gentleman terms damage suits. My practice has not been in that line, and I was not thinking of that class of cases when I assented to that proposal. I was thinking of it in a general way. When the general assembly passes a law it should be given effect. I think we are all agreed to that, and it should not be frittered away by a series of constructions, and I propose to add at the end of the present proposal as it now stands these words by way of amendment: "But the same shall be fairly and liberally construed to effect the object of the statute." I do not suppose I can do that under the motion to indefinitely postpone, but if I do have opportunity to offer that amendment, I shall offer it.

Mr. HALFHILL: I would like, before the vote is taken, to have the proposal read with the Doty amendment.

The SECRETARY: The amendment of Mr. Doty strikes out all the original proposal and the proposal would then read:

*Resolved by the Constitutional Convention of the state of Ohio, That a proposal to amend the constitution shall be submitted to the electors, to read as follows: "No court in this state shall exercise any power not conferred by the constitution or by law."*

Mr. HALFHILL: I confess it does strike the original proposal all out. It is a finishing stroke, delivered with swiftness and dispatch at the center of the target. But as to the main proposal or any amendment that may be offered thereto, permit me to say I can conceive how a proposal like that may be introduced here in entire good faith, but it is revolutionary to an extent that we hardly can comprehend the amount of revolution that would be comprised in those few words. The common law is the great fountain of learning that we draw from, both the courts and the legislature, and we must remember that it is a great body of law. The common law has judicial records going back for seven hundred years in England, and there are reported cases back for six hundred years. Of course, for the first three hundred years it is in barbarous law—French or Latin—but for the last three hundred years we have reports in our own tongue, and in all of those the great body of our rights and privileges as citizens are well defined. Now when our ancestors as colonists came here and established for themselves the several colonial governments they were secured in all of those rights and privileges by virtue of being English subjects, and we have succeeded to them, and what I want to point out is that they are perhaps greater in their scope and extent than all the legislative acts of all the states of the federal union. In fact, we can scarcely afford to cast aside the common law as it is defined, or else we will lose our bearings when we enact statutes and bring them before the courts for construction and interpretation. It was said by the proponent [Mr. ANDERSON] that the common law is not ap-

plied strictly, or that the rule of construction is not applied strictly, to remedial statutes, and that is true.

But we have two classes of legislative enactments. One class deals with remedies. Sometimes they call that adjective law. Then we have another class that deals with rights and privileges, and that is substantive law. All of the adjective law, all of the remedies and rules of evidence, never came within the common law rule of construction at any time, and therefore this proposal could not apply; and when it comes to the substantive law of rights and privileges, we all know what the rights and privileges are, and we can know by the decisions of the courts defining these rights and privileges whenever an innovation is made upon them by the legislature. Then and at all times we have a definite base line to start from as a rule of construction and anything else would be chaos.

Permit me to read the rule of construction given in Sutherland:

Such statutes as take away a common law right, remove or add to common law disabilities, confer privileges, or provide for proceedings unknown to the common law, or in derogation of the common law, are strictly construed.

Those are simply the statutes that deal with substantive rights, privileges and disabilities affecting the rights of persons, and the rights of property, and in no way at all referring to court procedure or remedial law. We have now a definite rule of construction, and I submit the proposition as suggested here is wrong in this, that it removes a definite starting place, to-wit, the common law, and you do not have a definite ending place, to-wit, strict construction on statutes governing rights and privileges, and then you have no stake set, no point at which the judge may stop, and instead of the law becoming a fixed rule of action, with a definite starting place and a definite stopping place, you would have the law administered according to the idea of the particular judge who is construing that particular statute.

Mr. DOTY: A point of order. The gentleman's time has expired.

The PRESIDENT: The gentleman has thirty seconds still.

Mr. HALFHILL: I can answer the gentleman from Mahoning, who I see has risen.

Mr. ANDERSON: Is not this the fact, that you go into the legislature to get relief because the common law does not give the remedy or this relief?

Mr. HALFHILL: Undoubtedly so.

Mr. ANDERSON: Then should not that remedy or correction which the lawmaking body gives be construed so as to carry out the real object of the law?

Mr. HALFHILL: No. The legislature should clearly define its own remedy, and then the court will construe it according to the expressed language, which ought to plainly set forth the object of the law.

Mr. FESS: It appearing that everybody has spoken that wants to, and desiring to bring this matter to a vote, I move that the whole matter be tabled.

The motion was seconded.

The PRESIDENT: All those in favor will say aye, and the contrary no. The motion is carried.

Mr. ANDERSON: We didn't have an opportunity to

## Construction of Statutes\* in Derogation of the Common Law.

vote on the motion to table. I move that the motion to table be reconsidered.

Mr. DOTY: I rise to a point of order. It is against our rules to reconsider a motion to table.

Mr. ANDERSON: I move that it be taken from the table then. I know as little about parliamentary proceedings as Mr. Doty does about law. My object is to have a yea and nay vote on the proposition.

Mr. FESS: I make a point of order that the gentleman cannot make a motion to take from the table unless he suspends the rules.

The PRESIDENT: The point is well taken.

Mr. DOTY: You can make that Monday night.

The PRESIDENT: The next business is amended Proposal No. 240, which will now be read.

The proposal was read the second time.

Mr. ANDERSON: Gentlemen of the Convention: This may seem to be helping the practice of some lawyers—

Mr. DOTY: Not mine.

Mr. ANDERSON: I do not know how it may appeal to those who are so well qualified in the law by reason of associating with some law professor in some college. I presume that all that is needed to be expert in all branches of the law is to have some experience like that.

Now, I have had some experience—I suppose I have had more experience where the individual is on one side and the corporation on the other than most here. I have made that a life study. I did not take it up intentionally in the first place, but I drifted into it, and I have made it a study and I ought to be more familiar with its hardships than those who have conducted the practice of law generally. The proposal you have just voted down would not in any way aid a damage lawyer, the professors to the contrary notwithstanding.

Mr. HOSKINS: May I ask you a question?

Mr. ANDERSON: You may not. I will not yield to you. You will never yield when I want to ask a question.

I say that all of those statutes passed to assist the individual are liberally construed because they are remedial statutes. The professor did not know that. I ask this particular professor to consult his fellow professor at the noon hour.

Now the limitation of recovery, by legislative enactment in Ohio, is \$10,000 in case of death, where no widow and minor children are left. Where minor children and a widow are left, dependent upon the husband and father killed, the legislative limitation in Ohio is \$12,000. Let me give you the rule of law. This is by the supreme court of Ohio, and it has not been overruled by a university professor. I read from 55th Ohio State, page 517:

In arriving at the total amount of damages in such cases (death cases) the jury should consider the pecuniary injury to each separate beneficiary, not found guilty of contributory negligence, but the verdict should be for a gross sum, not exceeding \$10,000.

Let me illustrate. Say that Mr. Donahey while coming to this Convention is killed by a head-on collision or by a derailment. His widow and his children would be entitled to recover. I understand that Mr. Donahey has been blessed with eight children. So he would leave a

wife and eight children. In arriving at the amount of damage in such cases the jury must consider the pecuniary injury to each separate beneficiary. In other words, the jury in trying that case would be told by the trial judge, "You must take into consideration the money loss to the widow, and the money loss to each one of her eight children, and then return a gross sum not exceeding \$12,000." In other words, the jury would take the amount of money that Mr. Donahey is earning in his business—not what he is making at the Convention here—and they would consider that, and they would consider his expectation of life, and they would consider the money lost to the wife and to each of the eight children, but they couldn't go above the \$12,000. Now any of you can see that that amount could not be right.

Different states have put this into their constitution. Utah (1895):

Art. XVI, Sec. 5. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

Kentucky (1890):

Sec. 54. The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

Oklahoma (1907):

Art. XXIII, Sec. 7. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

To you who are not attorneys, and are not connected with any institution where law is taught, I wish to explain that at common law the right of recovery for wrongful death did not exist. That right can only be created by statute. Consequently, it says "the right of action shall not be abrogated."

Certainly if Pennsylvania, where there are so many industrial plants, where there are so many men employed on railroads, where there are so many men killed each year, can have this section in their constitution, Ohio could not go very far wrong by following Pennsylvania's example.

Pennsylvania (1873):

Art. III, Sec. 21. No act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against the corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are void.

Now the great state of New York has thousands and thousands of men employed on railroads and in industries.



## Construction of Statutes in Derogation of the Common Law—Mechanics' and Builders' Liens.

New York (1894):

Art. I, Sec. 18. The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

Mr. DWYER: You have reference to compensatory damages?

Mr. ANDERSON: Yes; the same as discussed in the committee.

Mr. FACKLER: I would like to know how you can reconcile Proposal No. 240, beginning with "The right of action to recover damages for injuries resulting in death shall not be abrogated", with Proposal No. 24, which we have already passed.

Mr. ANDERSON: What is Proposal No. 24?

Mr. FACKLER: That provides that the state may provide compulsory workmen's compensation and employers' liability laws, and limit the right of recovery.

Mr. ANDERSON: The mere reading of it covers it. I am very much in favor of workmen's compensation laws.

Mr. FACKLER: If any injury results in death, the workmen's compensation act limits the amount of the recovery, takes away the very thing that this provides for.

Mr. ANDERSON: Add to this, then, "provided that nothing herein shall in any way affect the authority of the general assembly to enact a workmen's compensation law," and we can fix it in two minutes.

Now it may be said that the corporations, or those causing the death, would not be properly protected, but they are protected, first in the trial court by a motion for a new trial, which goes to the learned judge, and the judge can cut down a verdict to any sum he thinks proper. Not only that, but if the common pleas judge fails to cut down the amount given by the jury then the circuit court or the court of appeals has the absolute right to cut down the amount, provided the learned judges believe it to be too large.

Mr. CROSSER: Is it not a fact that that amendment is not at all necessary, for the workmen's compensation law would not be affected?

Mr. ANDERSON: I don't think it is necessary. Let me read you from 22 O. S., page 446:

Where the damages assessed by a jury are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the court, in the exercise of sound discretion, may make the remittitur of the excess the condition of refusing to grant a new trial.

In the first place, our statutory law provides if the trial judge believes that the amount given by the jury was induced by prejudice or passion then he can give a new trial, or even if he does not believe that the verdict was induced by prejudice or passion he can still cut it down and can say to the plaintiff in the case, "If you do not accept this amount that I suggest then I will grant a new trial," and the supreme court, in 22 O. S., says the court has that power. Now I do not want to take up too much of your time. As I say, Kentucky, Arkansas, Oklahoma, Pennsylvania and New York have like constitutional provisions, they have had them for a number

of years, and they have not worked any hardship there. I believe it is a proper measure for us to adopt here.

Mr. KING: This proposal simply provides for something that can be enacted under the constitution today, and I therefore move to lay it on the table.

The PRESIDENT: The question is on the motion to lay on the table.

Mr. ANDERSON: The yeas and nays.

The PRESIDENT: All those in favor of the motion say aye, and the contrary no.

Mr. ANDERSON: The yeas and nays.

The PRESIDENT: Not now.

Mr. ANDERSON: I demand the yeas and nays. I want the vote recorded.

The PRESIDENT: The motion is carried.

Mr. WINN: May I ask the president if he heard the demand for the yeas and nays?

The PRESIDENT: The rules require that the demand shall be seconded.

DELEGATES: We seconded it.

Mr. WINN: It was seconded.

Mr. ANDERSON: You gave no chance. I don't care much about this, but I want to know what we may expect in the future. There is a right involved here, and I say I was right under parliamentary law and under the rules of this Convention.

The PRESIDENT: The gentleman is out of order. Proposal No. 166 is the next thing in order, by Mr. Stilwell.

The proposal was read for the second time.

Mr. STILWELL: It is my hope that it will not require a great deal of the time of the Convention to dispose of this proposal. The judiciary committee has thoroughly discussed it, and it is my recollection that it was approved without any objection. It is made necessary because of the fact that the mechanics' lien law in Ohio was declared unconstitutional.

Mr. HOSKINS: Before you take your seat I want you to explain why we cannot have this now.

Mr. STILWELL: There was a legal controversy over the former mechanics' lien law, and it was declared unconstitutional by the supreme court of Ohio. The circuit court of appeals of the United States differed from this opinion of the supreme court of Ohio. However, that is of no effect in this state. I want to quote from the language of the circuit court, Judge Lurton delivering the opinion, referring to the mechanics' lien law. I am not going to read the full decision, but only parts here and there that are applicable:

With every disposition to come to an agreement with the views of the supreme court of Ohio, in the interest of harmony of decision, we are nevertheless compelled to express our inability to assent to the conclusions of that learned and impartial tribunal as to the validity of the legislation under which complainant's rights are claimed. The decision of that court was not placed upon any merely local or peculiar provision of the constitution of Ohio. The ground upon which they placed their objection to the law was that it was an unreasonable and oppressive restraint upon the owner's liberty of contract.

This restraint upon an owner's liberty of contract, the learned court said, was prohibited by

## Mechanics' and Builders' Liens.

those declarations of the Ohio bill of rights which declare that among the inalienable rights of man is "the right of enjoying and defending property, and seeking and obtaining happiness."

The "rights" supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government, and like declarations are to be found in all or most of our state constitutions. The question is therefore one of general law, having as much reference to the constitution of any other state as to that of Ohio.

In all or nearly all of the states there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner. These statutes vary in their character and purpose. Originally, they were chiefly acts giving a lien to persons having direct contractual relations with the owner. Such statutes did not protect those who contributed to the improvement through dealings with the contractor, and were soon followed by statutes extending the lien to persons not contractually connected with the owner, but who furnished labor or materials for the building through contracts with the principal contractor.

Referring now to the statute in Ohio, the court says:

But the validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor and materials has added to the property of another, thereby acquires a right to compensation. This strong natural justice has given rise to a variety of liens recognized by the common law. Thus, without any agreement the common law gave to one who, by his labor or expense, has made, preserved, enlarged, or repaired a chattel, a lien thereon for his security, which he may, however, lose if he surrenders possession.

Concluding their decision, Judge Lurton says:

The right of him who, by his labor and materials, had contributed to the betterment of another's estate, was an imperfect right, because it had not been done at the instance of the owner, though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors, and has turned the imperfect into a perfect right, by prescribing the consequences of a building contract, and giving a remedy to all who, at the instance of the contractor, shall contribute to the performance of his contract with the owner. That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its enactment. Neither upon reason nor authority are we able to come to an agreement with the Ohio court. In the exercise of our independent constitutional jurisdiction, we

must declare our conscientious judgment to be that the Ohio statute was not void.

Now just a word from the supreme court of the United States giving its approval to the decision of the United States circuit court of appeals:

The circuit court of appeals expressed its earnest desire, in the interest of harmony of decision, to come to an agreement with the state court, but its sense of duty compelled it to sustain the constitutional validity of the statute upon which the plaintiffs based their claim. Upon a careful consideration of the objections urged to the statute, and after an extended review of the authorities, the circuit court of appeals held that the statute did not deprive the owner of his property without due process of law, nor unreasonably interfere with his liberty of contract; that the restraints put upon the owner by the provisions in favor of subcontractors and those who furnished materials to be used by the contractor in execution of his contract with the owner, were neither arbitrary nor oppressive; that such provisions were no more onerous than required by the necessity of protecting those who actually do the work or furnish the material by which the owner is benefited; dictates of natural justice, and, as must be conclusively presumed as was known to the owner when he contracted for the building of his house, its requirements could only be avoided by pointing out some specific part of the organic law which has been violated by its enactment.

We are constrained to withhold our assent to the views expressed by the supreme court of Ohio, and to express our concurrence with the circuit court of appeals. The great weight of authority in this country as to the meaning and scope of constitutional provisions substantially like those to be found in the constitution of Ohio is, in our opinion, against the conclusion reached by the learned state court. Exercising an independent judgment on the subject, we are obliged to so declare.

I simply want to call your attention to the fact that this proposal only permits of legislation of a character that has been suggested, and it is made necessary because of the fact that the supreme court of Ohio has previously held certain phases of the mechanics' lien law unconstitutional. I doubt if there is a delegate in the Convention who does not fully appreciate the injury that is done to material men and mechanics by reason of their inability to collect for material or labor because of unscrupulous and oftentimes dishonest contractors. I am not assuming to say what kind of a law would be passed under this provision of the constitution, but I am assuming that such a statute would be passed as would require of all dishonest men to do the thing that all honest men do now.

The losses that have been sustained in the state of Ohio since this law was declared unconstitutional would mount into the millions in the last eight or ten years, and the losses are altogether to those who as contractors or subcontractors have either been lacking in ability in the particular line of business they were engaged in, or



## Mechanics' and Builders' Liens.

because they had deliberately set out to defeat justice or to defeat the material men or the laborers.

Mr. BOWDLE: If you will answer a question it may save me from making a speech. Why is it you leave out the word subcontractor? In other words, why are you not willing that the subcontractor should have a lien?

Mr. STILWELL: My idea is that ninety-five per cent of the damage done is done by subcontractors, and yet under this provision it is my understanding that if the legislature so desires, the subcontractors may be included, but the evil largely exists in the subcontractors.

Mr. ELSON: Do we understand by this proposal that the owner is responsible for the pay of every laborer who does a day's or an hour's work under any contractor in building, or one who furnishes any material, however small—that the owner is ultimately responsible for the pay?

Mr. STILWELL: That is one of the points I want to mention again. I have that faith in every delegate here that I do not believe there is a man in this Convention who would build a home today and not see, without the law requiring him to do it, that the material and the labor that went into his house were paid for before he paid the contractor. It is only requiring men of a different calibre from what the Convention is composed of to do the same thing.

Mr. ELSON: The contractor may have men in his employ who are only employed a small portion of the time, on part of the building. They may be employed elsewhere a good deal of the time. Would it not be making things complicated to require the owner to be responsible for each part of that man's time?

Mr. STILWELL: It had no such result when the law which was declared unconstitutional was in effect previous to its being declared unconstitutional by the court. I do not think it would have that result.

Mr. ELSON: I want to support this measure, but I want to thoroughly understand it.

Mr. STILWELL: It would require from the owner a little more care in the selection of the character of men who do his work.

Mr. LAMPSON: Does the gentleman know whether or not there was experienced any trouble or difficulty on the part of the owners of buildings before the lien law was declared unconstitutional?

Mr. STILWELL: No, sir; there was little or no trouble, and it was a great blow to all involved when the law was declared unconstitutional.

Mr. KRAMER: I was just wondering whether it would not work a hardship on the contractor. Would it not make it almost necessary for the man who had the house built to retain all of the money for the building of the house until the length of time had elapsed in which the material men would have a right to perfect their lien? We have four months now in which a contractor can file a lien. If the legislature would give the material men four months in which to protect his lien upon the property or building, would it not be necessary for the owner of the property to withhold the payment for the building until that whole time elapsed, and would not that work a hardship on the contractor?

Mr. STILWELL: He could be protected by a bond.

Mr. KRAMER: Yes; that would be a provision for protection.

Mr. STILWELL: That is a simple matter and of little cost.

Mr. HOSKINS: Would the giving of the bond be adequate protection to the contractor in this, that unpaid material might turn up afterwards and he would have no remedy except by a suit on the bond?

Mr. STILWELL: That is true.

Mr. HOSKINS: Would you have any objection to inserting in this proposal the word "subcontractor," as suggested by Mr. Bowdle?

Mr. STILWELL: Only that, as I have stated, the trouble is largely caused by the subcontractors, and you are including in the proposal the very men that we are seeking to protect ourselves against.

Mr. HOSKINS: Is not the subcontractor often one of the most important parts of a large contract? There are a number of them, and they are entitled to as much protection as the material men. I hope the delegates will recognize that.

Mr. HARRIS, of Hamilton: I have no objection to this except to that part which guarantees one class of men doing business in the state of Ohio. It offends the moral sense so thoroughly that it is only necessary to read it to be against it. Why should the legislature guarantee the credit of men selling material any more than it guarantees the credit of farmers who send their corn to a commission merchant, or the merchant who sells boots and shoes or any other article of merchandise? It is incredible that this proposition should be considered for a moment. I say there is a wide gulf separating the merchant or the farmer or the material man and the laboring man, who ought to get the fullest possible protection that the laws can devise for him.

Mr. STOKES: What protection would the laboring man have against the man putting up a building and collecting the money and getting out?

Mr. HARRIS, of Hamilton: I say I am absolutely willing to give the laboring man the lien.

Mr. STOKES: Well, is not the material man's claim just as important?

Mr. HARRIS, of Hamilton: That is so ridiculous I hate to have to reply to it. Is not the farmer who produces corn or raises chickens, or the merchant, just as important as the man whose time is employed in delivering material? What difference is there in principle?

Mr. STOKES: If you ask that as a question, there is this difference in the construction of a building, that it may take three, six or nine months from the time the material is furnished, and the man may be responsible at first and not at the end.

Mr. HARRIS, of Hamilton: If he has common sense enough to be in business he should know with whom he is dealing and to whom he is selling, and when he extends the credit it is purely at his option.

Mr. STILWELL: Are you insisting that the mechanics' lien laws, heretofore passed in this state and in every state in the Union for the last one hundred years, are ridiculous?

Mr. HARRIS, of Hamilton: I do not know what those mechanics' lien laws are. I say if any of the lien laws provide protection for poor credit in favor of the

## Mechanics' and Builders' Liens.

material men as against farmers and merchants, then I say it is unjust, immoral and highly ridiculous. I offer an amendment:

The amendment was read as follows:

In line 4 insert the word "and" after the word "artisans."

In line 5, strike out "and material men."

In line 6, strike out "or furnished material."

Mr. NYE: Gentlemen of the Convention: I am in full accord with this proposal to the extent that it is proposed here, and I am opposed to the amendment as presented by the gentleman from Hamilton [Mr. HARRIS]. If there is any one class of people that need protection it is the class of people that furnish labor and material to put up a building on property or real estate that cannot be removed. Take other kinds of property, and if it is personal property possession can be held, but the man who owns land and hires someone to build a building upon it retains possession of the property, and he holds it there for all time, and the man who furnishes the labor and material ought to be protected and have some kind of protection for that labor and material furnished to make the property more valuable.

Mr. HARRIS, of Hamilton: How many times ought the owner of real estate be under obligation to pay for the house that he has built?

Mr. NYE: Only once, but he ought to make his contract in such a way that that one payment shall pay the parties that furnished the material and furnished the labor. It is within his power in making his contract, whether he makes it with the contractor or with the subcontractor, to make it in such shape that he is absolutely protected, and he can withhold his money until the party who furnishes the material and labor shall receive his pay.

Mr. OKEY: Do you think under the terms of this proposal a subcontractor could be protected?

Mr. NYE: I am of the opinion that he might be protected even under this.

Mr. OKEY: That is a point.

Mr. NYE: But if it is not broad enough to cover him, if he furnished material or labor, it is possible it might be made broader.

Mr. HARRIS, of Hamilton: If a farmer ships five hundred bushels of wheat to a commission house in Cleveland on Tuesday and it reaches there on Wednesday, and the commission house sells and delivers the five hundred bushels of wheat on Thursday, how can the farmer get possession of his personal property on Friday when the commission man has failed?

Mr. NYE: He can provide in his contract, if he desires, that the wheat or corn shall not be delivered until he receives his pay for it.

Mr. HARRIS, of Hamilton: Would not that prevent the transaction of all business.

Mr. NYE: No. That is entirely different from constructing a building. Here is a building being constructed that will take a year or two to build. The man owns the land, and he hires the contractor, and he can provide in his contract that the material and the labor shall be paid for before he entirely pays the contractor. He has abundant means to protect himself, and he should do it so that the laborer, the artisan, the mechanic and the material man get their pay.

Mr. HARRIS, of Hamilton: Is not the mere fact that it takes from sixteen to eighteen months to put up a building of any size a great deal more protection to the material man, who has all of the time the building is in progress of construction to go to the head contractor, and, if he fails, to go to the owner and get his money? Is not that immeasurably greater protection than the farmer or merchant has whose goods, being personal property, leave his possession?

Mr. NYE: This Proposal No. 166 provides that laws may be passed to protect all of these men. Just what the details of those laws will be I cannot say, but the very thing you speak of can be provided for. I am of opinion that it ought to be provided for, and that the mechanic and artisan and laborer should receive their pay for the material or for the additional value that they put upon that property.

Mr. FOX: I was solicited by three different material men in Mercer county to work for this proposal, saying that the laws, as they are now, were entirely inadequate to protect material men. I would like to see the proposal pass without amendment. The trouble with the amendment of the gentleman from Hamilton [Mr. HARRIS] is that he wants to protect some and not the others. His proposal seems to carry the plan to only protect one set of people. And his reference to the farmer and the grain has no application at all. We all know that the farmer doesn't sell his grain that way. He brings it to a warehouse and he gets his money before he leaves.

Mr. HARTER, of Stark: Is it not a fact that the farmer can protect himself when he ships his grain to Pittsburgh or Cleveland by drawing with bill of lading attached?

Mr. FOX: Certainly.

Mr. HARTER, of Stark: And is it not a fact if contractors and material men are not protected it would discourage enterprises and business undertakings?

Mr. FOX: It certainly would.

Mr. HARRIS, of Hamilton: The gentleman from Stark [Mr. HARTER] just asked you if the farmer could not protect himself by attaching the bill of lading to his shipments?

Mr. FOX: Yes, sir.

Mr. HARRIS, of Hamilton: That is really selling for cash?

Mr. FOX: Yes.

Mr. HARRIS, of Hamilton: Could not the material men protect themselves by selling for cash all the time?

Mr. FOX: Not all the time.

Mr. HARRIS, of Hamilton: But suppose a fellow comes to you and says, "I want to buy this lumber. I will have this house put up in thirty days and I will settle for it"?

Mr. FOX: If I think he is good I will extend him credit, and if I don't I will not.

Mr. HARRIS, of Hamilton: Suppose you think he is good and he is not good.

Mr. FOX: I lose.

Mr. HARRIS, of Hamilton: We don't protect you there. In this proposal you are simply protecting against credit.

Mr. FOX: The way I understand it, this protects everybody. How should they be protected?

Mr. HARRIS, of Hamilton: The same as you pro-

## Mechanics' and Builders' Liens.

tect yourself with people coming to your store. Those you think are good you extend credit to, and those you do not, you do not.

Mr. FOX: And a lot that we credit and think are good, when the time comes around, don't pay.

Mr. HARRIS, of Hamilton: Then it is your bad judgment in extending credit.

Mr. FACKLER: Is it not a fact that merchandise sold for the purpose of erecting a building becomes part of the real estate and cannot be taken off as other personal property can?

Mr. HARRIS, of Hamilton: That has just the opposite effect from what you intend. The very fact that the merchandise sold is material in process of construction for six to eighteen months, where the owner of the material can go to the head contractor and to the owner and say, "This man is not paid, and I will hold back some of the material if he is not paid," which the farmer cannot do, because his personal property disappears in a day—every fragment of it is gone. And why should you protect that man who can protect himself when you don't protect the farmer?

Mr. HARTER, of Stark: Is it not a fact that bread-stuff is always sold for cash?

Mr. FOX: Yes.

Mr. HARTER, of Stark: And lumber and building material is always sold on time?

Mr. FOX: Generally so. And I do not see why there should be any discrimination in this proposal, and I would like to see it adopted, but without the amendment.

Mr. ROCKEL: I think we are wasting a great deal of time discussing the question of the policy of the law. That is entirely in the hands of the legislature. Almost all the states of this Union have passed just such laws as this would authorize our legislature to pass. They have made it different in its application. In some states they have required the contractor to file a statement with the owner of the property as to all material men and all subcontractors and matters of that character. In other states they provide different details. It would be entirely unnecessary to have this amendment at all in the present constitution were it not for that peculiar view that our supreme court took of our present constitution. That is all there is to it. We might have all these details of what is in the laws of various other states carried out under the present constitution but for the decision of the supreme court of Ohio which prevents it. And I think if that question comes before our supreme court they will reverse that decision, but it stands now as a bulwark in opposition to everybody.

Mr. JONES: I understood you to say that this proposal simply authorized the enactment of such a character of mechanics' lien law?

Mr. ROCKEL: So I understand.

Mr. JONES: Is it not in effect the enactment of a lien law itself, in that it provides that material men and workmen of every class shall have a lien upon the property, real and personal, upon which they bestow work or materials? Does it not create a lien in favor of all workmen and material men under all circumstances, dependent only upon the fact that their material shall go into the property?

Mr. ROCKEL: Sometimes it is well to go back. Laws may be passed to secure mechanics—

Mr. JONES: I beg your pardon. I was misled by the original proposal instead of the substitute.

Mr. NORRIS: May it not be that some of the members have turned to the original proposal instead of the substitute proposal? My friend Jones did and I did.

Mr. ROCKEL: We might discuss the policies that Mr. Harris, of Hamilton, has brought up, but that is a matter for the legislature. But let me say it has been thought wise to carry out a law that would protect the people who put money into a particular piece of property. That is all this does. You advance money for a man to build a house, and you really build the house. Why should you not have a right on that property to get your money back?

Mr. PECK: You would not have any money if you just advanced the money?

Mr. ROCKEL: Not at present. I mean your material or labor or whatever it is that goes in and increases the other man's property. As I said, we might go into the details of this matter. All the other states have something of this character—Illinois, Indiana, and almost all the other states. Therefore I move that the amendment of Mr. Harris, of Hamilton, be laid on the table.

The motion was carried.

Mr. HOSKINS: I offer an amendment.

The amendment was read as follows:

After the word "laborers" in line 4, insert a comma and the word "subcontractors."

Mr. STILWELL: We agree to that.

The amendment was agreed to.

Mr. HALFHILL: This proposal has a word in the forepart of it that limits its scope and effect and overcomes to an extent some things that have been here urged against its adoption. Laws may be passed which shall secure to certain men "their just dues"—note the word "just." Can anybody object to that as the policy of the state of Ohio? Here is the working of the constitution for a good many years in the state of Ohio. We have had a mechanics' lien law, and that law of course extended to a good many other things than buildings—the erection of bridges, derricks, as well as a host of public works. That law created a right in one who was a direct contractor with the owner to assert a lien on the premises or the thing constructed, and the law left out of consideration altogether for many years all of the rights of one who furnished material to go into that structure or one who furnished labor on that structure, and today we have not any way whatever to protect under the law as it now stands any subcontractor, any material man or any laborer except to the extent of such fund as would remain in the hands of the owner after he got through settling with the original contractor, so that all the lien now that the laborer, material man or subcontractor can assert is a lien on the fund, and that means the residue of the fund after the original contractor and the owner have their settlement. Into that settlement many things creep. Oftentimes the owner of the building finds that the contractor has not lived up to the specifications, that the contractor has not done what he agreed to do. Sometimes he discharges

## Mechanics' and Builders' Liens.

the contractor, and takes that fund for the purpose of carrying out and completing the contract, according to his own interpretations, and perhaps correctly, of the terms and stipulations of the contract, and he may use up that fund in adjusting the rights between himself and the original contractor. That is the condition of the law as it is now.

Mr. LAMPSON: Is the owner in any event compelled to pay more than his contract price?

Mr. HALFHILL: Can he now, do you mean?

Mr. LAMPSON: Yes.

Mr. HALFHILL: I apprehend that just laws would not confiscate anything and that the legislature will pass laws only to secure men their just dues.

Mr. LAMPSON: Suppose the contractor has a contract to build a building for \$10,000, but the material and labor put into the building amount to \$12,000. Would the owner be compelled to pay that excess?

Mr. HALFHILL: No, sir, and it is my belief that no law could be passed which would make him do it. No law can be passed which will impair the validity or obligation of a contract. It would be impossible for any state to pass any law in violation of that provision of the federal constitution. But at least the owner may always protect himself by taking a bond from the contractor.

Mr. JONES: Is not that just the very purpose of this amendment to the constitution? Our supreme court held under the present constitution that it would be an impairment of the rights of contract to impose the obligation on the owner of the property, and to require him to pay for material which he did not agree to pay for, although that amount may be in excess of what he agreed to pay.

Mr. HALFHILL: No; I don't understand that that was it at all.

Mr. JONES: Would not—

Mr. HALFHILL: I don't care to enter into any further argument on that point. I have only fifteen minutes.

So the situation that confronted everybody in the early nineties was the situation I now describe. At that time I was consulted and was instrumental in helping frame the law passed by the legislature, which appears in volume 91, page 136, of the laws of the state of Ohio. Permit me to read you that. This is the law that was declared unconstitutional:

Sec. 3193. Any subcontractor, material man, laborer or mechanic, who has performed labor or furnished materials or machinery, or who is about to perform labor or furnish material or machinery for the construction, improvement or repair of any turnpike road improvement or other public improvement provided for in a contract between any board or officer and a principal contractor, and under a contract between any such subcontractor, material man, laborer or mechanic and a principal contractor or subcontractor, may, at the time of beginning to perform such labor or furnish such material or machinery, or at any time thereafter, not to exceed ninety days from the completion of such labor or delivery of such machinery or material, file with the board or officer, or the authorized clerk or agent thereof, a sworn and itemized statement of the amount and value of

such labor performed and to be performed, material or machinery furnished, containing a description of any promissory note or notes that may have been given by the principal contractor or subcontractor on account of said labor, machinery or material, or any part thereof, with all credits and set-offs thereon.

The same sort of statute that applies there to these public boards was passed to apply to the individual landowner, and that is the language that the supreme court in the case of Palmer and Crawford vs. Tingle, 55 Ohio State, declared to be unconstitutional. I quote from the syllabus:

1. The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.

2. Liberty to acquire property by contract, can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive.

3. While a valid statute regulating contracts is, by its own force, read into, and made a part of such contracts, it is otherwise as to invalid statutes.

4. The act of April 13, 1894, 91 O. L. 135, in so far as it gives a lien on the property of the owner to subcontractors, laborers and those who furnish machinery, material or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner.

That was the construction the supreme court of Ohio gave to our bill of rights, and, as has been read here by the gentleman from Cuyahoga, the supreme court of the United States found that it was not necessarily a correct construction. The supreme court of the United States said that was going to the extreme limit of protecting the rights of property, and, as has been said here in debate, it might be if such a case came again before our own supreme court that the court might construe this kind of a statute differently from the way it did in 55 O. S. We want to make it easy for the court to get away from that decision, and we want to pass this proposal; and I submit this is only a proposal in line with common honesty, because it is within the power of every owner of property to make a contract whereby he can protect himself against the faults and shortcomings of his contractors, and whereby he will see to it that the material that goes into his house and covers his head, or the labor that goes into the structure and helps to complete it, is properly paid for. That is only just and right. And if any of you had had the experience that any ordinary attorney has in trying to protect the rights of his clients when called upon by laborers and material men, and had found how very far short of protecting those

## Mechanics' and Builders' Liens—Regulating Expert Testimony in Criminal Trials.

rights he can come under existing laws, you would be in favor of this change, because it is only in favor of justice, right and common honesty.

Mr. ANDERSON: Do you mean that if this proposal is adopted it will correct the decision of the supreme court in 55 O. S.?

Mr. HALFHILL: I mean that if this proposal is adopted it will be entirely competent for the legislature to pass a law similar to the laws that I read here, which the supreme court of Ohio has declared unconstitutional.

Mr. ANDERSON: It was declared unconstitutional because of the federal constitution, was it not?

Mr. HALFHILL: Oh, no. Not on that account, but that it seemed in conflict with the provisions of the Ohio bill of rights. The supreme court of the United States decided expressly that it was not in conflict with the bill of rights of Ohio in the case involving the construction of the Southern Hotel here in Columbus, which was read in debate by the gentleman from Cuyahoga [Mr. STILWELL].

Mr. BOWDLE: The gentleman and Mr. Stilwell have made my speech, and I move the previous question.

The main question was ordered.

The PRESIDENT: The question is on the passage of the proposal.

The yeas and nays were taken, and resulted—yeas 103, nays 6, as follows:

Those who voted in the affirmative are:

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

Those who voted in the negative are: Cassidy, Crites, Harris, of Hamilton; Johnson of Williams; Peters, Stevens.

So the proposal passed as follows:

Proposal No. 166—Mr. Stilwell. To submit an amendment to article II, by adding section 33 of the constitution.—Relative to liens.

*Resolved, by the Constitutional Convention of the state of Ohio, That a proposal to amend the constitution shall be submitted to the electors to read as follows:*

SECTION 33. Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material men, their just dues by direct lien upon the property, upon which they have bestowed labor or furnished material. No other provision of the constitution shall impair or limit this power.

Under the rules the proposal was referred to the committee on Arrangement and Phraseology.

Mr. Nye arose to a question of privilege and asked that his vote be recorded on Proposal No. 241, by Mr. Dwyer. His name being called, Mr. Nye voted aye.

Mr. Peck arose to a question of privilege, and asked that his vote be recorded on Proposal No. 241, by Mr. Mr. Dwyer. His name being called, Mr. Peck voted aye.

Mr. Thomas arose to a question of privilege, and asked that his vote be recorded on Proposal No. 241, by Mr. Dwyer. His name being called, Mr. Thomas voted aye.

Mr. Harter, of Huron, arose to a question of privilege, and asked that his vote be recorded on Proposal No. 241 by Mr. Dwyer. His name being called, Mr. Harter, of Huron, voted aye.

Mr. Harris, of Hamilton, moved that Proposals Nos. 272 and 329 be informally passed on the calendar.

The motion was carried.

Mr. DOTY: So that we may come to a conclusion as to what we desire to do the rest of the week and beginning with Monday, and only for the purpose of bringing the matter to your attention, I desire to move that when the Convention adjourns today it be until two o'clock Monday afternoon.

The motion was carried.

The PRESIDENT: The next business is Proposal No. 322—Mr. Bowdle.

The SECRETARY: You will find the amendment on page 11 of the journal of April 18.

The proposal as amended was read.

Mr. BOWDLE: Mr. President, and Gentlemen of the Convention: I shall speak very briefly for I take it that the value of this proposal is obvious to the professional men here, and those who are not professional men have certainly followed the public prints closely enough to know that it is important, in order to do away with the scandal surrounding criminal trials, that something should be done to regulate the introduction and use of expert medical testimony. The legal profession and the judiciary together have been made the butt of all sorts of jokes because of the introduction and use of expert medical testimony. I take it that it will go without elaboration here that there is nothing in this world more ridiculous than the examination of a medical expert in the ordinary criminal case. We speak of the expert witness—the medical expert witness. The term "witness" as used in that connection is a misnomer. A witness in legal contemplation is merely one who has seen something, or who has heard something about a transaction that is the subject of judicial investigation. A doctor or alien-

## Regulating Expert Testimony in Criminal Trials.

ist in a criminal case involving such testimony is not a witness in any proper legal sense. He is really a purchased special pleader, who has in every case been examined in advance by the lawyer on the side engaging him, and who has been carefully quizzed as to what his answer would be as an expert to a purely hypothetical case, and when he goes into court he goes there under a mysterious kind of employment receiving a fee unknown in size, and while he occupies the stand ostensibly as a witness he is really there in the capacity of counsel, and his business is to combat the cross-examination of the other side and to defend his theory of the case. All sorts of scandals have grown out of this curious situation. The medical profession—and it should be said to the credit of the profession—has endeavored time and time again to get away from this situation, but without success. So long as our jurisprudence is in its present condition, where either side may employ any expert that the side desires to employ, and pay any size fee that it is able to pay, so long will there be doctors who will respond to the demand, and proceed to furnish the evidence expected by the side employing them. The only effort I know of in the United States on the part of a legislature to get away from this scandal was made by the state of Michigan in 1905.

In 1905 the legislature of the state of Michigan passed a law suggested by the medical profession. It was a very excellent law, but it was promptly declared to be unconstitutional by the supreme court of Michigan. I read a part of it:

No expert witness shall be paid or receive as compensation in any given case, for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear or has appeared awards a larger sum; and any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not to exceed one year, or both, in the discretion of the court, and may further be punished for contempt.

No more than three experts shall be allowed to testify on either side as to the same issue in any given case, except in criminal prosecutions for homicide. Provided, the court trying such case may in its discretion permit an additional number of witnesses to testify as experts.

There was an evident attempt on the part of the state of Michigan to control the number of experts who should be used in a criminal case. I read another provision of the Michigan law:

In criminal cases for homicide where the issues involved expert knowledge or opinion the court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial.

The value of that is perfectly apparent. It took out of the hands of both parties the power to go out into the

open medical market, and by the use of money bring into court such witnesses as they desired to sustain the issue on their part and placed the whole matter in the power of the court that was trying that case. So when the court saw that the case was approaching a point where it involved the use of medical testimony it could at once appoint this board of medical experts of three persons. I read further:

And the compensation of such person or persons shall be fixed by the court and paid by the county where indictment was found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury.

The excellence of that act is perfectly apparent. What happened to it? The supreme court of the state of Michigan, having due regard to that large body of the common law, under the prescriptions of which, for time out of mind, either party could examine any number of witnesses to sustain the issue on his party, said that this was an effort to depart from that body of the common law which was especially binding in criminal trials and therefore contrary to the constitution of the state of Michigan, and proceeded to denounce it. I shall not attempt to read from the decision. I simply refer to it, *People vs. Dickerson*, 164 Michigan, page 148. The fourth paragraph of the syllabus reads as follows:

Sections 3 of Act No. 175, Pub. Acts, 1905, providing for the appointment of expert witnesses by the court in cases of homicide is unconstitutional since the act of appointment is in no sense a judicial act, is carried out without notice to respondent or the prosecuting attorney, since the names of the witnesses are not indorsed on the information, and the accused is prevented from knowing the names of witnesses who will testify against him, and since the experts receive a certificate of candor, ability, and truthfulness not given to any other witnesses in the case.

And thus that act fell by the wayside.

Now this provision before us provides that the legislature shall have power to provide by law for the regulation and use of expert medical witnesses and testimony in criminal trials. The provision is permissive only. It allows the legislature full power to determine, after the fullest kind of conference with the best experts to be had, on a scheme for the control of medical testimony. The word "medical" was stricken out and the provision here is somewhat broader than that.

Mr. PECK: Why not use the word "civil" as well as "criminal?"

Mr. BOWDLE: The only answer is that in civil cases involving only A and B, the issues tried usually are not of any great interest to the community at large.

Mr. PECK: Do you know of any class of cases in which experts are more used than in will cases?

Mr. BOWDLE: That is true. I do not object to an amendment broadening the power of the legislature and applying it to the ordinary case, but so far as my proposal is concerned, it is designed to reach criminal cases and thus prevent the greatest scandals that surround these trials.

Mr. PECK: I desire to offer an amendment. I want



## Regulating Expert Testimony in Criminal Trials.

to insert the words "civil and" before the word "criminal" in line 5 and also, on the suggestion of Professor Knight, to repeat the word "expert" before the word "testimony" in the same line.

Mr. BOWDLE: I will accept that.

Mr. DWYER: In all civil cases—take, for example, breach of contract in building a house—each side may bring in experts to show whether it has been done according to contract. That should not be eliminated here. In civil cases each party should have that right.

Mr. PECK: It only provides that the number may be limited. It does not exclude the power to call them.

Mr. DWYER: Of course, in criminal cases—I have had a great deal of experience with that character of experts in criminal cases, and I think the court should select experts instead of the parties. Then the jury will get some valuable testimony, but the way it is now it is a travesty.

Mr. PECK: The general assembly has the power to pass an act providing for that.

Mr. DWYER: The court should have the power. The court is disinterested, and if it is put in the hands of the court we may get some valuable testimony. The way it is now it is a farce, and the expert doctors are just as bad as the lawyers.

Mr. ANDERSON: Let us analyze this statement. The amendment authorizes the legislature to pass laws which, if passed, unquestionably will give the court the right to appoint experts in any particular case where medical experts are required in civil cases. If you do that, you give into the power of the judge the right to decide any case where expert testimony must be required and where the issues are predicated upon expert testimony. Let me give you illustrations. Say, for instance, some one brings a suit for injuries, which injuries are of a hidden or obscure nature—for instance, growing out of neurotic conditions, shocks or neurasthenia, or matters of that kind. Medical testimony is very much abused, I know, but that is the basis of your lawsuit. If the legislature acts under this proposed amendment the judge will have a right to appoint any doctor he may see fit, and if the doctor or doctors so designated by the judge testify that there is no injury, that concludes the case against the plaintiff, but if the doctor or doctors would say that the injuries were great, that would conclude the case, so far as the amount would be concerned, against the defendant, for a jury would certainly find with the doctor so appointed. If the question to be decided was whether or not a certain litigant had signed a promissory note and he denied the signature, experts could be appointed by the court and their testimony would equally conclude the matter in controversy. So, you see, you place in the hands of the judge the right to pick the witness or witnesses whose testimony will be conclusive, and thereby give to the judge more power than the law has ever seen fit to place in the hands of one person where the litigants had a right to a jury. I cannot conceive of any more dangerous situation being brought about.

Mr. DWYER: On the other hand, is it not a farce the way the medical experts are called by both parties in criminal cases?

Mr. ANDERSON: I am not talking about criminal cases.

Mr. DWYER: They are just as strong for their side of the case as the lawyers are.

Mr. ANDERSON: I am heartily in favor of the amendment as applying to criminal cases, because there the end sought is different. But in every civil case where an injury has been sustained, or where expert testimony is the basis of the lawsuit, it is in the power of the judge, under a law as here suggested, to appoint experts and thereby make their testimony conclusive, and thereby give to the judge the full power or right to decide the case.

Mr. PECK: I can not agree with the gentleman from Mahoning [Mr. ANDERSON] in his conclusions about this. It seems to me he is drawing on his imagination. In the first place the legislature need not under this pass the power over to the court to select the expert witnesses. It may, as suggested by Mr. Bowdle, create a commission for such purpose, or if the legislature does enact that the judges may select the expert witnesses, it does not seem to me there is any great wrong in it to anybody. It would operate like this: Either party might go to the court before the trial begins and say, "We would like an expert on this, that or any other kind of science. Please designate one for us so that we can have him brought in." The court proceeds to do so. The power of a court in the trial of a case is much greater in the matter of designating an expert. The court is impartial and will endeavor to select an expert who will give a fair opinion. He is not being paid, as at present, to give an opinion on one side. As it is now A and B have a lawsuit. A hires a doctor and he says, "I want you to give an opinion for me and I will give you \$500." Then a doctor comes in as an expert for B. He does the same thing. Their testimony is no more valuable than the argument of a lawyer, but it strikes the jury with a great deal more weight, because they are not so familiar with things going before. But let those experts be designated by the court and come in and give their opinion and the presumption is that they would come much nearer giving an impartial opinion than under the present system.

Now, I don't care whether the case is a civil or a criminal case. It does not seem to me there is any difference at all. The attempt to differentiate between a civil and criminal cases is a flat failure. There is no class of cases in which experts are more used than in the contest over wills. There the question of the sanity of the testator is nearly always the main question. Doctors galore are called to testify about his sanity. Judge Dwyer has indicated another class of cases where experts testified on buildings. There are thousands of kinds of experts who have at one time or another been called into court. What we want is to have experts selected in such a way that you may be sure the testimony when delivered will be something like the verdict of a jury. You take all sorts of precautions to have your jurors impartial. In many cases the jurors may be designated by the judge and you would get your experts more nearly impartial by the court designating them than under the present system. I think the passage of this proposal will facilitate the proper dispatch of justice.

Mr. HOSKINS: Just a word on this proposition. My attention was not called to it until it was read and discussion commenced. I do not see any necessity or any

## Regulating Expert Testimony in Criminal Trials.

demand for submitting a proposal of this kind to the people. It does not seem to me that it is of sufficient importance that we should make it one of the proposals to be voted for. I have never heard any demand for a constitutional provision of this kind. My judgment is that there is not anything in our constitution now that would inhibit or prohibit the legislature from providing against any evil that may have crept into our system under our present constitution. The legislature can provide for the regulation of procedure. We already have a statute limiting the number of witnesses that may be called in a certain character of cases, and in a number of instances the court at all times has control of its procedure and of the witnesses that may be called and of the examination of those witnesses. We are undertaking to write into the constitution a provision against an evil that in my judgment does not exist, and which, if it does exist, can be provided against.

I am opposed to the whole proposition, but I am especially opposed to that part of it that relates to civil procedure. The proposal if passed, in any event ought not to pass other than in its original form. I feel that the present constitution is ample to deal with any evil existing along this line, and I do not think we should appear here as doctors of every imaginable disease the body politic is afflicted with. We are trying to get through with the work. We are using expedition. However, we must not pass these proposals lightly, and unless this proposal is thoroughly discussed and understood we should not vote on it. I think the whole matter ought to be laid on the table or indefinitely postponed, but in any event, whatever may be the judgment of this Convention, I ask especially that you do not incorporate in the proposal the amendment that is proposed, because it is especially dangerous. It is my judgment that the whole proposition, the proposal and amendment, should be defeated. There is no public demand for the same and every evil attempted to be remedied by them can be cured under the present constitution.

Mr. PIERCE: I would like to vote for the original proposal, but I would like to vote against the amendment. Therefore, when the amendment is voted upon I demand the yeas and nays. I will ask for a division and the yeas and nays on both propositions.

Mr. BROWN, of Highland: I had not intended to say anything about this matter because I thought it was so fair that it would appeal to the judgment of every man as being a necessary provision in the constitution. The fact is that expert testimony, so far as medical testimony is concerned, has become a disgrace to our jurisprudence. There are many expert medical men in this state and others who make a business of taking employment as experts. They will take the side of the case that employs them regardless of who employs them, and they will enter in a battle of wits between themselves and the lawyers who are cross-examining them with the view of aggrandizing themselves without a whit's care for the merits of the case. That condition is beyond doubt existing and it should be regulated in some form, so that we would have some respectability and credibility along with that kind of legal procedure. I think the Peck amendment is dangerous on the ground that the judge who sits upon the bench and has the selection of the expert is liable to select a man in whom he has

confidence, and that would most likely be his family physician, who may enjoy his confidence and the confidence of the whole community and may not know very much. One knows whether a lawyer is capable because he has a forum before which he demonstrates his ability, but the doctor has none. Who has the discriminating power to test his ability? He covers up his mistakes in the graveyard and nobody ever knows about them. He may be enjoying a creditable reputation, based upon his personality and his credit in the community, which probably may be a mistaken credit. Many physicians know that there are men who are enjoying large reputations as being great physicians when they really know very little. The judge may have as his physician one of those. I think if the judge appoints one of those expert medical witnesses that would be the most dangerous power that could be given him.

Mr. RILEY: Does this allow the judge to select the expert?

Mr. BROWN, of Highland: I have been informed so.

Mr. RILEY: It does not. It simply applies these regulations to civil as well as criminal cases.

Mr. BROWN, of Highland: I understood under the proposal that would have to be the practice.

Mr. PECK: No; you are adopting Mr. Anderson's talk about that.

Mr. BROWN, of Highland: I believe the original proposal should go through and the Peck amendment should be defeated.

Mr. WINN: We have been discussing this so far as if medical experts were the only ones to which the act, if passed, would apply. We must keep in mind, however, that there are other experts. Let us assume that we are engaged in the trial of a will contest. The lawyers all understand that any person who had any acquaintance with the testator is an expert respecting his mental capacity. Now we give the same sort of regulation respecting the testimony of those persons as we do respecting medical experts.

Mr. PECK: Those persons who knew the testator are not classed as experts. They are testifying as to facts.

Mr. WINN: They are required to give opinion testimony. There are just a few instances in which opinion testimony is given and this is one of them. The witness becomes to that extent an expert. It is opinion testimony and all opinion testimony is expert testimony.

Mr. PECK: Oh, no.

Mr. WINN: There are higher and lower grades of expert testimony. Suppose you were trying a will case and the question is, "Did the testator have mental capacity to execute the instruments?" The legislature, if it passes the act at all must designate some authority to regulate that or there will be no regulation. It may be the court or the clerk of the court. I don't know what. It will be somebody else than the parties or their lawyers.

Mr. ANDERSON: Say it would be the court, the clerk of the court or a board, and that authority designated by the legislature would say that Doctor Smith must be the witness. That ends it so far as medical testimony is concerned in that lawsuit.

Mr. WINN: It might.

Mr. ANDERSON: The act would not allow either

## Regulating Expert Testimony in Criminal Trials.

party to bring in any other expert than the one appointed by the court and that would be an end to the case.

Mr. WINN: Suppose on one side of the case there are witnesses called who would give an opinion one way and another set of witnesses would give a contrary opinion. If some authority could say how many witnesses could be called and who shall be called, he might designate all on one side. I have just been engaged in a trial of an important suit in which the validity of a note was involved. It was claimed by the man who was sued that the note was a forgery. I claimed the same thing because he was my client. Perhaps one of the best experts on handwriting in the country was called as a witness for the plaintiff. He was put upon the witness stand and testified at very great length respecting a long, careful, painstaking examination that he had made of the signature to the instrument and of other writings which he used as a basis of comparison, and when he was through it was found on cross examination his experience extended over a period of fifteen years as an expert on handwriting. Yet he testified that he had been engaged as an expert in a very great number of cases in the fifteen years, and that there had been called on the other side of practically all of those cases other experts who testified exactly to the contrary of what he testified, leaving it entirely for the jury to say whether or not one expert was right or the other.

Mr. ANDERSON: This proposal if carried in reference to civil cases would not leave it to the jury at all?

Mr. WINN: No, sir.

Mr. ANDERSON: Then the court would be deciding the case and jury not.

Mr. WINN: Yes. Now, here we leave it to some court or authority or commission to say who shall be called as a handwriting expert. Suppose in that case this particular expert had been called as a witness and nobody else, the court or the commission assuming that he was altogether disinterested. In that case the other side would be precluded from attacking and breaking him down at all.

Mr. BOWDLE: Would you be in favor of the proposal if the word "civil" were stricken out?

Mr. WINN: I believe I would. I see the difference. It is not because the same rules may not apply, but it is because in the prosecution of criminal cases the state is one of the parties. The state presumably stands disinterestedly between the prisoner at the bar and an unjust verdict, and I believe in a case like that there is no serious objection, but I think this amendment offered by the delegate from Hamilton [Mr. PECK] is dangerous, and I move the previous question upon the amendment offered by the member from Hamilton [Mr. PECK].

Mr. KNIGHT: There are two parts to that amendment.

The PRESIDENT: When the motion is put the division will be made. The question is, Shall debate close on that amendment?

The main question was ordered.

Mr. KNIGHT: I had an amendment and I passed it to Judge Peck and he has included it in his. It has nothing to do with the question of a civil case.

The PRESIDENT: That question will be put first.

The question now is on the adoption of that part of the amendment.

The SECRETARY: That is to insert the word "expert" before the word "testimony" so it will read:

Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials.

The amendment was agreed to.

The PRESIDENT: Now the other part of the question.

The SECRETARY: That is to insert the words "civil and" so that it will read:

Laws may be passed for the regulation of the use of expert witnesses and expert testimony in civil and criminal trials.

Mr. WINN: The question is upon laying that upon the table.

The PRESIDENT: The question is upon the adoption of the amendment inserting the words "civil and".

Mr. HOSKINS: I move that the entire matter be tabled.

Mr. DOTY: The Convention is ready to vote upon this amendment. That is before the Convention and nothing else, and the motion is out of order.

Mr. LAMPSON: I think the gentleman from Cuyahoga is correct. The previous question has been ordered on this amendment.

The PRESIDENT: The point is well taken.

The amendment was disagreed to.

Mr. HOSKINS: I now move that this entire matter be laid on the table.

The motion to table was lost.

Mr. PETTIT: I move the previous question on the proposal.

The main question was ordered.

The PRESIDENT: The question is on the passage of the proposal and the secretary will call the roll.

The SECRETARY [calling the roll]: Anderson—

Mr. BROWN, of Highland: I would like to have that read.

Mr. DOTY: A point of order. The roll call has begun.

The yeas and nays were taken, and resulted—yeas 65, nays 37, as follows:

Those who voted in the affirmative are:

Anderson,	FitzSimons,	Okey,
Antrim,	Hahn,	Peck,
Baum,	Halenkamp,	Pettit,
Beyer,	Harbarger,	Pierce,
Bowdle,	Harris, Hamilton,	Read,
Brown, Highland,	Harter, Huron,	Redington,
Cassidy,	Hoffman,	Riley,
Cody,	Hursh,	Shaw,
Cordes,	Johnson, Williams,	Smith, Geauga,
Davio,	Jones,	Solether,
DeFrees,	Kehoe,	Stalter,
Donahay,	Keller,	Stamm,
Doty,	Kilpatrick,	Stewart,
Dunlap,	Kunkel,	Stilwell,
Dunn,	Lambert,	Stokes,
Dwyer,	Leete,	Tetlow,
Eby,	Leslie,	Thomas,
Elson,	Longstreth,	Ulmer,
Fackler,	Ludey,	Watson,
Farnsworth,	McClelland,	Winn,
Farrell,	Miller, Crawford,	Woods,
Fess,	Moore,	

Regulating Expert Testimony in Criminal Trials—Limiting Time of Operation of Laws.

Those who voted in the negative are :

Beatty, Morrow,	Harris, Ashtabula,	Mauck,
Beatty, Wood,	Harter, Stark,	Miller, Fairfield,
Brattain,	Henderson,	Miller, Ottawa,
Brown, Pike,	Holtz,	Nye,
Campbell,	Hoskins,	Partington,
Collett,	Johnson, Madison,	Peters,
Crites,	Kerr,	Stevens,
Cunningham,	King,	Taggart,
Earnhart,	Knight,	Tannehill,
Evans,	Kramer,	Wagner,
Fluke,	Lampson,	Walker,
Fox,	Malin,	Wise.
Halfhill,		

So the proposal passed as follows :

Proposal No. 322—Mr. Bowdle. To submit an amendment to article II, of the constitution.—Relative to the use of expert medical witnesses and testimony in criminal trials.

*Resolved, by the Constitutional Convention of the state of Ohio,* That a proposal to amend the constitution shall be submitted to the electors to read as follows.

Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings.

Under the rules the proposal was referred to the committee on Arrangement and Phraseology.

Mr. Watson arose to a question of privilege, and asked that his vote be recorded on Proposal No. 241, by Mr. Dwyer. His name being called, Mr. Watson voted in the affirmative.

Mr. Lampson arose to a question of privilege, and asked that his vote be recorded on Proposal No. 322, by Mr. Bowdle. His name being called, Mr. Lampson voted in the affirmative.

Mr. HOSKINS: I now move that we recess until 1:30 o'clock p. m.

The motion was carried and the Convention recessed until 1:30 o'clock p. m.

**AFTERNOON SESSION.**

The Convention met pursuant to recess.

Leave of absence for the remainder of the day was granted to Messrs. Pettit, Röckel and Harter, of Stark.

Leave of absence for Monday and Tuesday was granted to Mr. Marshall.

By unanimous consent the following proposal was read by its title and referred as follows:

Proposal No. 334—Mr. Jones. To the committee on Judiciary and Bill of Rights.

Mr. Donahey arose to a question of privilege, and asked that his vote be recorded on Proposal No. 241, by Mr. Dwyer. His name being called, Mr. Donahey voted in the affirmative.

The PRESIDENT: The next business is Proposal No. 232—Mr. Doty.

The proposal was read the second time.

Mr. DOTY: The principle involved in this proposal is probably new to most of you laymen and all of the lawyers. That a very prominent lawyer, vice president of the United States and afterwards president of the

United States, and one of the greatest lawyers of his time is the originator of the idea is neither here nor there so far as the lawyers are concerned, for they never heard of it before. So that you may not think I am tremendously original and got up this myself I will tell you that the name of the man who originated this idea was one Thomas Jefferson, who came from Virginia and who was vice president of the United States and president of the United States and a few other things too numerous to mention. Those of you who have the idea that this is a brand-new proposition get over it, for it is about one hundred and fifteen or twenty or thirty years old. Thomas Jefferson was the greatest progressive of his time. I presume if he were living now he would be a conservative. You always get conservative as you grow older. This Convention is an illustration of that. When we started on January 9 it was heralded as the progressive convention of all time. I do not know whether some of the rest of you have reached the conclusion that I have, that this Convention is not a progressive Convention, but it is a reactionary Convention. Just look at the votes. The last vote we had that gave the line of demarkation between the progressive and the reactionary, showed we had just exactly twenty-nine progressives left. When this proposal of mine comes to a vote I want to see how the twenty-nine hold out.

Mr. HOSKINS: What is your definition of a progressive? What must the Convention do to be progressive?

Mr. DOTY: It should have been progressive enough to adopt the short ballot and it may do it yet, notwithstanding the member from Auglaize [Mr. HOSKINS] is not yet progressive enough to vote for the short ballot.

Mr. WINN: Is it progressive to go back and adopt the theories of Thomas Jefferson?

Mr. DOTY: It is progressive to go back and adopt the theories of Thomas Jefferson if the theories he founded then are still progressive in their tendency.

Mr. WINN: That would be progressive like —

Mr. DOTY: —like the democratic party, and Thomas Jefferson was a democrat, too.

Mr. LAMPSON: Don't you know that was a piece of satire on Jefferson's part?

Mr. DOTY: No; I think he put it in as a "safe-guard." Now, I really want to say something about my proposal.

Mr. ANDERSON: Does not the gentleman think if we had just adopted the initiative and referendum and quit that then we would have been progressive?

Mr. DOTY: When I look over the things that we have adopted since the initiative and referendum and size them up it strikes me if we had stopped at the initiative and referendum we would not have been so far wrong. Anyway we have gotten away with the idea that we are progressive. Some of us have had to change our minds since.

Mr. HALFHILL: May I ask a question?

Mr. DOTY: Yes; I was wondering where you were, you were quiet so long.

Mr. HALFHILL: Did your people complain any about the initiative and referendum we adopted?

Mr. DOTY: No, sir; our constituents haven't had any mass meetings of more than three of them together

## Limiting Time of Operation of Laws—Contempt Proceedings and Injunctions.

Mr. LAMPSON: Will you allow me to present to you a progressive card [presenting a card entitling one to a free shampoo at a certain barber shop in town].

Mr. DOTY: This is a card that the member from Ashtabula [Mr. LAMPSON] seems from his appearance to have been in the habit of using—"One extra shampoo free."

Now, before I retire from the floor I propose to offer an amendment correcting a typographical error or two.

The amendment was read as follows:

In line 9 strike out "for ten" and insert "twenty-one," and change "from" to "after".

That increases the life of a law to twenty-one years, and that is all the time that Thomas Jefferson, one of the greatest democrats that ever lived, said that a law should last, and as I am in a convention of democrats, I think this ought to pass.

Mr. WINN: Do you think any lawyer would ever draw a bill like that?

Mr. DOTY: No, sir; I don't think he would. Having sat at the desk there and having seen a good deal of the bills that lawyers draw, I know they could not. Let me tell you something about lawyers trying to draw bills. It is a well-known fact that never in the history of legislation has any lawyer been able to draw a bill correctly. I state that from an experience of five years at that desk and never yet was any lawyer that ever came down here able to draw a bill correctly.

Mr. TANNEHILL: And nobody else.

Mr. DOTY: Yes; I can draw one.

Mr. HOSKINS: We don't send our best lawyers down to the legislature.

Mr. DOTY: Nor to this Convention either. Now I am going to have a yea and nay vote on this proposal. If the Convention will accord me a yea and nay vote on the main proposition well and good, but we are going to have a yea and nay vote on this and if the Convention will amend the proposal as I have asked and have a vote on the proposition that is all I want. Those who vote for it will be really and truly progressive. I have nothing further to say.

The amendment offered by the delegate from Cuyahoga [Mr. DOTY] was agreed to.

The question being "Shall the proposal pass?"

The yeas and nays were taken, and resulted—yeas 23, nays 63, as follows:

Those who voted in the affirmative are:

Baum,	Farrell,	Pierce,
Beatty, Wood,	Hahn,	Read,
Bowdle,	Halenkamp,	Stamm,
Crosser,	Harter, Huron,	Stilwell,
Davio,	Hoffman,	Thomas,
Donahey,	Hoskins,	Ulmer,
Doty,	Leete,	Mr. President.
Eby,	Moore,	

Those who voted in the affirmative are:

Anderson,	Colton,	Fackler,
Antrim,	Cordes,	Farnsworth,
Beatty, Morrow,	Crites,	Fess,
Beyer,	Cunningham,	Fox,
Brattain,	Dunlap,	Halfhill,
Campbell,	Dunn,	Harbarger,
Cassidy,	Earnhart,	Henderson,
Cody,	Evans,	Holtz,

Johnson, Madison,	Malin,	Smith, Hamilton,
Johnson, Williams,	Mauck,	Stalter,
Jones,	McClelland,	Stevens,
Kehoe,	Miller, Crawford,	Stewart,
Keller,	Miller, Ottawa,	Taggart,
Kerr,	Norris,	Tannehill,
Kilpatrick,	Nye,	Tetlow,
King,	Okey,	Wagner,
Knight,	Partington,	Walker,
Kramer,	Peters,	Watson,
Kunkel,	Redington,	Winn,
Lampson,	Riley,	Wise,
Longstreth,	Smith, Geauga,	Woods.

So the proposal, not having received the required majority, was lost.

Mr. DOTY: The progressives have gone down from twenty-nine to twenty-three. There are only a few of us left.

Mr. BEATTY, of Wood: I move that Proposal No. 252 be informally passed on the calendar.

The motion was carried.

Mr. DOTY: I make the same motion with reference to Proposal No. 170.

The motion was carried.

The PRESIDENT: The next is Proposal No. 134, Mr. Halenkamp.

The proposal was read the second time.

Mr. HALENKAMP: This proposal has come at a time when I did not expect it. Looking over the calendar the other day I noticed it was behind taxation, municipal government and a few others, and I naturally did not think the proposal would come up until some time next week. I am not really prepared to come before the Convention with the argument I had hoped to make in favor of it, so if the Convention will permit I would ask that the proposal be informally passed and retain its position on the calendar.

Mr. DOTY: Is there any opposition to the proposal that you know of? Would it not be well to go on with it for a time and pass it without your argument if there is no opposition.

The question being "Shall the proposal pass?"

The yeas and nays were taken, and resulted—yeas 33, nays 52, as follows:

Those who voted in the affirmative are:

Anderson,	Elson,	Leete,
Beatty, Wood,	Farrell,	Miller, Crawford,
Beyer,	Hahn,	Moore,
Bowdle,	Halenkamp,	Pierce,
Cordes,	Harbarger,	Read,
Crosser,	Harter, Huron,	Smith, Geauga,
Davio,	Hoffman,	Stamm,
DeFrees,	Johnson, Williams,	Stilwell,
Donahey,	Kilpatrick,	Tetlow,
Doty,	Kunkel,	Thomas,
Earnhart,	Lambert,	Mr. President.

Those who voted in the negative are:

Antrim,	Evans,	Keller,
Beatty, Morrow,	Farnsworth,	Kerr,
Brattain,	Fess,	King,
Brown, Lucas,	Fluke,	Knight,
Campbell,	Fox,	Kramer,
Cassidy,	Halfhill,	Lampson,
Cody,	Harris, Ashtabula,	Longstreth,
Colton,	Henderson,	Ludey,
Crites,	Holtz,	Malin,
Cunningham,	Johnson, Madison,	Mauck,
Dunn,	Jones,	McClelland,
Eby,	Kehoe,	Miller, Fairfield,

Contempt Proceedings and Injunctions—Abolition of Divorce.

Miller, Ottawa,  
Norris,  
Nye,  
Okey,  
Partington,  
Peters,

Riley,  
Smith, Hamilton,  
Stalter,  
Stevens,  
Stewart,  
Taggart,

Tannehill,  
Watson,  
Winn,  
Wise.

So the proposal, not having received the required majority, was lost.

Mr. FESS: I do not believe any of us want this matter to be passed over in that manner. I voted on the prevailing side and I move to reconsider the vote by which the proposal failed to pass.

The motion was carried.

Mr. DOTY: I move that the further consideration of this proposal be postponed until tomorrow and that it retain the position it has now on the calendar.

The motion was carried.

The PRESIDENT: The next is Proposal No. 227.

Mr. MILLER, of Crawford: I have to look after all the Millers in the Convention and I asked for indefinite leave of absence for Mr. Miller, of Fairfield, for the rest of this week and it was granted. Now he is here and I withdraw that request.

Mr. HARRIS, of Ashtabula: I do not know any reason why the informally passing of other measures does not obtain in regard to this. I have met several men on the way out who are somewhat interested and who requested that it be informally passed retaining its position, and I so move.

The motion was carried.

Mr. TANNEHILL: I move that the Convention adjourn.

The motion was lost.

Mr. DOTY: The next proposal is the so-called short ballot. I move that that be informally passed and retain its position on the calendar, which will give Mr. Bowdle a chance to make his anti-divorce speech.

The motion was carried.

The PRESIDENT: Proposal No. 25 is the next business in order. The committee on Judiciary and Bill of Rights recommends the indefinite postponement of this proposal.

Mr. DOTY: Under the present rule the gentleman is limited to five minutes and as I think he has at least half an hour's speech there, I move that Mr. Bowdle's time be extended sufficiently to allow him to read his paper.

The motion was carried.

Mr. BOWDLE: I fear that after I have read my paper you will promptly decapitate my proposal, but I shall have no feeling against you whatever.

This minority report is signed by Mr. Johnson, of Williams, and myself. If, when I finish, there are any other members of the Judiciary committee sharing the sentiments of this report, those persons are cordially invited to sign this report.

After full consideration by the Judiciary committee of Proposal No. 25—Mr. Bowdle, providing for the abolition of divorce in this state, we, constituting a minority of the committee, beg leave submit the following:

1. It seems wise to us that this Convention should take cognizance of this evil, which has now become a national peril, benumbing the nation's moral sense, and destroying the integrity of society's most sacred institution—that of monogamous marriage. While the legislature has power to deal with this question, yet its course

for a half century, and the course of all our state legislatures (except one, to be mentioned) has been toward greater and greater laxity. The legislature, by reason of its very closeness to the people, has proven responsive to the demands of that evil, egoistic spirit that is so deplorably active in modern life, while the great inactive mass of men, who still cherish the old ideal of indissoluble monogamous marriage, remain unheard. It is, therefore, evident to us that the protection of this ideal, which is the foundation of human society, is very properly a constitutional matter, and well within the scope of this Convention's work. To a convention which has debated for two weeks on the initiative and referendum and whether or not the saloon should be licensed or taxed, or whether it is desirable or undesirable for the new court of appeals to see the witnesses personally, it should not be necessary to elaborately prove that the Divine institution, which is responsible for our existence, and the state's integrity, has a claim for constitutional consideration superior to the claim of any other subject pressed upon our attention. Moreover, we have a variety of precedents, in that many state constitutions of this Union are not content to leave the matter of divorce wholly to the legislature. These constitutions limit the power of the legislature in many ways and that of South Carolina undertakes to abolish divorce altogether. All this justifies the view that this Convention on principle and precedent should take jurisdiction of this grave subject.

2. At the outset of our constitutional history, as an assemblage of states, the legislatures assumed the power of granting divorce. This scheme of things, like the present, led to vast abuses; and, accordingly, later constitutions deprived many of our state legislatures of this power, and, thinking to cure the evil, conferred this power on the courts. This course, it was supposed, would at least eliminate politics from the trial, would surround the hearing with the strict rules of proof not applicable to legislative hearings, and would impart a degree of seriousness and solemnity to the proceeding which would deter parties from lightly entering the divorce court. Precisely the reverse has been the ironical result; it is simply notorious that the getting of a divorce is the lightest thing of modern life; entering the divorce court is now catalogued by the individual and the public with jocular happenings. Moreover, the proof required is of the lightest character, many courts being already under the spell of that menacing spirit which obligingly "looks to the happiness of the parties," overlooking utterly the institution of marriage, which has today received its all-but-death wound at the hands of that lustful egoism which, in America, is the pestilence that walketh in darkness. The Fathers, in taking this power from the legislature and conferring it upon the courts, overlooked an interesting merit (?) in their scheme—the element of cheapness. Today, in Ohio, a man may be fully divorced for \$10.35, with \$5 additional to some impecunious attorney, who will attend to the perfunctory details of the formal proof. Thus, the system being evil, every evolution of the system has been evil, until today under the blight of it all the condition of family life in America is but little better than domestic life in the days of Rome's decline.

3. In the loosening of the family tie nothing now remains but the allowance of divorce by "mutual consent." The apostles of the present system see this to be a logical



## Abolition of Divorce.

step, for it has the splendidly utilitarian features of allowing full and immediate expression of sexual desire, and likewise saves the parties from the annoyance and embarrassment of even a formal public hearing of their real or fancied differences. That this scheme may result from the present carnal program is well within the range of probability. Already one may see in current literature numerous suggestive articles having such titles as "Why not Freer Divorce?", "Shall Divorce be Made Easier?", "Impurity of Divorce Suppression," "A Defense of Divorce," "Divorce by Mutual Consent, Why Not?" These articles—and they are very numerous—should arouse us to a sense of the profound peril that menaces us.

4. The divorce system, being immoral, the whole drift of it is toward the extinction of the marriage tie by common consent.

M. Emile Durkheim, a distinguished professor of Paris, in writing on "suicide" deals with the moral aspects of the divorce problem, particularly with relation to its bearing on his subject. He says:

Marriage gives a man the strongest moral standby, as it places a wholesome check on promiscuous desires, which are mentally and physically so enfeebling, as well as destructive of the moral fibre. In proportion as the marriage tie is fragile the continence of married persons become less reliable. A check from which it is possible to free one's self with conventional ease is no longer a check that will moderate the desires, and, by moderating, appease them. There is consequently little need to show that in instituting divorce by mutual consent further facility would be given to couples who were the victims of illicit desires; the salutary check, in fine, would cease, more than ever, to exist.

Answering the proposition that marriage, being a contract, should be rescindable at the wish of the contracting parties, this distinguished sociologist says:

Every contract is susceptible of affecting other parties than the principals. In the case of marriage the contracting parties are bound by ties which are no longer subject to their own will, but involve the interests of third parties. Marriage modifies the material and moral economy of two families, the relationship of persons and things after marriage entirely changing. This holds even where no children have been born. As soon as the children are born the physiognomy of marriage changes entirely. Each parent has become a functionary of domestic society bound to fulfill a specific function; neither can be allowed to withdraw from the obligation because of any personal dissatisfaction occurring. The institution of marriage is the best safeguard of the interest of both men and women, promoting, as it does, the utmost amount of normal happiness to be expected. The regulation and discipline of natural desires is the end of marriage. To permit promiscuous divorce is to enfeeble the principle on which marriage is based, with the result that those who benefit by it will be the first to suffer.

As showing that divorced persons, while seeming to find their own "happiness," are in fact the first to suffer, this clear thinker points out that it is "statistically a fact that divorced persons commit suicide much more frequently than married persons—the exact ratio being four to one."

Mr. Durkheim quotes Bertillon approvingly, the latter showing that "divorce varies in degree in every country in proportion to the character and mental stability of its inhabitants." What shall be said of our national character and stability?

The increase of divorce in America is most astonishing. Mr. Stevens in the Outlook for June 1, 1907, says: "More divorces are granted in the United States each year than in all the rest of the Christian world." The statistics on this subject show an amazing situation here in America. It would be a waste of time simply to more than allude to this notorious fact. Professor Ross, of the University of Wisconsin, says, writing in volume 78 of the Century:

Twenty years ago an investigation by the Department of Labor showed that 328,716 divorces had been granted in the United States between 1867 and 1886 [20 years] and that divorces were increasing two and one-half times as fast as population. The recent census for 1887-1906 brings to light 945,625 divorces, and demonstrates that the movement certainly gains in velocity. \* \* \* The fact that accelerated divorce is produced by the modern social situation, rather than by moral decay, does not make it any less the symptom of a great evil.

5. The evidence of our moral breakdown in this prime matter is on every hand.

(a). In family life young women of marriageable age freely speak of the ease with which divorce may be obtained, when older persons happen to utter some cautionary word about entering into the marriage engagement. (b). The stage constantly parodies marriage and its old-time sanctity and deftly glorifies free-love. (c). The modern novel cannot sell unless it exhibits a "situation" in which the old-time purity is placed in antagonism to the modern "freedom" from conventional restraints.

And this—all this—is seconded by the divorce laws of Ohio, and by the laws of all our states, except one.

The exception is the state of South Carolina. In 1895 that state, by its constitution, article 17, abolished divorce. The writer of this report has a letter from his excellency Governor Blease saying that the scheme works so well that "the state would not think of returning to the old practice."

6. It is often naively urged by advocates of freer divorce that it is in the interest of the race unborn to allow freedom in this respect. The fact is that divorce is not sought in the interests of the race born or unborn. The race gains nothing in quantity or quality by divorce or the remarriage that often follows it. The selfishness which usually brings on divorce is not interested in children.

7. It is well known by lawyers of experience that our divorce litigation is productive of nothing but evil. Rarely does the truth reach court or counsel. While the

## Abolition of Divorce.

law dismisses cases in which there are symptoms that the parties have agreed, yet it is impossible for court or counsel to discover such agreement, when it exists; and, in many cases where it does exist, it is freely winked at. Perjury abounds in such cases and it is absolutely undetectable. Thousands of men and women have taken their first lesson in perjury in our divorce courts.

8. There are those who dispose of this great question by simply saying, "Oh, the law can't make the married live together if they don't want to." This superficial popular utterance obscures the issue. To allow the married to separate, and to allow them to divorce and remarry, are vastly different things. Separations however unfortunate, occur daily and without legal intervention. These inflict no damage upon the institution of marriage, and the maintenance of the bond allows of sober second thought and reconciliation. Divorce allows, usually, no repentance, inflicts irreparable damage to the institution of marriage, sets its parties adrift in society, and subjects both parties, and particularly women, to altogether peculiar temptations. The report of the Chicago Vice Commission contains pitiful statistics as to the large number of divorced women who are driven to evil lives because of their uncertain social status. With this fact before us, Durkheim's figures as to the large ratio of suicides among divorced persons are explicable. It is evident to all who have carefully studied this subject that once the affections of two persons are solemnly blended the severance of them involves necessarily a profound tragedy. In that tragedy the state should take no part.

9. The adoption of this proposal would tend to strengthen the moral stamina of our people. There would be fewer hasty marriages. It would tend to the adoption of much-needed medical-examination laws, and thus prevent fraud in marriage. It would tend to check the carnival of free-love now in full sway in America—at least, it would put the state out of partnership in it. It would save our courts from grave misuse and take from them a filthy class of cases, the trial of which tends to break down the moral sensibilities of the parties. Our divorce laws are but a dangerous sop to weakness. They increase the evil. They do not allay it. With the frequency of post, ease of transportation, and the telephone, those intending marriage may know more of each other than in former days. There is no reason for ignorance. Weakness here needs no comfort. The oath should mean what it says. The institution of marriage is greater than any weak man or silly woman.

The national government has compiled the statistics of marriage and divorce throughout the entire nation, from January 1, 1867, to December 31, 1906. The compilation is most complete. The figures and comparative tables are astonishing. At page 19 of the government report there is shown diagrammatically that, taking 100,000 of the population as the unit, the United States grants more than twice as many divorces as Switzerland, which country leads Europe in this regard. These two governments, the most democratic of the world, stand far and away beyond every other government except Japan (p. 19, Gov. Report). This latter nation is the most immoral nation, maritally. Our nation stands next to Japan. It is instructive to observe that for 100,000 of the population the United States grants sixty times as many divorces as Ireland. Within our own country the comparison be-

tween our states is startling. Thus, taking 100,000 of its married population as the unit, the state of Washington granted twelve times as many divorces in 1900 as did the state of Delaware.

Washington, as a state, is far more advanced in democracy and liberal thought than is Delaware. This relation between democracy and marital looseness bears out the theory of Montesquieu, that democracy has its dangers, and that it requires a high decree of virtue to permanently support it. Unless carefully guarded it is evident that a degenerate egoism is liable to vitiate and destroy the best institutions of a democracy, and this spirit is threatening our civilization. Montesquieu's truth is gravely thrust upon the attention of the people of America, for it is daily more evident that our complex national structure requires a greater and ever greater influx of virtue and honor to sustain it. The assault upon the foundations of our national life is now insidious, satanically cunning and destructive. Truly, as said St. Paul, "We war not against flesh and blood, but against principalities and powers, against the rulers of the darkness of this world, against spiritual wickedness in high places."

The situation entails upon us, who are apostles of democracy, an unspeakable responsibility in this matter of divorce. If democracy is to be maintained—and it must be—we must pay a price for it, a price of increasing sense of moral responsibility, increasing in direct ratio to our wealth and intelligence.

We hold that the function of law should be to invite men to higher ethical levels rather than to facilitate their descent to lower. This is actually facilitated by our present divorce laws. Unless this descent can be arrested the outlook in America is far from reassuring. We accordingly recommend the adoption of Proposal No. 25.

Mr. DOTY: Do I understand that the member is offering some kind of a report?

Mr. BOWDLE: I offer this minority report.

Mr. DOTY: I don't object to a minority report, but I object to that speech going in.

Thereupon Mr. Bowdle reduced to writing and offered the minority report which was read as follows:

The minority of the standing committee on Judiciary and Bill of Rights to which was referred Proposal No. 25—Mr. Bowdle, having had the same under consideration, reports it back and recommends its passage.

STANLEY E. BOWDLE,  
SOLOMON JOHNSON.

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

Mr. WALKER: I offer an amendment.

Mr. DOTY: To what? This is the report of a committee. It has not reached the stage for amendment yet. The minority report has to be voted on and presented. We have not come to the stage where amendments are permissible.

The PRESIDENT: The question is on the substitution of the minority report for the majority.

Mr. OKEY: I demand the yeas and nays.

Mr. DOTY: I second it.

## Abolition of Divorce—Petitions and Memorials.

The yeas and nays were taken, and resulted—yeas 39, nays 46, as follows:

Those who voted in the affirmative are:

Baum,	Halfhill,	Longstreth,
Beatty, Wood,	Harbarger,	McClelland,
Bowdle,	Harris, Ashtabula,	Miller, Fairfield,
Brown, Lucas,	Harter, Huron,	Partington,
Cody,	Hoffman,	Peters,
Crites,	Johnson, Williams,	Riley,
Donahey,	Kehoe,	Solether,
Dunn,	Keller,	Stilwell,
Eby,	King,	Taggart,
Elson,	Kramer,	Tetlow,
Farrell,	Kunkel,	Thomas,
Fox,	Lambert,	Walker,
Halenkamp,	Leete,	Watson.

Those who voted in the negative are:

Anderson,	Fess,	Nye,
Antrim,	Hahn,	Okey,
Beatty, Morrow,	Henderson,	Pierce,
Beyer,	Holtz,	Read,
Brattain,	Hoskins,	Smith, Geauga,
Cassidy,	Johnson, Madison,	Smith, Hamilton,
Collett,	Jones,	Stevens,
Colton,	Kerr,	Stewart,
Cordes,	Kilpatrick,	Tannehill,
Crosser,	Knight,	Ulmer,
Cunningham,	Lampson,	Wagner,
Davio,	Ludey,	Winn,
Doty,	Mauck,	Wise,
Earnhart,	Miller, Crawford,	Woods,
Evans,	Moore,	Mr. President.
Fackler,		

The minority report was disagreed to.

The PRESIDENT: The question is on agreeing to the report of the majority, which is the indefinite postponement of the proposal.

The motion to indefinitely postpone was carried.

Mr. MILLER, of Fairfield: I want to ask that the committee on Labor be relieved of Proposal No. 131, offered by myself, and I call up that proposal before the Convention.

Mr. DOTY: I move that Proposal No. 131 be re-committed to the committee on Labor.

The motion was carried.

Mr. ANDERSON: If there is no objection I would like to move that Proposal No. 240 be taken from the table. In the conclusion I do not think we got proper consideration upon that and so that we can have a vote properly recorded I would like to have it taken from the table.

The PRESIDENT: By unanimous consent the motion to take from the table Proposal No. 240 will be put.

The motion was carried.

The PRESIDENT: The question is "Shall the proposal pass?"

Mr. ANDERSON: I would like to have a full vote and I move that that be informally passed.

Mr. KING: I second the motion.

Mr. DOTY: I move that further consideration of the matter be postponed until tomorrow and that it be placed at the foot of the calendar.

The motion was carried.

## PETITIONS AND MEMORIALS.

Mr. Fess presented the petitions of four hundred members of the W. C. T. U. of Sherwood; of the W. C. T. U. of Beallsville; of the members of the W. C. T. U. of Brookfield; of the members of the W. C. T. U. of Edon; of E. Knox, of Oak Hill; of R. N. Edwards, of Oak Hill; of A. E. Arthur, of Oak Hill; of the Rev. R. O. Williams, Oak Hill; of Geo. E. Jaynes, Oak Hill; of Lewis C. Foster, Oak Hill; of the Rev. J. R. Fields and many other citizens of Oak Hill; of the Rev. Chas. P. Cornetet and many other citizens of Oak Hill; of the members of the Loudonville W. C. T. U.; of thirty thousand adherents of the Maumee Presbytery; of the Rev. D. Thomas and other citizens of Oak Hill; of the members of the W. C. T. U. of New Lexington; of the members of the W. C. T. U. of Millersburg; of the members of the W. C. T. U. of Cuyahoga county; of the ministers union of Toledo; of E. J. Jones and many other citizens of Oak Hill, asking for the passage of Proposals Nos. 65 and 321; which were referred to the committee on Education.

Mr. Stilwell presented the petition of the council of the city of Cleveland, to establish home rule for cities liberal enough to permit cities to establish a double platoon system in the fire department in cities; which was referred to the committee on Municipal Corporations.

Mr. Miller, of Fairfield, presented the petition of the Rev. Hugh Leith, and twenty-two other citizens of Lancaster, asking for the support of Proposal No. 321; which was referred to the committee on Education.

Mr. Cassidy presented the petition of E. P. Ames, of Wauseon, relative to salaries; which was referred to the committee on County and Township Organization.

Mr. Weybrecht presented the memorial of W. L. Ringwald and many other citizens of Alliance, representing Stark Lodge No. 630, Brotherhood of Locomotive Firemen and Engineers, requesting the passage of Proposals Nos. 24, 34, 122 and 209; which was referred to the committee on Labor.

Mr. Ulmer presented the petition of Isaac Taylor and twenty-three other citizens of Toledo asking that the legislature be abolished; which was referred to the committee on Legislature and Executive Departments.

Mr. Bigelow presented the petitions of F. H. Schoonard, of W. L. Dulin, of Cleveland, asking for the passage of Proposal No. 4; which were referred to the committee on Liquor Traffic.

Mr. Bigelow presented the memorials of the Rev. W. H. Walden, of Clyde; of the Rev. C. T. Redfield, of Springfield; of the Rev. Todd Forker, of Pleasant Hill; of the Rev. C. H. Wolcott, of Chagrin Falls; of the Rev. G. C. Quillin, of Coshocton protesting against the passage of Proposal No. 321; which were referred to the committee on Education.

Mr. DOTY: I now move that we adjourn.

The motion was carried and the Convention adjourned.