

FIFTY-SECOND DAY

(LEGISLATIVE DAY OF APRIL 2)

EVENING SESSION.

MONDAY, April 8, 1912.

The Convention met pursuant to recess, was called to order by the president and opened with prayer by the Rev. W. C. Stevenson, of Columbus, Ohio.

The president recognized the delegate from Mahoning [Mr. ANDERSON].

Mr. KNIGHT: Will the gentleman from Mahoning [Mr. ANDERSON] yield for a motion to suspend consideration of the present business for five minutes so seven or eight proposals can be referred to the committees?

Mr. ANDERSON: I will yield.

Mr. KNIGHT: I move that the pending discussion be suspended for five minutes.

The motion was carried.

Mr. KNIGHT: I now move that the rules be suspended in order that we may make a reference of proposals to the committees.

The motion was carried.

REFERENCE TO COMMITTEES OF PROPOSALS.

The following proposals were read the second time by their titles and referred as follows:

Proposal No. 322 — Mr. Bowdle. To the committee on Judiciary and Bill of Rights.

Proposal No. 323 — Mr. Hoffman. To the committee on Equal Suffrage and Elective Franchise.

Proposal No. 324 — Mr. Antrim. To the committee on Taxation.

Proposal No. 325 — Mr. Anderson. To the committee on Judiciary and Bill of Rights.

Proposal No. 326 — Mr. Anderson. To the committee on Judiciary and Bill of Rights.

Proposal No. 327 — Mr. Beatty, of Wood. To the committee on Legislative and Executive Departments.

Proposal No. 328 — Mr. Woods. To the committee on Corporations other than Municipal.

Proposal No. 329 — Mr. Knight. To the committee on Education.

Mr. PIERCE: I would ask the gentleman from Mahoning [Mr. ANDERSON] to yield that I may ask unanimous consent of the Convention to introduce a resolution.

The delegate from Mahoning [Mr. ANDERSON] yielded and the gentleman from Butler [Mr. PIERCE] offered the following resolution:

Resolution No. 99:

WHEREAS, This Convention has been in session for practically three months, and,

WHEREAS, The work so far accomplished is but a small fraction of the whole work to be done, and,

WHEREAS, It is not now necessary to take up much time with committee work, and,

WHEREAS, Many of its members are engaged in agricultural pursuits who feel their services are required at home, and,

WHEREAS, If due weight and consideration are given to all proposals submitted, and that may be submitted hereafter, it will require much time to dispose of them, and,

WHEREAS, It should be the policy of this Convention to give every proposal careful attention without being hurried in its closing days, therefore,

Be it resolved, That it shall be the policy of this Convention to hold three sessions a day, except Monday, from 9:30 to 12:00 o'clock a. m.; 1:30 to 5:00 o'clock p. m., and from 7:00 to 10:00 o'clock p. m. on Tuesday, Wednesday, Thursday and Friday of each week until the Convention has fully completed its labors.

Be it further resolved, That this Convention shall adjourn after the session on Friday night of each week until the following Monday evening at 7:00 o'clock.

Be it further resolved, That the chairman and minority chairman, if any, of any committee shall not speak longer than one hour consecutively on any subject, and that no other member shall speak longer than thirty minutes, without the unanimous consent of this Convention.

The PRESIDENT: The resolution will lie over under the rule.

Mr. KNIGHT: I now move that the discussion of the pending proposal be resumed.

Mr. SMITH, of Hamilton: Will the gentleman from Mahoning [Mr. ANDERSON] yield to me just a minute?

Mr. ANDERSON: Yes.

Mr. SMITH, of Hamilton: I introduced last Monday night an amendment to the Anderson proposal. I was asked by the vice president at that time to withdraw the resolution. I wanted to yield at the time, but my object in introducing it was to get it in the journal and printed so that every member could see what it is. During the last week, as some of you noticed, those members of the Convention who think the way to stamp out the evils in the liquor traffic is by a restricted license met and their conclusion was it would not be well at this time and in this Convention to inject another discussion on that proposal. You gentlemen know that I did not discuss the liquor proposition when it was up. It is a matter that does not touch me much personally, but I represent a constituency largely interested, and I want, with your permission, to make a motion now to indefinitely postpone Resolution No. 92 so it will not come up at this time. I want, before putting that motion, on behalf of the large wholesale interests, amounting to millions of dollars, in Cincinnati, to give due notice to all of you gentlemen, so you may know exactly what you

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are asked to do, that an amendment will be offered to the liquor license proposal when it comes up for its third reading. With that explanation I move to indefinitely postpone my resolution offered last Monday night.

The motion was carried.

On motion of Mr. Knight the consideration of the pending matter was then resumed and the chair recognized the gentleman from Mahoning [Mr. ANDERSON].

Mr. ANDERSON: Gentlemen of the Convention: In the beginning I wish to say that I do not expect to read from any books except those in front of me [referring to a number of Ohio State Reports], and in reality I have not these books here for that purpose, but I have them here so that if I am challenged I shall be able to prove by the supreme court reports that the statements I make are true.

Mr. DOTY: We would rather take your word for it.

Mr. ANDERSON: The only way I could get you to take my word would be to have the evidence in front of me.

Now take this Proposal No. 184. I believe that this is the most important proposal that has been before this body or will come before this body. If it becomes a law, it will produce the most immediate good to the largest number of people; and the greatest good I see in it is that it makes, in many questions, the circuit court the court of final determination. Judge Worthington has one thing in his amendment to which I very much object, and that is that all questions where the interpretation of a statute is concerned may be taken to the supreme court. That, in effect, would be the same as it is at the present time. You gain next to nothing, therefore, by the Peck proposal. I also object to the amendment suggested by the member from Fayette [Mr. JONES], for under his proposed amendment if the circuit court disagrees on questions of law and fact it would permit the case to go to the supreme court. It must be understood by you who are not attorneys that at the present time the supreme court does not review questions of fact, and that the amendment offered by the member from Fayette, instead of diminishing the amount of work of the supreme court, would increase it.

The object of the Peck proposal, as I understand it, is to effect a speedy and economical determination of the rights of litigants. In other words, it is for the purpose, if the litigant be right, of permitting him speedily and economically to obtain that which is his, and if he be not right, of permitting that fact to be determined quickly and cheaply. We all know the great hardships that are caused by the law's delay. There is not a writer in any magazine or a writer of text books, who in any way touches upon the subject, that does not speak in emphatic terms of the great hardship occasioned to the poor people by reason of the law's delay.

Let us analyze the proposal so you who are not lawyers may understand. Say, for instance, my friend, Mr. Watson, while upon the train coming to this Convention, by reason of a derailment, has suffered injury. By reason of his becoming a passenger the company agreed to carry him to his destination safely. The company, of course, is not an insurer, but by its contract it impliedly agreed to exercise the highest degree of care. Shortly after the accident the claim agent of the company goes to see Mr. Watson for the purpose of attempting to make a settle-

ment, in which he fails. The next thing and the only thing left for Mr. Watson is to employ an attorney. The attorney draws a petition, Mr. Watson signs and swears to it and it is filed in the clerk's office and a summons issues. The railroad company is notified, through a deputy sheriff, that it has been sued. The summons is taken to the office of the corporation lawyers. The corporation, through its attorneys, for the sake of delay, files a demurrer or some motion. After the motion or demurrer is disposed of in Mr. Watson's favor, the railroad company, through its attorney, files an answer and in the answer it will probably set up contributory negligence on Mr. Watson's part, as he may have been standing in the aisle, or may have been attempting to walk through the car, or may have been on the platform at the time of the derailment. By reason of the claim of contributory negligence it will be necessary for Mr. Watson to file his reply. The filing and disposing of these papers in court will take at least six months. Then a jury is impaneled and at the end of the plaintiff's testimony a motion is made by the defendant's counsel to direct a verdict for the defendant. That motion is addressed to the learned man on the bench. The relationship of carrier and passenger existing between the railroad company and Mr. Watson, the motion will be denied. Then the defendant corporation puts in its evidence, and at the end of all the evidence the attorney for the defendant renews its motion to direct the verdict for the defendant, and that again is directed to and passed upon by the learned judge. Then upon the part of the railroad company comes a request to charge before argument and the charge is given provided it is the law. Then comes the argument of counsel to the jury, by the attorneys for the plaintiff and the defendant. After the arguments of counsel the judge charges the jury on what he believes to be the law, and in the charge he will especially caution the jury not to be influenced by prejudice or passion or sympathy in favor of the injured party. After considerable deliberation the jury brings in its verdict for Mr. Watson. Within three days the attorney for the defendant corporation files a motion for a new trial. That motion is heard by the judge and he reviews the evidence and the law, and if he finds the law and evidence both in favor of Mr. Watson he then renders a judgment on the verdict, and that ends the trial of the case in the common pleas court.

The next step taken by the railroad company is to get out a record and bill of exceptions. This is done by the official stenographer, and the bill of exceptions and record is in typewritten form; then the case is taken to the circuit court, composed of three men learned in the law, and those three men carefully and conscientiously review the law and the evidence, and if the evidence is in Mr. Watson's favor, and the trial judge has made no mistake in his charge to the jury before or after argument, and if he has made no mistake in overruling motions or demurrers, and if he has made no mistakes in the introduction or exclusion of evidence, then the circuit court will decide the controversy in Mr. Watson's favor. At least a year and one-half have elapsed from the time of the receiving of the injury and the time of the final determination by the circuit court, and hundreds of dollars have been spent in the way of attorney's fees, court costs and costs of records and briefs. The railroad com-

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pany, through its attorneys, wishing to delay the payment of the judgment as long as possible, then takes the case to the supreme court, but before it can be taken to the supreme court the typewritten record on which it was tried in the circuit court must be printed, and the briefs of all parties must also be printed, all of which means an expenditure of a considerable amount of money. In about two years from the time that the circuit court found in favor of Mr. Watson the case would be heard and determined by the supreme court, consisting of six judges, and say, for the sake of argument, that the supreme court might find some technical, prejudicial error of the trial court in the introduction or exclusion of evidence or in its charge to the jury, that error would cause a reversal of the case and would necessitate Mr. Watson's starting again in the common pleas court, to all intents and purposes as if the case had never been tried.

The Peck proposal, provided it had been the organic law, would have stopped that case in the circuit court cheaply and quickly, and if the money was legally due Mr. Watson at all it was his at the time he was negligently injured, and if Mr. Watson were wrong in his contention, and there was no money legally coming to him, he ought to have found it out long before it was necessary to go to the supreme court. No one can claim that under the Peck proposal the corporation would not be entirely and completely protected in all things that honestly demand that protection should be extended.

The law today is not the poor man's law. The poor and the wealthy do not stand equally before the law. But some one may urge that the rich should have full opportunity to defend against any claim, but we insist that we give full opportunity to the wealthy to defend. Let us analyze it. Under the Peck proposal the petition, the demurrers, motions, answers, the motions to direct verdicts, the charging of the law before and after argument, the motion for a new trial, the trial of the case in the circuit court, or, if the Peck proposal is adopted, the court of appeals, are all addressed to learned judges, and surely after not only the jury has found in favor of the injured party, but all matters that the judges have a right to speak on are also determined in the plaintiff's favor, no one can claim that the corporation has not been properly protected and all of its rights conserved. It is a notorious fact that considerable attention of the railroad companies' attorneys is given to a study of determining how best a final determination of a claim against a railroad company can be delayed. A lawyer for a corporation is paid as much for causing delay as he is paid for actual work in the trial of a case.

Mr. ELSON: May I ask a question?

Mr. ANDERSON: Certainly.

Mr. ELSON: If I understand the Peck proposal it provides if a case involves a constitutional point it may be carried up to the supreme court; is that correct?

Mr. ANDERSON: Yes.

Mr. ELSON: Could not almost any corporation lawyer inject some kind of a constitutional point in the average case?

Mr. ANDERSON: No; I do not think so. He could inject an interpretation of a statute in very nearly every case, but not a constitutional question, for the reason that practically every constitutional question that can be made, where a master is on one side and the servant on the

other, or an individual on one side and a corporation on the other, has been determined. The corporations for so many years have been trying to escape liability through the avenue of the unconstitutionality of statutes that there is practically nothing left undecided.

It must be understood that we are trying to get the Peck proposal through, not as a protection to the lawyers, because if we were legislating in our organic law for the lawyer we would create a higher court, which would be over the supreme court, and we would probably, if we did our full duty toward the attorneys, not stop there, because every court in which a case can be reviewed, of necessity, means additional fees to the lawyer.

Mr. KRAMER: How much more do the attorneys who take damage suits against railroad companies get, if the cases go to the supreme court than if they stop in the circuit court?

Mr. ANDERSON: No more, as a rule, and for this reason: Unfortunately the men who have causes for wrongful injury, or a widow who has a cause of action for the wrongful death of her husband, have no money to pay the attorney a retainer or pay him his fees, because, with very few exceptions, it is the man who has to work around dangerous machinery or in dangerous occupation for his day's wage that is injured or killed, and, although we claim that we have great prosperity in the United States, it has required all the money he could possibly make by day's wage to take care of his family. Therefore, by reason of the poverty of the litigant the attorney has to take such case upon a contingent fee, and if it were not for the fact that some "damage lawyer" is willing to take the case upon a contingent fee the corporation would go acquit, and that is one reason why, through corporate influence, so many harsh and abusive things have been said concerning lawyers who take cases upon a contingent fee.

But let me again state we are not legislating with an eye single to the benefit to the lawyers, and therefore we claim that we should not be compelled to try our cases in the same old way. You know that the lawyer, other than the "damage lawyer," charges a big fee for taking a case to the supreme court. He assumes an air of importance and tells his client that he is taking it to the "supreme court of Ohio;" that he is getting out a printed record and brief, and by repeatedly mentioning the "supreme court" and producing a feeling of awe in his client he succeeds in charging a larger fee than it is worth, for it is easier to try a case in the supreme court than it is in the common pleas or circuit courts. An attorney should charge less, but he always charges more. Therefore, if we were legislating for the lawyers, we would add another court instead of reducing it by one. Nor are we legislating here for the benefit of the supreme court.

Speakers told us the other day—several of them—that if the Peck proposal prevailed the supreme court would not have much, if anything, to do, and the speakers' conclusions were, because the supreme court would not have anything to do, we must put that great burden and charge on the poor people to the end that the supreme court would be kept reasonably busy.

Let me again say we are not legislating with an eye single for attorneys and the supreme court; we are try-

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ing to legislate for the whole people of the state of Ohio, including the attorneys and the members of the supreme court. I admit that it is difficult to discuss this question without doing that which the newspapers may say is making an attack upon the supreme court, but I am not trying to do that. It is far from my intention. I have practiced law before a great many judges, both federal and state. I do not believe I ever practiced law before a corrupt judge; consequently, I am not trying to make an attack upon any judge or any set of judges, and that is one of the reasons I have here before me these many books which contain the opinions of the supreme court. I have a right to refer to what there is contained in these books. I am not in any way responsible for the record therein contained, and if it may be said that I criticise the supreme court such claim must be predicated upon the fact that the decisions which the court has made seem to create hardships.

The people who suffer most by reason of the law's delay are the persons of little or no wealth. The poor people who have to go into court to try to get that which is legally coming to them are those who while in the employ of some corporation have received an injury, or the representatives of those who while employed by a corporation were negligently killed.

Judge Taft, in speaking of this class of litigants, said:

No one can have sat upon the federal bench as I did for eight or nine years and not realize how defective the administration of justice in these cases must have seemed to the defeated plaintiff, whether he was the legless or armless employe himself or his personal representative. A non-resident railway corporation has removed the case which had been brought in the local court of the county in which the injured employe lived to the federal court, held, it may be, at a town forty or one hundred miles away. To this place, at great expense, the plaintiff was obliged to carry his witnesses. The case came on for trial, the evidence was produced and under the strict federal rule as to contributory negligence or as to the non-liability for the negligence of the fellow servant, the judge was obliged to direct the jury to return a verdict for the defendant.

* * * How could a litigant thus defeated, after incurring the heavy expenses incident to litigation in the federal court, with nothing to show for it, have any other feeling than that the federal courts were instruments of injustice and not justice, and that they were organized to defend corporations and not help the poor to their rights?

You will notice that Judge Taft was describing the procedure in a federal court. For twenty years I have been practicing law and where it was possible I have taken my cases into the federal court instead of the state court. I did it because the federal courts of this part of the United States, notwithstanding the description of Judge Taft (himself, for years, a federal judge), were preferable to the state courts.

Let me read what another judge has said, a man of national reputation, and I especially desire to call your attention to the criticism made upon the floor of this Convention of the Peck proposal, in reference to that para-

graph which, upon constitutional questions, holds that all of the judges of the supreme court must concur before they can hold an enactment of the general assembly unconstitutional. The writers upon constitutional law and the judges themselves, in their opinions, state that before an act can be declared unconstitutional its unconstitutionality must clearly appear. In fact, some writers claim that the rule is the same as in criminal cases, and the unconstitutionality must appear beyond the question of a reasonable doubt, and before a court can declare a law unconstitutional it is its duty to do everything within reason to so interpret the law in question as to render it constitutional. Since that is the rule, how can a court of nine, five one way and four another, declare an act of the legislature unconstitutional? Is there not a doubt where four out of nine, all equally learned, hold an act to be unconstitutional?

Mr. JONES: Is it not the duty of every judge to give a case that comes before him his individual best judgment, and if the individual and best judgment of that court is that the law is unconstitutional is there as to that majority any reason for doubt?

Mr. ANDERSON: That is just the point. If the five were there by themselves constituting the court it would be all right, but there are four other men who are supposed to be equally learned, equally honest and equally conscientious, who do not agree with them. Does not that put the decision in the domain of doubt?

Mr. JONES: Is not there too much in your argument? If it proves anything in regard to the constitution does it not prove something in favor of the point I make?

Mr. ANDERSON: No.

Mr. JONES: In other words, the rule of a majority of the court determining the question does not apply?

Mr. ANDERSON: I will explain that. You remember I opposed the less-than-unanimous verdict in criminal cases because the rule in criminal cases differs entirely from that in civil cases. In criminal cases you have to find the accused guilty beyond the question of a reasonable doubt, but in civil cases all you need is probability. And our supreme court, in 80 O. S., there lays down the rule of probability. Where there are probabilities at stake, and only that, then it would be proper for the deciding court to render a verdict on probabilities, and that was the reason why I favored the passage of the Elson proposal, requiring less than a unanimous verdict in civil cases. But where the rule is that before an act can be declared unconstitutional it must be clearly and beyond a doubt so found, then a majority of one does not take such question out of the realm of doubt. Have I answered you?

Mr. JONES: Would it not be possible with that rule to put the judgment of one man against eight or nine?

Mr. ANDERSON: You don't want minority rule?

Mr. JONES: Suppose you have a case in the common pleas court where the common pleas judge holds the law unconstitutional, and the court of appeals also holds it unconstitutional. Now you go to the supreme court of six judges, and five of them declare it unconstitutional. Do you think it the right thing to let that one man man in the supreme court defeat the judgment

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of the five members of the supreme court, the three circuit judges and the common pleas judge?

Mr. ANDERSON: You didn't start back far enough. Where did the act come from?

Mr. JONES: Do you think it right to let one member of the supreme court, by his individual judgment, defeat the judgment of the other nine judges that the law was unconstitutional?

Mr. ANDERSON: You didn't start back far enough. In the first place, take the house of representatives. We presume there are a number of lawyers elected to the house, and we presume they are moderately well posted in the law, as well, say, as the average lawyers on this floor. It may be a violent presumption, but we will presume for the sake of argument that they are, and those lawyers give their best efforts to framing the law. Then from the house of representatives the act goes to the senate, and we will presume the senate has a like proportion of lawyers, who give their best attention to the consideration of the proposed law. And the house and senate pass it and then it goes to the governor—I hope in the future the governor will be a lawyer, and generally he has been a lawyer—and then we will presume that the governor, after careful consideration, does not veto it but approves it, and of course if there is any question concerning the constitutionality of the law he will ask the advice of his attorney general. Then we will say, later, in the court of common pleas the constitutionality of the act is questioned, but that the judge of the court of common pleas holds it to be constitutional; from there the case is taken into the circuit court and two circuit judges say it is unconstitutional and one says it is constitutional; from there the case is taken to the supreme court, composed of six learned men, and they divide equally three to three, and that by reason of the circuit court, divided though it was, holding the law unconstitutional, would cause the act of the legislature to be declared null and void. What have you in favor of the constitutionality of the act? The house of representatives, the senate, the attorney general, the governor, the common pleas judge, one of the circuit court judges and three of the supreme court judges. But as against them you have two circuit judges and three supreme court judges. So that, after all, you have, under my hypothetical statement, minority rule, and in reference to that which all law writers declare must be found unconstitutional beyond the question of a reasonable doubt.

Now let me read to you what this ex-judge, this man of national reputation, Mayor Gaynor, has said on this question:

Nothing is more distressing than to see a bench of judges, old men as a rule, set themselves against the manifest and enlightened will of the community in matters of social, economic or commercial progress.

The same rule is true in matters of moral and religious growth. Jesus, Socrates, and many who came after them, age after age, fell victims to judicial narrowmindedness.

Let me cite some of the recent judicial decisions which are planted right in the path of economic and social progress.

The tenement house tobacco case was decided by the court of appeals of this state in 1885.

Good men and women found tobacco being manufactured into its various products in tenements. They found little children born and brought up there in the unwholesome fumes of tobacco. They applied to the legislature and had a law passed forbidding the manufacture of tobacco in such tenements.

The courts held it was "unconstitutional." They professed to find this constitutional provision latent in the general provision in our state constitution that no one shall be deprived of "life, liberty or property without due process of law."

The court has said that the tenant has the right, under the constitution, to do what he liked in the way of lawful business in his tenement.

Some years later good and intelligent influences brought about the enactment of a statute for the sanitary regulation of underground bakeries. It prescribed a list of sanitary safeguards, and also that the employes should not work more than ten hours a day.

The supreme court of the United States declared this ten-hour requirement to be unconstitutional, as depriving workmen, without due process of law, of the "liberty" to work as long hours as they saw fit in underground bakeries.

The learned court stood five to four. Notwithstanding a rule which is often repeated by the courts that they will declare a statute unconstitutional only in a case free from doubt, they declared this statute unconstitutional. What is five to four but a state of doubt?

In 1893 the legislature passed a statute that women should not work in factories between the hours of 9 at night and 6 in the morning. This statute was intended to protect the health of women, and hence of their offspring.

It is almost inconceivable that the gentlemen then composing the court of appeals of this state found in this humane and benevolent law an infringement of the "liberty" of women.

It is not at all to be wondered at that such decisions should provoke a widespread dissatisfaction with the courts. These decisions so exasperated the people of this state that they swept them all out of existence.

Who is to be the judge of legislation as to whether it tends to general health, comfort, safety and welfare? The legislature, representing the community? No. The judges took that unto themselves. They judge, therefore, over the heads of the legislators and declare legislation unconstitutional which exceeds their opinion of what is economically or socially wise or beneficial.

No such power was ever given to the courts. They have simply taken it away from the legislative department of government. They have set themselves up as "protectors" of society against the lawmaking power, safeguarded as it is by the consent of two houses and the executive veto.

They do not seem to consider who is to protect us against them in their judicial legislation.

Mr. WATSON: Do you think that decision is rendered in the light of the Declaration of Independence?

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Mr. ANDERSON: No; I think it was in the "light" of big interests. I have no doubt all of you who are attorneys have in your library "Words and Phrases". Let me read from volume 3, page 2096:

The most odious and dangerous of all laws would be those depending on the discretion of judges.

Lord Camden, one of the greatest and purest of English judges, said:

The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends on constitution, temper and passion. At best it is often caprice. In the worst it is every vice, folly and passion to which human nature can be liable.

What is the definition of judge-made law? What do we mean by judge-made law? It very largely springs from the common law. The common law is supposed to be present wherever there are communities. As soon as you have a territory you have common law, and always within the borders of the state common law is present, and it differs in different states, because of the personality of the judges, because of the environment of the judges, because of the habit of thought of judges. Take Pennsylvania and Ohio. On the one side of the line you have one kind of common law and on the other side another and entirely different and distinct kind of common law. The rights of the people, so far as outlined by the common law, may be largely protected on one side, and just on the other side of the imaginary line dividing the states by reason of this same common law the rights of the corporation and "big business" may be supreme. Judge-made law very largely depends upon the condition of the liver of the judge at the time of its making.

Now you hear much of assumed risk. Assumed risk has been defined as the legal right given through judge-made law to a corporation to kill and maim without any legal responsibility on its part. Let me repeat it. The common law right given to the corporation to kill and maim its servants without any legal responsibility is known as the doctrine of "assumption of risk." In England away back in 1837, in what was known as the Presley case, the doctrine of assumed risk was first enunciated. It was not such bad law then, because few men were working together, each knew the other, each knew whether the other men employed were careless or drunken, and consequently they could be vigilant and guard against any negligence. This doctrine in the Presley case appeared in Massachusetts in 1844, in the Farwell case. It was like the English sparrow, insignificant when it arrived from England, but it has multiplied greatly. The assumption of risk has been used by the corporation lawyers, inducing judges to add a little in this case and a little more in some other case, always growing in the direction that causes the rights of the individual to be decreased, until it has taken upon itself such proportions that it is stronger than the rights of the individual; yes, even stronger than the acts of the legislature.

Another judge-made law is known as the "fellow servant rule." It was first enunciated in England, and it had its first application where not to exceed fifteen men were employed in a common enterprise. The doctrine

of fellow servant was then based upon good logic and justice—that where each man worked so near to every other, and so few men are employed that each, in the exercise of ordinary care, can protect himself against the carelessness of his neighbor, then under the law, if he is injured by reason of the act of a co-employee, his master does not have to respond in damages. This judge-made defense has been added to by innumerable judges and the addition meant the diminishing of the rights of the individual, so that today the reason and logic of the rule have long ceased to exist. Take our big mills at Youngstown, where there are six or eight thousand men engaged in each mill. There is no opportunity for one of the men so employed to keep any supervision over any other, because, with the complicated machinery there used, the servant who may cause injury may be a long distance removed from the place at which the accident occurred. Yet if one of these men is injured by reason of the negligent act of any other the judge-made law exonerates the corporation. It must be understood that I am not in any way referring to the statutory law, but to the common law. Apply this doctrine of the fellow-servant to steam railroads. A telegraph operator, by reason of his inexperience—and no set of men, considering the responsibility resting upon them, are paid so poorly as telegraph operators—may cause injury to some brakeman who lives hundreds of miles from the place of work of the telegraph operator, but the judges hold that the negligence of the telegraph operator is the negligence of a "fellow servant" and the railroad company is innocent of any blame.

No judge-made law was ever repealed by any other judge-made law. Consequently, to try to escape from the rigors of the common law relief was sought through the lawmaking body instead of the law-interpreting body, and the result was that a number of protective acts were passed. I believe that the number in Ohio is from thirty to thirty-five. When a remedy, therefore, is sought by an individual against corporate interests, if you permit the interpretation of these protective statutes to be lodged in the court of last resort then you permit the statutory laws that take the place of the judge-made law to be interpreted by those who have applied the judge-made laws to the same conditions that are sought to be remedied by the statutes, and that is just what is accomplished under the Worthington amendment. It is urged that no statute would go to the court of last resort upon interpretation more than once, but the national safety appliance act has been taken to the federal courts for interpretation more than fifty times. Consequently, if the Worthington amendment becomes a part of this proposal it in a very large measure nullifies it.

I have here some reported cases that I looked up this afternoon and I believe they will be interesting to you. If there is any question as to any of them I have the Supreme Court Reports in front of me to prove the statements I am about to make. I was desirous of knowing the number of cases where the individual interest came in conflict with the corporation to determine to what extent a different result would have been had provided the Peck proposal had been the law for the last ten or fifteen years. When a case goes to the supreme court it is decided with or without report. In other

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words, if it is decided without report it is disposed of in very few words, the court stating whether the plaintiff in error or the defendant in error wins. If it is reported, then one of the judges writes the opinion. It is published in the Supreme Court Reports, and that becomes, on the particular legal question involved, the determining factor in other cases of the same nature. Consequently the great importance of reported cases will at once be seen. I understand that within two or three years past a law was enacted stating that the supreme court should give written reasons in all cases whether the case was affirmed or reversed, but the supreme court, not being in the same department with the lawmaking power, did not see fit to obey the law. I do not want any mistake made in reference to just what I mean, for I have only examined the reported cases where the individual was on one side and the corporation on the other, and where the circuit court was reversed by the supreme court. They are as follows:

- Railroad Company vs. Ehlert, Admr., 63 O. S. 320.
- Railroad Company vs. Marsh, 63 O. S. 236.
- Railroad Company vs. Fox, Admx., 64 O. S. 133.
- Railroad Company vs. Aller, 64 O. S. 183.
- Railroad Company vs. Skiles, 64 O. S. 469.
- Railroad Company vs. Gaffner, 65 O. S. 118.
- Railroad Company vs. Shaffer, 65 O. S. 414.
- Railroad Company vs. Osborn, 66 O. S. 45.
- Pennsylvania Company vs. McCurdy, 66 O. S. 120.
- Railway Company vs. Cox, Admx., 66 O. S. 276.
- Railway Company vs. Kistler, 66 O. S. 326.
- Railway Company vs. Workman, 66 O. S. 509.
- Railway Company vs. Little, 67 O. S. 91.
- Railway Company vs. Lake, Admx., 68 O. S. 101.
- Railway Company vs. Kinz, 68 O. S. 210.
- Kelley Island Lime & Transport Company vs. Pachute, Admx., 69 O. S. 442.
- Railway Company vs. Rigny, 69 O. S. 181.
- Railroad Company vs. McCormick, 69 O. S. 45.
- Railway Company vs. Ludtke, 69 O. S. 384.
- Railway Company vs. McClellan, Admx., 69 O. S. 142.
- Railway Company vs. Lockwood, 72 O. S. 586.
- Railway Company vs. Hubbard, 72 O. S. 302.
- Railway Company vs. Loftus, 72 O. S. 288.
- Railway Company vs. Chambers, 73 O. S. 16.
- Railway Company vs. Forrest, 73 O. S. 1.
- Railway Company vs. Stephens, Admr., 75 O. S. 171.
- Terminal Company vs. Hancock, 75 O. S. 88.
- Railway Company vs. Ropp, 76 O. S. 449.
- Railway Company vs. Johnson, 76 O. S. 119.
- Railway Company vs. Harvey, 77 O. S. 240.
- Railway Company vs. Cappel, 80 O. S. 128.
- Railway Company vs. Kessler, 84 O. S. 74.
- Railway Company vs. Addison, 84 O. S. 259.

It will be noticed that I started with 63 O. S. and end with 84 O. S., the 84th being the last volume. I made this examination of these cases with the object in view of finding the cases that had been won by the individual in the circuit court and where, if the Peck proposal had been in effect, those cases would have ended and I find that of these reported cases thirty-three which would have ended in the circuit court in favor of the individual were reversed by the supreme court and re-

ported. These cases, because they were reported, make the standard by which all inferior courts in the state of Ohio are to be guided—not only guided, but controlled. Therefore, it is quite important to those interested to have the law determined in their favor, because not only does the establishing of law control the lower courts in like cases, but when a similar case is brought into an attorney's office and he is consulted concerning it, he, in examining the Supreme Court Reports, will be compelled to advise his client in accordance therewith. There are thirty-three cases in those fourteen books [pointing to the books on the desk] which were won by the individual in the circuit court, but all of them, except those where judgment was rendered against the individual, were reversed and sent back to the common pleas court, compelling the individual to start his litigation all over again. In every one of these he had to wait for some years before a reversal was had in the supreme court, and it means, therefore, that he will have to wait an additional number of years before the case will again reach the supreme court, and in many instances the litigants were surrounded by abject poverty. The thing that is demonstrated by the examination of these reports is the fact that of the cases such as I have described, where the legal rights of the individual and of the corporation were in conflict, and where the circuit court was reversed by the supreme court and the cases reported, that one of such cases, within the fourteen volumes mentioned, was where the decision of the circuit court was in favor of the individual against the corporation. It means, therefore, that thirty-three cases were determined and established in favor of the corporation and one in favor of the individual. So there can be no mistake about the importance of reported cases and their far-reaching effect, let me give you another illustration: For many years it was held that where a railroad company owned a turntable and children were in the habit of congregating about the turntable and playing with it, it was the duty of the railroad company to exercise ordinary care to the end that the children should not, by reason of their playful instincts, receive injury. But we find, in 77 O. S., p. 235, in Railroad Company vs. Harvey, that the railroad company is not liable to an infant who is injured while playing with a turntable. The circuit court had held that the railroad company was responsible, and this is one of the cases among the thirty-three mentioned. This reported case being controlling upon all accidents of a like nature that would happen after its determination, it means that for all time, no matter how many children may be injured by the lack of ordinary care on the part of the railroad company in and about its turntable, yet no recovery can be had. This is the judge-made law in Ohio. The courts of the United States, Minnesota, Nebraska, Missouri, Kansas, Iowa, California, Washington, Tennessee, Illinois, South Carolina, Georgia and Texas hold that where a railroad company failed to exercise ordinary care it would have to respond in damages. The one case of the thirty-four where law was made for the individual is McGarvey vs. Railway Company, 83 O. S. 73.

Mr. WATSON: May I here make one suggestion to the gentleman?

Mr. ANDERSON: Yes.

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Mr. WATSON: You will have no objection if I use that later on for the recall of judges?

Mr. ANDERSON: No I am not in favor of the recall of judges, nor am I in favor of the recall of decisions, but I do want to recall the court back to the people, and you do recall the court back to the people with this Peck proposal, for then you will have an opportunity of personally knowing all of the judges. The judges will be in closer contact with the people and the people with the judges; for judges who are nominated and elected in the state as a unit must be, of necessity, unknown at the time of the nomination and election to over ninety-five per cent of the voters. I am not one who believes that a judge suddenly becomes greatly more learned upon being transported from the common pleas or circuit bench to the supreme court. I do not believe that any judge on the supreme bench is any better qualified than such men as Judge King, Judge Norris and Judge Taggart. I would trust them with all great questions as willingly as I would the judges of the supreme court.

Mr. KRAMER: I want to understand you—

Mr. ANDERSON: I am trying to explain to men who are not lawyers.

Mr. KRAMER: Well, I want to understand too. Do you mean for us to infer that the supreme court was wrong in those thirty-three cases that were appealed from the circuit court and won by the railroads?

Mr. ANDERSON: Well, they are not always right are they?

Mr. KRAMER: How do you know?

Mr. ANDERSON: I have read some of the cases and I believe I can prove it to you. I have some of them here.

Mr. ROEHM: You have not included hundreds of cases that have gone unreported where the supreme court reversed similar cases.

Mr. ANDERSON: No; I could not do that. I did not have time and it would mean the examination of more than a thousand cases, and not only the examination in the supreme court, but you would have to go back, because they are unreported, to the court below.

Let me suggest this to you: That certainly the rights of the individual had as much reason to be safeguarded by the supreme court as had the rights of the corporation. Then how can you in any way explain that in thirty-three out of thirty-four cases, where the circuit court was reversed and the cases reported, only one such case was favorable to the individual and thirty-three in favor of the corporation when it is understood that the reporting of a case means that the law which controls is thereby made?

Mr. HALFHILL: Were there any more cases carried up by the individual than the one you referred to?

Mr. ANDERSON: I have tried to make that plain. I only had time this afternoon to find these cases. I suppose I could have found a great many more by hunting longer. These are the cases the supreme court reported where its action is different from the circuit court and where it reversed and found in favor of the corporations.

Mr. TALLMAN: Is it not a fact that the circuit court deciding against the individual often report their cases?

Mr. ANDERSON: The circuit court?

Mr. TALLMAN: Yes.

Mr. ANDERSON: Nobody pays any attention to those decisions.

Mr. TALLMAN: Don't they often report cases in favor of corporations?

Mr. ANDERSON: They certainly ought to and also in favor of the individual.

Mr. TALLMAN: Now if they decide any cases in favor of the corporation and the case is reported and then it goes up to the supreme court and the case is affirmed, does not that make the law as announced by the circuit court the decision of the supreme court?

Mr. ANDERSON: No; I wish it did, but it does not—a non-reported case does not.

Mr. TALLMAN: It does to a number of bars.

Mr. ANDERSON: It does not to courts before which I practice.

Mr. TALLMAN: If the circuit court decides a case and reports a case, and that case goes to the supreme court and is affirmed, doesn't that adopt the opinion of the circuit court?

Mr. ANDERSON: No, sir; the supreme court has made that very plain and has decided that in no way do they adopt as part of their findings that which the lower court reported. Ex-President Roosevelt, when he was here, said that which seemed very familiar to me, and I am afraid he did not use quotation marks. I will read from the case and tell you where he obtained it and I will read the whole paragraph. This is found in *Railway Company vs. Taylor*, 210 U. S. 295:

When applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interests of the employer to the exclusion of the interests of the employe and of the public.

Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who would measurably control the causes, instead of upon those who are, in the main, helpless in that regard.

Now keeping that decision in 210 U. S. in mind, I want to call your attention to what the supreme court has held, and I read from the case of 49 O. S. 607:

The servant, in order to recover for defects in the appliances of the business, is called on to establish three propositions: 1, That the appliance was defective; 2, That the master had notice thereof, or knowledge, or ought to have had; 3, That the servant did not know of the defect, and had not equal means of knowing with the master.

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An employe injured by reason of defective machinery has to establish, before he can recover, that he did not have equal means of knowing with the master. In other words, if he had equal means of knowing with the master then that would be a complete bar. In answer to this judge-made law I want to again quote from a decision by Judge Taft:

But the degrees of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance, required of the master and servant in a particular case, may be, and generally are, widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe, if placed in the position of the master who furnishes it, than if placed in that of the servant who occupies it.

But in Ohio not only must the injured servant establish that he did not have equal means of knowing with the master, but this Ohio judge-made law states that the servant must further establish that he, the servant, did not know, nor in the exercise of ordinary care could he have known, of the defective machinery, but where a defect in the machinery or appliances caused the death of the servant, yet, under this judge-made law, the widow suing as administratrix must establish that her dead husband, before she can recover damages for herself and children, did not know, or in the exercise of ordinary care could not have known, that the machinery was defective.

Since the language used by one of the common pleas judges, in passing upon this holding, is stronger than any language that I would care to use, I will quote it:

I undertake to say that in a case like that of Clark, where a dead man is called upon to prove that he did not know a certain thing, that it is a substantial foreclosure of his cause of action. How is he going to prove that fact, that he himself had due notice or knowledgs? * * *

Taking the 49 O. S., and have this man prove that he did not know of that existence, when he was in his grave, it simply bars him from the right of action. You can't do it; you might as well save your paper and pen in drawing that petition.—6 Nisi Prius. N. S. 451.

Mr. HALFHILL: Would you have the Convention believe that the legislature could not change it?

Mr. ANDERSON: Certainly they can change it, and they did do it in the Norris law, which I helped to pass and which I drafted.

Mr. HALFHILL: Didn't your law simply construe the law?

Mr. ANDERSON: Where do you find that?

Mr. HALFHILL: That is the common law you are speaking about, is it not?

Mr. ANDERSON: Yes; I am talking about the common law or judge-made law.

Mr. HALFHILL: Does not the judge apply the rule of the common law in all proceedings unless a statute changes it?

Mr. ANDERSON: Yes, but the judges make the common law.

Mr. HALFHILL: That is what I understand your proposal is for.

Mr. ANDERSON: That is it exactly.

Mr. HALFHILL: Then you can consistently criticise the judge if he is not furnished with the law by the legislature and the rule of evidence and substantive law is not changed by the legislature? That is the question I want to get at.

Mr. ANDERSON: I am afraid I put it awkwardly, my friend. The point I am trying to emphasize is this: I am trying to draw a distinction between the judge-made common law and legislative enactment, and I am trying to show the foolishness, as in the Worthington amendment, of putting up to the judge who makes the judge-made law (that kind of judge-made law that makes you go down into the grave to get evidence before you can recover) the right to interpret the legislative enactment which is supposed to take the place of his judge-made law.

Mr. HALFHILL: In the case in the United States court that you referred to there was a decision under the federal safety appliance act?

Mr. ANDERSON: Yes, a drawbar.

Mr. HALFHILL: There was no set act under consideration by the supreme court of Ohio, was there?

Mr. ANDERSON: Section 8 of the federal safety appliance act was written into it as an inhibition against assumption of risk as a defense.

Mr. HALFHILL: But in these cases in the supreme court of Ohio, which you criticise, the supreme court was not passing on legislative acts?

Mr. ANDERSON: No, sir.

Mr. HALFHILL: They were announcing the rule of the common law?

Mr. ANDERSON: That is their common law because it does not exist as statutory law.

Mr. HALFHILL: Is not that a rule of common law?

Mr. ANDERSON: Of the judge who made it. It never was the statutory law and never will be.

Mr. HALFHILL: Let me ask you a question: Instead of attempting by fundamental law to control the supreme court in those matters of personal injury, is it not a fact that the best economic thought today teaches us that we should pass some laws that would distribute on the employer the burden?

Mr. ANDERSON: Workmen's compensation laws?

Mr. HALFHILL: Something of that kind, instead of leaving it to the court that we ought to get out of it by passing a proper workmen's compensation law; is not that the burden of the argument today, rather than put it into the fundamental law as you are arguing here?

Mr. ANDERSON: That is beside the particular question we are now discussing, but let me answer it, for

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I have had some experience along that line. For some years my efforts have been directed toward just such an act as you suggest—workmen's compensation. I do not care how much it reduces my business. I am heartily in favor of it, because no crippled man or widow, where her husband has been wrongfully killed, ought to be compelled to employ a lawyer and pay him a contingent fee of a fourth or a third to obtain money which is honestly and legally due, but because of the practice that now exists, and for which the corporation is entirely responsible, such amount must be paid as contingent fees. I do not believe the so-called "damage lawyer" is to blame, for he certainly ought not to be expected to try the case without compensation, but the corporation, with its extremely able attorneys and active co-operation of many claim agents, is to blame. The individual certainly needs some legal assistance, and if individuals cannot employ attorneys upon a contingent fee, then, by reason of their poverty, they would be denied the right of being represented by counsel. But let us examine the history of workmen's compensation in Ohio, and see whether the corporations are in favor of it.

Some years ago we introduced the so-called Norris law, defining employer's liability, in the house of representatives and you, Mr. Halfhill, are familiar with it, and you know that it has worked no hardships, but it has been an extremely just law, and you further know that what the Norris law did was to correct the abuses that had grown up under judge-made laws. Remember that the corporations had never suggested that they wanted a workmen's compensation law, but when we began to have some success in the lawmaking body with the Norris act—thanks to the Ohio Federation of Labor—then the corporations developed a great friendship and interest for and in the workmen's compensation act, so much so that Mr. Brenner, of Springfield, who, by the way, failed of election for his second term, drew a substitute for the Norris bill. He and Mr. Cobb, who also failed of being elected for his second term, wished this substitute looking toward the establishment of workmen's compensation law to take the place of the proposed Norris law, and this substitute providing for a committee to be appointed to examine into workmen's compensation law was substituted in the house and such substitute was then sent to the senate, where Senator Matthews, of Cleveland, there had substituted the original Norris bill for the substitute sent over from the house. Then upon the Norris bill coming back to the house, it carried by practically a unanimous vote. It was indeed a little hard on the corporations, for in their attempt to escape from the liability law they had succeeded in getting started a demand for workmen's compensation, and we have it today by reason of the fact that they tried to kill all laws which would supersede the judge-made law.

And let me ask you this, Mr. Halfhill: If the corporations are so much interested in workmen's compensation, why do they not take advantage of the law now on our statute books?

Mr. TALLMAN: Don't you agree that all the crudities and injustices arising out of the extension of the rules of the common law which pertain to property and necessarily, under the advance of civilization, from the original common law of England where every employe associated with the man he worked with—the law of

fellow servant—cannot all of those crudities and injustices be remedied by legislation, clear, plain and simple, that would be absolutely binding on the courts?

Mr. ANDERSON: I have a lot of matter that later on will answer that question.

Mr. TALLMAN: Do you agree with that?

Mr. ANDERSON: No; I can prove just the opposite.

Mr. TALLMAN: If the judges go according to the intent of the legislative enactment, won't that be the result if a legislative enactment is sensibly drawn?

Mr. ANDERSON: Well—

Mr. TALLMAN: Answer yes or no.

Mr. ANDERSON: I will answer you. If the judges interpret according to the intent of the law that would produce the desired result, but unfortunately they seldom have done that.

Mr. TALLMAN: They are supposed to do it.

Mr. ANDERSON: But the supposition is in many cases wrong.

Mr. TALLMAN: You say you are not casting any reflections on the supreme court when you say that; aren't you casting reflections?

Mr. ANDERSON: If the statutes were not interpreted as their spirit indicated then let that fact be a reflection. I have the proof.

Mr. TALLMAN: Men may go wrong—

Mr. ANDERSON: I don't say they go wrong. I will read these cases and let you decide.

Mr. TALLMAN: If the legislature could remedy that and a legislative act goes to the supreme court for interpretation, have we not then with the interpretation of that statute one general rule applicable to all counties and districts of the state which everybody knows?

Mr. ANDERSON: Hypothetically it is true. That has to be true because your statement makes it such.

Mr. TALLMAN: If the case stops in the circuit court and there is no review by the supreme court, haven't we as many different rules of law, or may we not have, as there are circuit courts?

Mr. ANDERSON: Have you read the Peck proposal?

Mr. TALLMAN: Yes.

Mr. ANDERSON: You can get the answer in it.

Mr. TALLMAN: I would like to have you answer.

Mr. ANDERSON: The Peck proposal answers it.

Mr. TALLMAN: But I want you to answer it.

Mr. ANDERSON: There is a rule in the Peck proposal that those decisions can be made uniform.

Mr. TALLMAN: How about the poor fellow going there—he has to go to the supreme court to get uniformity?

Mr. ANDERSON: But there will be only one "poor fellow" to go, not hundreds as under the present system.

Mr. TALLMAN: The short route is to remedy by legislation.

Mr. ANDERSON: But legislation does not remedy it.

Mr. TALLMAN: That is with the legislature.

Mr. ANDERSON: No; it is not.

Mr. TALLMAN: Then we ought to have a referendum applied to these laws.

Mr. ANDERSON: Well, we can have it. Let me answer the gentleman. I did not intend to take this up

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at this time. Your position is this: Go to the legislature and get the legislature to pass certain laws, clear and distinct, and that will be such a check and control upon the supreme court that it will have to do the decent thing and quit making so-called judge-made laws. That is your statement, is it not? That is, you would correct the evil of judge-made laws because the judges do not correct it themselves, and because from year to year the judge-made defenses of contributory negligence, assumed risk and fellow servant are becoming more and more in favor of the corporation—you would correct them through the legislature?

Mr. TALLMAN: Yes.

Mr. ANDERSON: Then you are saying more severe things against the supreme court than I.

Mr. THOMAS: Is it not a fact that it kept the labor organizations of Ohio busy amending the safety laws to meet the misconstruction placed upon them by the supreme court of Ohio?

Mr. ANDERSON: It seems that I cannot make that which might be called a speech. I will have to make myself understood through the medium of answering questions.

To illustrate what I mean, in stating that you can obtain the proper remedy through legislative made laws, I wish to call your attention to a number of cases. A man by the name of Naramore was working in the railroad yards at Cincinnati, if I remember correctly, and he was coupling and uncoupling cars in the night time, and although the rules of the company provide that a brakeman must not go between the cars while they are moving, yet the employe would be discharged if he insisted upon obeying the rules. The coupling or uncoupling has to be made while the cars are moving, and in 1884 or 1885 the legislature of Ohio did as Mr. Tallman suggested. It passed a law so clear, so far as construction is concerned, that there could not be any mistake about it, stating to the railroad companies that they had to block their frogs and guard rails, because railroad employes walking between the cars in the night season, busily engaged, under the old link-and-pin system, in attempting to uncouple cars, might step into the unblocked frog or guard rail and be caught, and these unguarded frogs and guard rails were largely of the same nature as traps that we as boys used to use to catch muskrats. They would hold a foot and when a foot was fastened the moving cars would cause the brakeman thus held to be injured for life or he would have his life crushed out. The legislature, therefore, to guard against this destruction of life and limb, passed a law requiring the railroad companies to block the frogs and guard the rails. Naramore's foot was caught in one of these unguarded places and his foot was cut off. He started his suit in the state court and by reason of diverse citizenship and the amount involved being more than \$2000, the railroad company removed it to the United States court at Columbus or Cincinnati and the case was there tried. The United States circuit court held that Naramore assumed the risk of the unblocked frogs and guard rails and could not recover. The case was then taken to the United States circuit court of appeals, composed of Judges Taft, Lurton and Severance, one of the ablest courts that ever rendered a decision. Judge Taft in his opinion said—

Mr. TALLMAN: Judge Taft held otherwise?

Mr. ANDERSON: Yes, and he was right. So that men who are not lawyers may understand this allow me to explain that assumption of risk grows out of contract, express or implied, and cannot arise in any other way. In other words, it is part of a contract of employment based upon the supposition that the man remains in the service of the master after he knew, or in the exercise of ordinary care might have known, of the dangers incident to the employment. The assumption of risk always sounds in contract, express or implied. Judge Taft said:

If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against the servant an agreement, express or implied, on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interests of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute.

The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servant deal in regard to the danger of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to admit the servant to contract the master out of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that.—37 C. C. A. 502 (opinion by Taft, circuit judge).

That is a good, commonsense, humane and confidence-inspiring opinion, is it not?

Mr. TALLMAN: I thoroughly agree with just what he said there and if the statutes had added that failing to put in that guard they would be liable for damages, or if they had made the act something similar to employers' liability, the court could not have made the decision they did.

Mr. ANDERSON: You are getting in a little too far. You apparently are not familiar with what our supreme court did later. A man named Johns, in the night season, in the railroad yards in Cuyahoga county got his foot caught in an unguarded guard rail and the moving cars crushed his life out. I suppose the lawyers for the widow knew about the Naramore case. She as administratrix brought suit against the railroad company for illegally killing her husband. The corporation, in attempting to save a few dimes, was a wilful lawbreaker, subject under the laws of Ohio to a fine, and by reason of its failure to spend a few dimes the head and support of the Johns family was taken away. The corporation and the servant being citizens of the same state, the case could not be removed to the federal court. There being no diverse citizenship there could be no right predicated on the federal statutes, and it had to remain in the state court and the supreme court held that as a complete defense to the widow's right to recovery the railroad company could set up the doctrine of assumption of risk.

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Mr. TALLMAN: That was before the passage of the switch-block law.

Mr. ANDERSON: It certainly was not before the passage of that law. You are not familiar with it. I will give you the case. The accident happened after 1885.

Mr. TALLMAN: Did that take place while the employers' liability act was in force?

Mr. ANDERSON: It was under exactly the same circumstances and the same statute as applied in the Naramore case where Judge Taft held that recovery could be had. In other words, the United States circuit court of appeals held that where the master was a lawbreaker and the lawbreaking propensity proximately caused the injury to the servant, then in a suit by the servant for damages the corporation could not set up as a defense assumption of risk.

Mr. TALLMAN: I fully understand you and fully agree with you.

Mr. ANDERSON: Then you do not agree with the supreme court?

Mr. TALLMAN: But no decision could be made under the employers' liability as passed—

Mr. ANDERSON: You mean the Norris law?

Mr. TALLMAN: Yes.

Mr. ANDERSON: No; I took care of that when I drew it, but the point I am making—

Mr. TALLMAN: If there were equal care in the passage of laws by the legislature could not that remedy all the ills of which you complain?

Mr. ANDERSON: I am not advancing the argument for that purpose. Your position is that the lawmaking body, the legislature, must say to the lawinterpreting body, the supreme court, that it must not continue in using judge-made laws.

Mr. ROCKEL: How will the Peck proposal prevent the supreme court in the future from rendering such decisions?

Mr. ANDERSON: It will not if Judge Worthington's amendment prevails, for if upon interpretation of the statute it would then go up to the supreme court we would have the same conditions. I am trying to make it plain to those who are not lawyers—and I think I will have less trouble with them than with the lawyers—to show them the necessity of killing the Worthington amendment.

Mr. TAGGART: You find no such difficulty in the substitute I offered for the Worthington amendment.

Mr. ANDERSON: No; I am thoroughly satisfied in that respect with yours. Mr. Halfhill and Mr. Tallman have been anxious to know, judging from their questions, whether the harm arising from judge-made law cannot be minimized by acts of the legislature, or, in other words, have the statutory law take the place of judge-made law, but it has been demonstrated that the great trouble is that the judges, by interpretation, practically nullify the statutory law which was made to nullify judge-made law, as the following will demonstrate:

The coal miners of the state, being compelled to work under ground, where to a large extent they are unable to protect themselves, and such work being extremely dangerous, the legislature, believing that some protection was needed, enacted a law, but this protective law was not enacted until after years of hard work upon the part

of the miners' organizations. This very just and humane law provided that mines should have proper outlets—cages should be fitted with safety appliances; should have proper ventilation; that working places should not be driven more than sixty feet in advance; that such working places should be examined every morning; that safety appliances should be supplied; have covers over the hoods of cages; that boilers should not be nearer than sixty feet to shaft or slope and, that safety lamps should be provided. Then to enforce the law it was further provided:

For any injury to persons or property occasioned by any violation of this act, or any wilful failure to comply with its provisions by any owner, agent or manager of any mine, a right of action shall accrue to the party injured for any direct damage he may have sustained thereby; and, in any case of loss of life, by reason of such wilful neglect or failure, as aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained. Sections 298 to 301, inclusive.

Thousands of miners in Ohio, after they caused this law to be placed on the statute books, believed, and rightly so, that they had obtained something of substance, something that provided, if a mine owner should become a lawbreaker and by reason of such disregard to the law the miner received injuries, that he would receive reasonable compensation for such injuries, or if by reason of the disregard of the law by such mine owner his life would be crushed out, that his family would receive damages for illegally causing his death, but the judge-made law and the statutory law came in conflict, and this conflict was resolved in favor of the judge-made law. For we find in 53 O. S., at page 26, in the case of Krause vs. Morgan, the following, which was the decision of the supreme court in that case:

One who voluntarily assumes a risk thereby waives the provisions of a statute made for his protection. And where a statute does not otherwise provide, the rule requiring the plaintiff in an accident for negligence to be free from fault contributing to his injury is the same, whether the action is brought under a statute or at common law.

It seems that it would be impossible to state in plainer and more forcible language than was stated in this statute that a right of recovery shall accrue to the injured person, yet the supreme court, in this decision, by reason of the judge-made defense of assumption of risk, so far as any benefit to the thousands of miners in Ohio was concerned, wiped the statute from the books.

Mr. TALLMAN: That decision was made long before the passage of the mining act, the section of which you just read.

Mr. ANDERSON: Certainly not. The supreme court in this case refers to this particular law in their decision. Will one of the pages please take this book to the gentleman [giving to the page the 53 Ohio State Report]? I advise him for his own information to read it.

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Mr. TALLMAN: This was decided in 1890, and the mining act or section to which you refer was passed in the revision of the act later than that.

Mr. ANDERSON: No, sir. The code was passed some time ago, but the law upon which this decision was predicated was the same before the passage of the so-called miners' code. It is in sections 203 and 204. If you will consume some of the time in reading the decision that I have sent you instead of devoting so much time to questions you will find that I have correctly informed you. Laws of this same nature have been passed for the protection of children, and every father ought to be interested in these laws. Our legislature some years ago passed a law on this subject and the same kind of a law was enacted in Pennsylvania and New York and is today the law in those states. Pennsylvania is supposed to be corporation-ridden. In fact, one of the law writers in Pennsylvania employs this language:

The law-interpreting and the law-creating power of Pennsylvania are run by the Pennsylvania Railroad Company with as much regularity as the trains on its tracks.

It has recently been said that when the lawmaking body of Pennsylvania was about to adjourn a member arose and said: "Mr. President, if the Pennsylvania Railroad Company has nothing further for us to do, I move we do now adjourn." But this supposedly corporation-ridden state of Pennsylvania has this law in reference to children, stating to the corporations that they must not employ in and around dangerous machinery children under fourteen or sixteen years of age. Let me read to you a decision of the courts of Pennsylvania, growing out of the disobedience of the law, and where a child, by reason of its immature age, not being able to protect itself, was injured:

It is within the power of the legislature to fix an age limit below which children shall not be employed in dangerous kinds of work, and an employer who violates the law by engaging a child under the statutory age does so at his own risk, and in an action of trespass for personal injuries sustained in such employment, the master cannot set up as a defense either the assumption of risk or the contributory negligence of the child servant.—*Stehle vs. Automatic Machine Co.*, 220 Pa. St. 617.

Then let us see what the corporation-ridden state of New York has done upon this same subject:

Laws of 1897, c. 415, sec. 70, prohibiting the employment of a child under the age of fourteen years in any factory, is a determination, in effect, that a child of that age does not possess the judgment and discretion necessary for the pursuit of a dangerous work, and is not, as a matter of law, chargeable with contributory negligence or with the assumption of any risk of the employment.—*Marino vs. Lehmaier*, Court of Appeals, N. Y. 66 N. E. 572.

You notice that in these states the supreme court, instead of attempting to put up judge-made laws in opposition to the express will of the legislature, assisted in enforcing, to its very letter, the law as passed. Let us

find out what the courts of Ohio hold in similar cases. It must be remembered that all of these states—Pennsylvania, New York and Ohio—upon this question of employment of children have in all respects the same statutory law, and so that the harm that the Worthington amendment will work, if adopted, may be fully understood, I now read to you from 67 Ohio State, p. 76:

The employment of the plaintiff, when he was under sixteen years of age, was not the proximate cause of the injury, and it could not in any degree tend to show that the defendant was negligent in not giving or causing to be given, to the plaintiff, proper instructions as to operating the machine.

Mr. ROCKEL: I understand that you believe the circuit court is better able to interpret laws than the supreme court?

Mr. ANDERSON: The circuit court does not make judge-made law.

Mr. ROCKEL: Why could it not, and why would it not just as likely do that as the supreme court?

Mr. ANDERSON: It could, but does not and I will tell you why.

Mr. ROCKEL: Well, I want to know why.

Mr. ANDERSON: Because you have recalled the courts back to the people. The courts are not now close to the people, for not five per cent of the voters of Ohio know the candidates for judge of the supreme court at the time of the nomination and election.

Mr. ROCKEL: You said a moment ago you believed the members of the supreme court were honest.

Mr. ANDERSON: I do. Do you mean to say that what I have read indicates that they are not?

Mr. ROCKEL: If they are honest in their opinions the circuit court might render the same kind of an opinion.

Mr. ANDERSON: They might.

Mr. ROCKEL: I don't know about that.

Mr. ANDERSON: I do.

Mr. ROCKEL: Do you mean to say that the supreme court is influenced in some way?

Mr. ANDERSON: I certainly do not mean to say that they are affected in any way by any outside influence, but I do want to say—for if I do not answer you it might be said that I could not—I have represented individuals for twenty years, in all kinds of courts, and in ninety per cent of such cases I have been on the side of the individual, fighting corporations. I do not deserve any credit for it; I got paid for it. My environment has necessarily caused a habit of thought and I admit that I am prejudiced. It could not be otherwise, and I could not divest myself of that habit of thought or that prejudice by being elected judge and going upon the bench. I would be inclined to see all of the circumstances in a favorable light to the plaintiff's interest, or in trying to be fair, knowing my prejudice, I would lean too far the other way. But I believe, notwithstanding my habit of thought and my prejudice, notwithstanding my over twenty years of service on the side of the individual, I could be as fair on the bench as any man who had twenty years or more training on the side of the corporation.

Mr. ROCKEL: Then we have put the wrong kind of man on the supreme bench?

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Mr. ANDERSON: If you agree with me that I would be the wrong kind of a man to be placed on the bench, then you must agree that men of long corporation training, men who have specialized in favor of corporations, are also the wrong kind of men to place on the bench.

I have spoken from the money standpoint, or as to recovery of money damages that ought to be received by the individual in cases of this nature, but there is a bigger and better side to it, for just as soon as we commence making corporations obey the law, just so soon you will largely prevent accidents, and that is the big thing to be accomplished—make the corporations responsible in damages every time that they disobey the law which is passed for the protection of the individual, and the corporations, through their officers, will commence to obey the law, but so long as the corporation can save itself through the defense of fellow servant, contributory negligence or assumption of risk—the judge-made defenses—it will not obey the law. Take the laws I have mentioned, which were passed for the protection of children. If the corporation does not have to respond in damages the corporation will pay no attention to obedience of the law, for only a small fine is imposed. A child is employed around dangerous machinery by a lawbreaking corporation, and if it is crippled the corporation pays a fine of \$25. But if you say to a corporation that if it becomes a deliberate lawbreaker then it will have to pay thousands of dollars to that child so that the child can be educated, so that he can make a living by the use of brain instead of brawn, that corporation will quit employing children under the age limit.

William H. Tolman, the director of the museum of safety and sanitation, New York, in representing the United States Steel Company, in a lecture before the chamber of commerce at the city of Youngstown, in January, 1910, said:

The most conservative estimate of the loss, in cash, to the wealth of the United States through preventable accidents in the various industries is \$125,000,000 a year.

It is worth while for employers of American labor to adopt the safeguards which shall preserve to the nation the lives and limbs of the 500,000 workers now annually incapacitated or killed, whose wage-earning capacity, estimated at the low average of \$500 apiece, means a loss to the country of \$250,000,000 each year.

Here I have a statement from Mr. Davis, the factory inspector of Illinois, and I call your attention to this because the law to which Mr. Davis refers is like our factory act, passed in 1900, which through judge-made law and judge-made interpretation, has been very largely nullified. Mr. Davis said:

This danger device could be recast into a safety device for thirty-five cents; the projecting top of the set screw could be sunk flush with the rest of the whirling shaft, and then no sleeve could be caught by it, no human body could be swung or thrown by it, no father or mother could be made to grieve for a son, no woman could be widowed by it.

What remote consequence of long and lonely years may be in a quarter and a dime! More than once it must have happened that a widow had her rent paid by a charity society to which yellow-backed bills were contributed by a manufacturer who could have prevented her from being a widow by the proper expenditure of a quarter and a dime.

From these statements it will be seen that no hardship whatever rests upon the corporation if it be made to obey the law and the preventable accidents will be largely done away with.

For the purpose of demonstrating that the enforcement of laws will compel the corporations to obey, and by obeying greatly reduce the number of injured and killed, I wish to read from a report made by Mr. Mosely, secretary of the United States interstate commerce commission, page 57 of the report of 1902:

The gratifying results of the law of 1893, requiring the use of automatic car couplers and of power brakes, were spoken of in the Fifteenth Annual Report. The benefits of the law have been increasingly evident during the last year in particular. The number of persons killed and injured in coupling and uncoupling cars during the year ending June 30, 1912—the first entire year reported since the law went into full effect—shows a diminution as compared with 1893, the year in which the law was passed, of 68 per cent in the number killed and 81 per cent in the number injured.

Mr. TALLMAN: That was a statute?

Mr. ANDERSON: A federal statute.

Mr. TALLMAN: And a good one.

Mr. ANDERSON: Yes. The courts of Ohio practically nullified a similar state statute, until in 1906 it was amended, in reference to assumption of risk and contributory negligence.

Mr. LAMPSON: Was not a similar statute passed in Ohio before that?

Mr. ANDERSON: Not containing assumption of risk and contributory negligence clauses. That statute was passed in 1906.

Mr. LAMPSON: It was introduced by myself in the senate and became a law before that.

Mr. ANDERSON: Yes; that was the law. But recently in reference to a safety-appliance clause, where a locomotive crane was involved, the supreme court, even with a statute containing the assumption-of-risk and the contributory-negligence clause, held it to be null and void, and this case came up from your county, Mr. Lampson.

I wish to say a few words in conclusion in reference to the proposed amendment by the delegate from Fayette [Mr. JONES]. If this amendment carries it permits all cases where there is a disagreement in reference to the law or the facts in the circuit court, or in the new court of appeals, to go to the supreme court. It is my opinion that the court of appeals ought to be required, before they reverse a case coming from the common pleas court on questions of fact, to be unanimous. I am not so sure that this would be the just rule on questions of law. I at one time had a case where a man

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by the name of Alburn had a son injured. The injured son was a brother of Assistant Attorney General Alburn. The young man was injured while driving a wagon in the country across the tracks of the Pennsylvania Company, which were constructed at grade, and before we finished the case it was tried before eighty-four jurors, and all of the eighty-four jurors held that the company was guilty of negligence, that Alburn was free of contributory negligence and should recover damages. Yet the judge set his judgment up—upon purely questions of fact, and denied a recovery, where it is supposed that the average juror is as good, if not a better, judge of fact than the judge himself—against the judgment of the eighty-four jurors. The supreme court of the United States has given a beautiful description of the jury and its duties. This is taken from the 17th Wallace, 657:

Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used and that negligence existed. Another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education; men of learning and men whose learning consists only in what they themselves have seen and heard; the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven and draw a unanimous conclusion. The average judgment thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts, thus occurring, than can a single judge.

One more quotation and I have finished, and since this is from a certain ex-president of the United States, I especially request the attention of Mr. Fackler:

The special pleaders for business dishonesty, in denouncing the present administration for enforcing the law against the huge and corrupt corporations which have defied the law, also denounce it for endeavoring to secure sadly needed labor legislation such as a far-reaching law, making employers liable for injuries to their employes. It is meet and fit that the apologists for corrupt wealth would oppose every effort to relieve weak

and helpless people from crushing misfortune brought upon them by injury in the business from which they gain a bare livelihood. The burden should be distributed. It is hypocritical baseness to speak of a girl who works in a factory where the dangerous machinery is unprotected as having the "right" freely to contract to expose herself to dangers to life and limb. She has no alternative but to suffer want or else expose herself to such dangers, and when she loses a hand, or is otherwise maimed or disfigured for life, it is a moral wrong that the whole burden of the risk necessarily incident to the business should be placed with crushing weight upon her shoulders, and all who profit by her work escape scot-free.

Let us take the courts back to the people. Let us have speedy and inexpensive trials in the ascertainment of the rights of the individual. Let us make the poor man understand that he, in the courts, can get justice. Let us make him understand that they will afford him full legal protection. I say to you that you can accomplish this by passing this Peck proposal.

The president recognized the delegate from Noble.

Mr. THOMAS: Will the gentleman yield for an amendment?

Mr. TAGGART: There cannot be any more amendments to the Peck proposal. Mr. Worthington's substitute strikes out all of the previous amendments, and it has to be an amendment offered to my amendment.

Mr. THOMAS: I have it drafted that way.

The amendment was read as follows:

Amend by striking out the of Taggart proposal the words "adopted by the general assembly" in line 25, also the words "except by the concurrence of the five judges of the supreme court." Place a period after the word "court" in line 26.

Mr. THOMAS: I want to explain that so that the members can understand it. It simply means that no statute can be held unconstitutional and void by any proceedings of this court.

Mr. WATSON: I want to offer an amendment.

The PRESIDENT PRO TEM [Mr. Dory]: The chair would like to acquaint himself with the parliamentary status.

[After being informed by the secretary] The chair will rule three amendments are now pending and that is all we can have under the rules. The member from Guernsey [Mr. WATSON] will withhold his amendment.

The chair recognized the delegate from Noble.

The delegate from Noble yielded to a motion to recess until tomorrow morning at ten o'clock, which was carried.