FIFTY-FIRST DAY

(LEGISLATIVE DAY OF APRIL 2)

MORNING SESSION.

THURSDAY, April 4, 1912.

The Convention met pursuant to recess, was called to order by the president and opened with prayer by the Rev. Fred L. Brownlee, of Grandview, Ohio.

The delegate from Hamilton [Mr. WORTHINGTON] was recognized and yielded to Mr. Doty.

Mr. DOTY: I want to ask if it is possible to agree at this time to vote on this proposition next Tuesday?

Mr. PECK: Today is satisfactory to me.

Mr. DOTY: I have talked with a good many of the delegates and it seems that it is not deemed wise to attempt to vote this afternoon. My notion is that the debate will go forward this week and that possibly Monday night we will take up the regular business and this matter will come to a vote Tuesday about two o'clock. If there is no objection to that I will make that motion.

Mr. PECK: There will be a number of amendments and the voting will take considerable time.

Mr. ANDERSON: After talking with Judge Worthington I do not see why we shall not be able to vote today. Judge Worthington has only offered one thing that I have objection to and that is statutes going to the supreme court. I am, however, only speaking for myself in regard to that, and I agree with everything that Judge Worthington suggested in his speech yesterday, as a member of the committee and as a member of the subcommittee.

Mr. PECK: How about the constitutional question?

Mr. ANDERSON: What is that?

Mr. PECK: That the supreme court must be unanimous to hold a law unconstitutional?

Mr. ANDERSON: If we can agree upon the other thing it leaves that one thing to be voted on.

Mr. PECK: There are two or three which will require voting on.

Mr. DOTY: I then move that the final vote on this question with the amendments pending at that time be had Tuesday, at two o'clock.

The motion was carried.

The PRESIDENT: The delegate from Hamilton county [Mr. WORTHINGTON] has the floor and he yields to the delegate from Scioto [Mr. EVANS].

Mr. EVANS: Mr. President and Gentlemen of the Convention: Through the courtesy of Judge Worthington, who has had the floor, I am permitted to occupy it for a few minutes. I wish to say I have known Judge Peck, the chairman of the Judiciary committee ever since the 15th of January, 1861. We were in college together. I have kept in touch with him ever since and there is no one in the Convention for whom I entertain a higher opinion both for his legal and his judicial ability.

I entertain the highest regard for any report that may emanate from his committee, and the presumption is first that it is correct.

I approve of his report on Proposal No. 184 in every particular but one, and that is in the election of judges by popular vote. I find I am in the predicament where I have to choose which side I will take. It has been a question whether I shall stand with George Washington, Alexander Hamilton, Benjamin Franklin and the other worthies who made the federal constitution. In my judgment that feature is absolutely vicious. When the federal convention was in session, May to September, 1787, and the method of the selection of federal judges came up, there was no division of opinion. The convention was unanimous that the judges should be appointed during good behavior. That was then the opinion of every state in the Union, and of all the civilized states of Europe. The convention of 1787 which prepared our federal constitution was the ablest body of organic lawmakers which ever sat in the country.

Continental Europe has retained the plan of the permanency of the judges. Of the states, Massachusetts and New Hampshire still retain the plan of appointment and life tenure.

In Ohio judges were not elected by the people until 1851. Before that they were appointed by the legislature for seven-year terms. In the convention of 1802 Judge Byrd promised the convention he would copy the plan of the Tennessee constitution of 1792 as to the selection of judges, which was the federal plan of a life tenure, but some pressure caused him to change the plan and leave to the legislature the appointment of judges for terms of seven years.

The plan was a failure, as it deserved to be. When the whigs were in power, whig judges were elected, and when the democrats were in power democrats were elected. The judicial system was so unsatisfactory that it led to the calling of the convention of 1851. Sam Medary, a pestiferous politician of this state, thought he had a heaven-born mission to write the judicial article in the convention of 1851. He determined to be elected to that convention, and tried to be, as a member from Franklin county. He had opposition in his own party, and in a primary received 509 votes and his nearest opponent, Adin G. Hibbs, received 204 votes. He had opposition and was defeated before the people by John Graham, a popular whig, who was dragooned into being his opponent. Graham had 3,087 votes and Medary 2,999; Graham's majority 88.

It was the bitterest defeat of Medary's life, but he determined to carry his point. Before the convention met he conducted a weekly leaflet, May 5 to October 20, 1849, in which he advocated the election of judges by popular vote. He was a prominent democratic politician, public printer, editor of the Statesman and determined to carry out his purposes. He drove the convention before him like a flock of sheep, and forced the system of elective judges on Ohio. It turns out the plan was as great a mistake as Sam Medary's life. From 1856 to 1861 he was an ardent supporter of James Buchanan's proslavery policies. He was fully in sympathy with the Southern leaders who brought on the Civil War, and had Robert Toombs ever read the roll of his slaves from

Bunker Hill, Sam Medary was so strongly proslavery that he would have been there an approving listener. While territorial governor of Kansas, on February 25, 1860, a bill to abolish slavery in that territory was passed and he vetoed it. Happily it passed over his veto. He began the publication of the Crisis in January, 1861, and continued it until his death, November 7, 1864. That paper was opposed to the war for the suppression of the Rebellion. This is the man above all others responsible for the system of elective judges in Ohio. He was mistaken in his political ideas as to the institution of human slavery and as to the preservation of the Union, as he was in providing for elective judges, and it has been demonstrated for sixty-one years that he was mistaken in the election of judges.

What is the political theory as to the election of judges in Ohio as gathered from its organic law of 1851? The theory is that any elector who can secure a majority or plurality of votes in his district can be a judge, and such plurality or majority makes his fitness. Further, it is the theory that this fitness only continues for six years and then ceases. This mere statement of this matter is a sufficient refutation. Moreover, while the organic law does not require it, by custom the judges are uniformly selected from among the members of the bar. What is necessary and required in a judge?

First. He must be learned in the law. That requirement is observed by custom, but could be disregarded at any time.

Second. A judge should be absolutely independent. This cannot be attained by any means whatever unless the judge is appointed or elected to serve during efficiency. No judge can be made absolutely independent unless he is appointed permanently, subject only to good behavior and efficiency. The wit of man has never devised and can not devise any plan to make a judge independent except to make his tenure permanent.

If a man is once fit for judge his fitness does not cease until he looses his faculties or health.

In the election of judges, the people of this state and other states who have elective judges have defied the experience of the whole world. Not a country of Europe would for a moment consider the question of adopting our plan of electing judges for short terms.

Third. A judge must be a person of known integrity and above suspicion of influence.

If the incumbent of a judgeship is worthy of the position he is much more efficient in his office at the end of his first six years than at the beginning, and his services are much more valuable to his constituents after six years' experience in office than they were before.

Why should the people not elect judges? Because it is impossible for them to know or pass upon the fitness or qualities of the candidate for judge for the office, and for that reason they should not determine the judgeship by their votes.

When we place on the voters the determination of questions they can not properly determine, either from want of knowledge or inability to obtain it, then the voters are compelled to perform a function which they can not intelligently discharge.

In such a case they must vote for some reason, and they do so by political label or by newspapers' reports of a candidate.

In fact, the people in voting on the selection of judges have only the privilege of ratifying the choice of one of two political parties, and that privilege is not worth a fig. The political managers, who are without any responsibility to any one, select the candidates, and the people can only ratify the selection by voting for one of two persons presented to them by the political managers. The exercise of such a privilege is not only dangerous to the public, but it destroys the self-respect of the voters.

Why not elect an officer to make the selection of the judges and require him to take an oath of office and let this officer select the judges under the sanction of an oath of office? That is representative government. When the officer to be selected is an expert, the selection should be by an officer selected by the people for that purpose and sworn to perform that duty.

Power in the government must rest somewhere, and it should rest in an officer who can be called to account for the exercise of it. The election of judges places the power of their selection on political managers and bosses, who are self-selected and chosen and who are not responsible to any tribunal whatever for the exercise of their power.

The statement that the people have the power to and do select the judges is the veriest nonsense. One set of politicians nominate one candidate and another set another, and the people are only permitted to choose between the two. That is a privilege as a voter that I do not care for and would rather give up. Whenever any group of persons exercise a power in the state they should be able to do it intelligently, or they should not have the power.

The voters as a body can not exercise the power of selecting judges intelligently because they do not have the time or opportunity to inform themselves, and hence they should not exercise the power. The power of nomination in the selection of judges is the real power, and people have never had that power, and it is the intention of the political managers that they never shall have it and to keep that power, they insist on the election of the judges, which means that they have the kernel of the nut and give the shell to the people.

What has been our experience for sixty-one years? The judges of our lower courts have reflected the political sentiment for the time being of their particular districts. The political parties by their conventions have nominated the judges and judgeships have been and are sold, bartered and exchanged like any political plunder.

For twenty-eight years there has not been a judge in any circuit or district who has not received his office by virtue of trades of public patronage. When Sam Medary got up our present plan of election of judges it was half baked. He merely provided that their selection should be determined by votes at the election. He did not provide for their nomination, and the political managers seized that and have held it for sixty-one years, and propose to hold on to it by telling the people they control it when in fact they do not. The bosses, like savage political chiefs, who without any responsibility name the judges, really select them, and the pretended election by the people is a farce. I would rather that the governor, whom I know, or can know, should name the judges, than that they should be named by

irresponsible politicians who have no interests to subserve but their own.

The selection of these officers at an election is no better than gambling. We are liable to have too many political accidents. Look at the last election of supreme judges in Ohio. Two competent and able judges were summarily dismissed by a political revolution, and two new and untried men given their places, when neither of the four were considered by the people in casting their votes for these offices. Such happenings are a disgrace to the administration of justice and ought to be put to an end.

Mr. DOTY: Do I understand you to say in this state the judges are not nominated by the people directly?

Mr. EVANS: I say that the politicians nominate the judges. There has not been a judge in our part of state for the last twenty-eight years whose office has not been traded for as part of the political plunder of the dominant party.

Mr. DOTY: In our part of the state we nominate them by primary.

Mr. EVANS: That is the very worst possible form. It is beneath the dignity of a judge to submit to a primary.

Mr. DOTY: How can the people exercise their power in choosing their judges?

Mr. EVANS: I don't think they can except through the governor. I say the selection of judges has been bartered, traded, sold, and passed around by politicians for the last thirty years.

Mr. WATSON: You say you would have a man chosen to choose the judges. How would he be chosen? Would not the politicians choose him?

Mr. EVANS: The politicians are bound to name a man who is acceptable if they can. They can not put up an objectionable man.

Mr. WATSON: The man you would have chosen to choose the judges would be indebted to the politicians for his office.

Mr. EVANS: I think the governor ought to select the judges just as he ought to select the attorney general or any other experts. I think that is the best way to provide for experts.

Mr. WATSON: Then if people haven't sufficient intelligence —

Mr. EVANS: It is not a question of intelligence. The trouble about it is the people have not the time or opportunity to get the information to enable them to vote intelligently on the man. They are too busy on their private affairs in making a living to qualify themselves to select judges. The people can inform themselves about a governor or a lieutenant governor or a member of the legislature, but that is the most they have time to do, and when you provide for them to select by election a multitude of officers the result is that machine politicians nominate them and the people have to choose between two machine-made nominations.

Mr. WATSON: Don't the politicians nominate the governor?

Mr. EVANS: I have expressed my view of it.

Mr. HALFHILL: According to your theory you agree with Mr. Doty's view on the short ballot, that the people haven't sense enough to know whom they want for executive officers?

Mr. EVANS: No, sir; I don't say they haven't sense enough. They have not time enough or opportunity.

Mr. HALFHILL: That is the theory on the short ballot as to executive officers?

Mr. EVANS: I think if the short ballot is to be applied anywhere we should drop the judges from the list to be elected.

Mr. DOTY: Can I ask a question?

Mr. HALFHILL: No, I am asking now. I want to ask you, Captain Evans, if it is a fair parallel to point out the federal judges, appointed as they are under a limited jurisdiction, and compare them with the judges who preside in a state which reserves to itself nearly all the powers of government?

Mr. EVANS: I say we have had very good judges in the state because politicians know better than to put up judges who will not be acceptable, but we are liable to get bad ones and we have had some very bad ones.

Mr. HALFHILL: It is a conceded fact that the federal government has only limited powers?

Mr. EVANS: Yes.

Mr. HALFHILL: And the great powers of sovereignty are reserved to the state?

Mr. EVANS: Yes, I am very glad it is so, but at the same time it is a fact.

Mr. DOTY: That is somewhat theoretical, is it not?

Mr. HALFHILL: You sit down.

Mr. BROWN, of Highland: I rise to a point of order.

Mr. PRESIDENT: What is the point?

Mr. BROWN, of Highland: I want one of those gentlemen to vacate the floor. There are too many standing up.

Mr. EVANS: I want to call attention to one thing. There never was a more able judge in Ohio than Judge Swan, who sat in the convention of 1851, and as soon as he got out of the convention, like many others, he changed politics and the anti-Nebraska people put him up in 1854 and elected him. When he came up for election in 1859 he decided the case of ex-parte Bushnell, and he decided it according to law, and because he was honest he was not re-nominated and Judge Gholson was nominated. If Judge Swan had held for life that could not have happened and it was a calamity. Look at the last election. Two good men on each side, Crew and Summers, were willing to remain, but they were defeated and the others elected.

Mr. WOODS: You said that two good judges had been elected. Who nominated them?

Mr. EVANS: It is not necessary to answer that. You are as well informed as I am.

Mr. WOODS: Were they nominated by the politicians you have been talking about?

Mr. EVANS: Yes; they were good men because they have to put up good men. Now what is the result? Those two good men were put out of positions that they were fit for and had served in and two new ones were put in just because of a political revolution.

Mr. HALFHILL: Were they good men that were put in?

Mr. EVANS: Yes; I am not saying to the contrary. They were good men, but were new and untried and the others had six years' experience.

Mr. PIERCE: You don't believe in the recall of judges by the people?

Mr. EVANS: No; I believe in Proposal No. 83, which I put in before the Convention. You are all familiar with it and can read it.

Mr. PIERCE: If the recall of judges is not needed, does it not prove that the elections by the people are not a mistake?

Mr. EVANS: No; I don't agree with the gentleman.

Mr. BOWDLE: Under your scheme to have the reigning political king or assembly of kings and the governor appoint the judges, would not that king get all the judges?

Mr. EVANS: I say this much, that if a majority of the people of Ohio want a certain man for governor with power to appoint the judges, let them have him. That is popular government.

Mr. WORTHINGTON: Gentlemen: Since I was talking to you yesterday I have given considerable thought to the objections made by the gentleman from Mahoning [Mr. ANDERSON] and the chairman of the Judiciary committee [Mr. PECK] about giving an absolute right of review to the supreme court wherever the construction of a statute is involved, and what I wanted was to enable such cases to come before the supreme court where it was important. It has seemed to me that the same object could be accomplished by making that a specific grant for the issue of the writ of certiorari, as Mr. Anderson has foreshadowed to you. I was going to make such an amendment. I wish now to confirm what he has said.

At the time we adjourned yesterday, I had reached lines 39 to 46 of the proposal. The modification that was made by the chairman of the Judiciary committee in line 39 by substituting "by expiration of term" after the word "vacancy" and substituting the word "before" for the word "after", a little before that, changed, at least to my mind, the thought that was intended to be expressed. I had supposed from the first draft as printed that what the committee was intending to do by that clause was to provide for filling accidental vacancies which could not be foreseen, and that therefore, the election was to be after the occurrence of the vacancy, and it seemed to me the rest of the scheme they had would not work out well in that line of view because they had to elect a judge for a full term after every accidental vacancy and in that way the terms would not expire as we have them now with intervals of two years. I am not saying this by way of criticism. I am saying it simply to explain the reason why I drafted the amendment as I have. As Judge Peck has altered it now he has made clear that what was in his mind was the same as that in mine, that this was to refer to regular vacancies by expiration of terms. Accidental vacancies would have to be filled under the provision of section 13, article IV, of the constitution, which provides that such accidental vacancies should be filled by the governor, the appointee to hold until the next regular election, and that section, as I read it, is broad enough to cover the judges of the appellate court as well as of all other courts.

Mr. PECK: It was the idea that that was to remain intact.

Mr. WORTHINGTON: I suppose so. The only suggestion I have to make in reference to that is, in case the accidental vacancy should occur by the death or resignation of a present circuit court judge, is it worth while to let that office be filled by the governor until the next election and have an election for the rest of the term, or whether that is not such a mere temporary matter that it would be just as well to let the governor fill in this instance for the unexpired term? There can not be more than one or two at the outside, so my suggestion would be to substitute this in those lines: "Vacancies occurring prior to such expiration shall be filled by the governor for the unexpired term."

That is for the present term of court. It would then read:

> Vacancies occurring prior to such expiration shall be filled by appointment of the governor for the unexpired term. [That is as the proposal at present is.] Their successors shall hold office for such term, not less than six years, as may be prescribed by law. Vacancies caused by the expiration of the terms of office of the judges of the appellate courts shall be filled by election by the electors of the appellate districts, respectively, in which said vacancies shall arise.

In the proposal of the committee there is in lines 43 and 44 a provision that the number of appellate judges may be increased. That is rather out of the order which I should have followed in presenting the matter. I had occasion yesterday to say that it seems to me this was an unnecessary provision; that the legislature has the power to increase the number of appellate districts; that I could see no reason for having more than three judges sitting on the bench in any district; that if help were needed it could be furnished rather by increasing the number of districts than by increasing the number of judges and in that way get an additional court rather than increase the incumbents in any particular district.

Mr. JONES: I understand you to say that the proposal now provides for the legislature increasing the number of districts.

Mr. WORTHINGTON: Yes; it provides both for the legislature increasing the number of districts and the number of judges in that district.

Mr. JONES: How can that be true in view of the provisions in lines 32 and 33 that the state shall be divided into eight appellate districts?

Mr. WORTHINGTON: The "eight" has been cut out.

Mr. PECK: And it is provided "until further changed by law."

Mr. WORTHINGTON: Further, in line 43 the number may be likewise increased. Then immediately following that "the number of districts and boundaries shall be prescribed by law." That specifically grants to the legislature the power to increase or diminish the number of districts. For the reasons I have stated I omit the clause giving the general assembly power to increase the number of judges except insofar as it might arise from increasing the number of districts.

Then my draft provides: "Laws shall be passed prescribing the time and mode of such election, and the number of districts or the boundaries thereof may be

altered by law; but no such change shall abridge the term of any judge then in office." That I believe is substantially in the proposal as reported by the committee.

Mr. ANDERSON: Under your proposed amendment could there be more than three judges elected in each district or circuit?

Mr. WORTHINGTON: No, sir.

Mr. ANDERSON: Don't you think it would be better to leave that open so that the lawmaking body might, if it thought necessary, give them more than three judges?

Mr. WORTHINGTON: It is a matter of judgment. To my mind, no. To my mind if the business in any particular district is so heavy that the judges can not carry it, the true remedy is to diminish the size of that district. Take the most compact district so far as you can conceive of — the county of Cuyahoga or the county of Hamilton — I have no doubt that a court of three could always dispose of the business of either one of those counties, if in a district by itself, and I see no reason for making a court of five because the business may be increased. To my mind you do not increase the efficiency of a court by increasing the number of judges in the same ratio as you increase the judges. It is better to give them less business and a sufficient number of judges to do that business, and three is enough to my mind.

Mr. HALFHILL: Commencing in line 41, there is the language "But the length of the term of office of such judges and the time and mode of their election may be changed from time to time by the general assembly, and their number may be likewise increased." Is there in that clause any restriction at all as to the length of term, and is not that clause so drawn that the life term might be created by the legislature for any of these judicial officers?

Mr. WORTHINGTON: I can conceive that is possible, but there are many things possible but so improbable that it is not necessary to forefend against them.

Mr. HALFHILL: I have a letter from a very distinguished lawyer calling attention to that fact, and the further provision that if such a legislative body would so act there would be no redress against it by any subsequent legislature. I had it called to my attention and I desire to have it investigated.

Mr. PECK: This clause would continue to be operative and they would have the same power to cut down the term that they have to increase it.

Mr. WORTHINGTON: I take it for granted that it would not be the thought of this Convention that a judge should be turned out of office by a reduction by the general assembly of the number of appellate districts, and yet if the district was gone what would there be for the judge to do?

I have thought in that case it would be well to provide that he should be what they call in the Episcopal church, a missionary bishop, so to speak, and upon any change of a district the judges of the appellate court whose districts have been put out shall be re-assigned to duty by the chief justice of the supreme court. That would enable them, supposing the number of districts should be decreased from eight to seven, to have three judges at liberty to be assigned by the chief justice to help at any place where the docket is behind, and it is behind now in Hamilton county and I do not know in how many other counties.

Mr. CAMPBELL Speaking of the matter just passed over that the increased work of the court may be cared for by changing the lines of the court's jurisdiction, what would happen practically in a case, for instance, in the city of Cleveland or the city of Cincinnati, which, if not now, will soon be practically co-extensive with the county lines, when the business of that court becomes so great that it can not take care of the business? Already you have to have a circuit court practically to represent those cities alone in those counties. In the very natural increase of population it seems quite likely that with what added work may be placed upon the court by this very provision that court will be as your supreme court is now, overburdened. Now then, when you meet that practical difficulty, which it seems to me may not be so far off, how are you going to meet it under this proposed measure? Are you going to divide Hamilton county into two districts? If so, then you have to have additional clerks. You have lost your county boundary line and your whole present machinery, as to clerks, etc., can not meet the conditions. It seems to me that the increased growth of business would be better provided for by an increase in the number of judges, or power to do so, than to be circumscribed by changing the boundary lines, which, it seems to me, might soon become impracticable.

Mr. WORTHINGTON: I can answer that suggestion, or at least give my own views about it, after I have come to another matter, which is very shortly upon my slate, and I prefer not to speak upon it just at present.

Now the next matter is one that gave rise to some debate yesterday: "The appellate court shall hold one or more terms in each year at such places in the district as the judges may determine upon, and the county commissioners of any county in which the appellate court shall hold sessions shall make proper and convenient provision for the holding of such court by its judges and officers."

The sole force of the objection that was made by the gentleman from Allen [Mr. HALFHILL] to the provision as reported by the committee lay in his other question, whether under this proposal the appellate court would have jurisdiction in appeal as the circuit courts have at present, and before I take up this question about the districts I think it would be well for me to express my own views upon that question of appeals, because I wish to say very frankly that I do not concur in the opinion rather hesitatingly expressed by the chairman of the committee that the right of appeal is preserved under this proposal. To my mind it is destroyed, destroyed absolutely, and can not be revived, and that is one reason why I am in favor of this proposal. For the benefit of those members of the Convention who are not lawyers it may be well for me to explain a little bit what is meant by an appeal. An appeal, as known in every place other than Ohio where the right is given, with the exception of a change in the use of the meaning of the word in New York and possibly some other states, where they use the word appeal to mean petitions in error — an appeal in ordinary jurisprudence

means a review of the case upon matters of fact and matters of law in a different court than that which heard it in the first instance, but, and that is the principal thing, the testimony taken in the trial court is reduced to writing, and it is that testimony which goes before the reviewing court. An appeal in Ohio is not that. It is a trial de novo, a recalling of your witnesses in the appellate court and it may be different witnesses. There is a little history connected with that Ohio idea. It is peculiar to Ohio. I do not know of any other jurisdiction which tolerates a second trial upon the facts in cases tried before a judge without a jury. There were some that allowed another trial in cases of ejectment — cases for the recovery of real estate — but the history of this goes back to the creation of Ohio courts under the constitution of 1802. By that constitution, if you will look at it, section 3 of article III, you will see that the common pleas court consisted of a president and associate judges. The state was originally divided into three circuits, with power in the general assembly to increase the number, and in the circuit there were a president and two or three associate judges and three of that number made a court. The associate judges were not as a rule men who had a legal education. They gathered what information they could from the remarks made to them by the lawyers as the ordinary justice of the peace does nowadays. And because that was a court so constituted, and because it was a court that, while it might be presided over by a lawyer, was not necessarily presided over by a lawyer, a general power of appeal in all cases — that is, of a new trial with witnesses — was given in the supreme court when it traveled on the circuit. It took the place of our present circuit court and former district court. When the constitution of 1851 was adopted there was nothing in the constitution about prohibiting the changing of this right of appeal, although they had changed the character of the common pleas court. It was no longer a justice of the peace court of a higher degree, but was a regularly organized court, supposed to be of lawyers, under supervision of a man who had studied law. The right to a new trial was given by appeal to the district court in every case in the first instance, both in cases triable by jury and those not triable by jury, and the result was the district courts were soon so crowded that the legislature, instead of giving appeal in cases triable by jury, gave a second trial in the common pleas court, continuing that system of two trials upon the fact until some twenty or thirty years ago, I have forgotten exactly how many.

Allusion has been made by my colleague to the occasion of the institution of the superior court of Cincinnati as a commercial court. One of the reasons was to get rid of this very matter of the second trial and a new trial with witnesses on the facts when there had been one trial, so that we should have one court in the state where when a case was tried it was tried. Now this new trial upon the facts has led in my experience to a great many abuses. The first trial was a sham trial when I began to practice law. The lawyers never thought of putting their best foot foremost in trying to win the case. They were simply fencing to see what their adversary had, and the real trial came upon the second trial, whether it was a law case or an equity case that was appealed to the district court. To my mind the whole system is vicious and we ought to get rid of it, and I think the committee has gotten rid of it. That was one of the things that commended this report to my mind, and I may say in addition, to fortify my own construction I asked the opinion of the judiciary committee of our bar association down in Cincinnati to look into the matter. They did so, and advised me that they concurred with me. I can state my reasons for coming to that conclusion very shortly.

When a case is appealed in Ohio to the circuit court the court tries the case anew upon the pleadings, without any reference to the judgment entered in the court below. That judgment is practically set aside by the appeal and the appeal bond takes its place. The court neither reverses, affirms nor modifies the judgment entered in the court below. It has absolutely nothing to do with the judgment entered in the court below. Now look at the grant of power here: "Appellate jurisdiction to review, affirm, modify or reverse the judgment of the common pleas court." That is what the appellate court does. It reviews the judgments that are entered in the court below and it cannot do that under our system of appeals as now known.

It has nothing to do with those judgments below, so I am in favor of this proposal of the committee.

Now, gentlemen, there is a practical question involved in this aside from the theoretical one I have mentioned. I know that in our own circuit court the right of appeal as given by the statutes has been practically denied by the court for years, and I am informed that the same thing is true in other circuits.

Mr. HOSKINS: "Review, affirm, modify or reverse" — is it your position that that takes away the right of trial de novo in the appellate court, the introduction of witnesses, etc.?

Mr. WORTHINGTON: Yes.

Mr. HOSKINS: And you would go on appeal in an equity case with your transcript of testimony, instead of the witnesses, to the appellate court?

Mr. WORTHINGTON: Yes; that is my construction of it. I will say as a matter of practice the circuit courts have denied the right to produce your witnesses anew in the circuit court. I do not mean to say that they have done that to the extent of telling the lawyer he should not do it, but they have given him to understand very plainly it is not for the satisfaction of the court that he should do it and lawyers usually find it well to consult the wishes of the court as to the manner of presenting their cases, and therefore they do present the transcript of testimony taken below and the case is tried on that transcript. That is the kind of appeal you have in the United States court today and it was the kind of appeal known in the chancery practice before Ohio was ever thought of as a state, and it is the kind of practice that can be preserved under the provision here, and I submit it is the only kind of appeal that is useful, unless you want to preserve the old right of fencing instead of trying your case. If that is true, I think you will admit there is no reason why a court should hold a term in every county of the district, because then there is practically no difference, so far as convenience of parties go, between cases that go up by appeal and cases that go up on error, since in either case it is a matter of the

lawyer attending the court and not bringing the witnesses.

Mr. HALFHILL: Is it not a fact that the chancery practice in the federal court is notoriously cumbersome, to such an extent that the supreme court of the United States is now attempting to revise and amend that practice?

Mr. WORTHINGTON: That is true, but it doesn't relate to this branch. The trouble about the chancery practice in the federal court partly grows out of the pleading system in which you do not get an issue, and partly out of the reference to a master, but I am saying that under this proposal as it stands you can continue in force the method of trial that is now actually produced under compulsion of court.

Mr. HALFHILL: But the preparing of the transcript is very much more expensive than the presentation by witnesses in the circuit court.

Mr. WORTHINGTON: I am inclined to doubt that. I doubt it for this reason: I suppose the lawyers will all admit that the stenographers are a nuisance and are a burden to the profession, but having come into existence we are obliged to make use of them for our protection, and we never try a case of importance enough to take to a higher court without having a stenographer.

Mr. ANDERSON: Is not that especially true when you are going to cross-examine witnesses on another trial?

Mr. WORTHINGTON: Yes; you always have them there.

Mr. HALFHILL: This further question: The case from the circuit court is reviewed on the record made there now — that is to say, the supreme court reviews the trial in the circuit court on the record made there and we now present as good a record to the supreme court by simply taking up the common pleas record as by retrying in the circuit court.

Mr. WORTHINGTON: If the gentleman will stop to think he will see that he is mistaken, because there is no more difficulty in forming a record in the circuit court in any case you want to get to the supreme court by certiorari than in forming it in the common pleas to get to the circuit court, but there is another point I want to bring out and that is this: This idea of preserving what is known as the Ohio appeal is radically inconsistent with the fundamental idea of this proposal of one trial and one review. Then you have in those cases two trials and no review. That is what it comes to, because you have no review as a matter of right in the supreme court.

Mr. PECK: That brings back to my mind some things I had in mind when I considered that thing, and when I was asked about it yesterday I was surprised and answered before I thought. Your construction of that clause is absolutely correct according to my notion.

Mr. CAMPBELL: Don't you think that the reason this right of appeal before three judges has been kept, so far as the people are concerned, has grown out of the idea that when you try an equity case before a single judge as you do now in the common pleas court, you are submitting your case upon the facts and law to a jury of one man? Don't you think there is a feeling among the people generally that they are not exactly satisfied to have a jury of one man pass upon the facts and the law, swayed sometimes by the influences that may prevail with a judge coming from that immediate locality, and that they want a jury of three men to pass on the law who are removed from all those influences? I want to ask the judge if in his experience and observation and reflection he does not think that the people want this appeal, that it is not a question for us lawyers simply, but that the people may want it because in equity proceedings some of the most important matters of life are disposed of and you don't have a jury trial?

Mr. WORTHINGTON: If you ask for my observation I say "no." I do not think the people at large, any more than the laymen of the Convention, know anything about the matter, and they leave it to their lawyers, and it has been the lawyers who have been interested in preserving the trial de novo. I say that because in times past, trying to serve the public, I have been before committees in the general assembly endeavoring in the first place to get rid of the right of appeal altogether being forced upon the superior courts. There was a court organized in 1854 for the express purpose of getting rid of this trial before a new set of judges with a recalling of the witnesses. That was the very object and purpose of establishing that court, and it continued with powers of that kind for about forty years, and finally, within the last five years, the right of appeal has been given from the superior court of Cincinnati to the circuit court.

Mr. CAMPBELL: Now, if you will pardon me a moment, when we changed from the old district court to the present circuit court, was it not in the minds of the people generally that while the case was tried again in the old district court as it is now, yet the people were not getting that consideration of their cases — that is, they were not removing these conditions that they felt existed, because the district court was made up of the judges of the common pleas court in a certain district, and they rather thought it was a case of tickle my elbow and I will scratch your back, you sustain my decision and I will sustain yours, and that they wanted a court made up of judges entirely independent of the man who made the decision? In other words, they wanted a jury removed from all influences, who would not be influenced by the decision of the former jury of one man and so the appeal simply cut off his judgment and it was tried de novo.

Mr. WORTHINGTON: You will bear in mind that the criticisms at the time to which you allude as to the tickling operation was the judges reviewing their decisions on matters of error. I never heard the matter discussed with reference to appeal cases. The district court was composed of all the judges of the common pleas court within the circuit and of one judge from the supreme court, and that court reviewed the decisions of the common pleas court, so that the man who tried the case below was a constitutional component and member of the district court that sat in review. Some times he sat and some times he didn't, but whether he sat there or not this mutual admiration society probably did exist. At any rate it was a cause of complaint, and that was one reason for establishing an independent circuit court, but that agreement was on matters of error and not on appeal.

Mr. PECK: Was not the principal reason for the

establishment of the circuit court the fact that the work took up so much time in the common pleas court that the work became a clog and that a new court was necessary?

Mr. WORTHINGTON: That is true; the particular set of men had no time to do the business of both courts. Down in our county we got relief by having the number of common pleas judges increased and then we set aside three to hold court in the district court all the time, but there were very few other counties, if any, so formed.

Mr. ANDERSON: Would it not amount to a second trial under this proposal, except that the second trial would be on the record instead of having the witnesses personally appear before the court?

Mr. WORTHINGTON: Yes.

Mr. ANDERSON: Because under that language the rule that now prevails with reference to review of facts in the higher court would not apply — that is, manifestly against the weight of evidence would not apply.

Mr. WORTHINGTON: Not at all. It would come up as in the federal court, on the papers, and instead of having witnesses the court would take the transcript of testimony and decide the case.

Mr. ANDERSON: Do you object to the appellate court's hearing newly discovered evidence outside of the record?

Mr. WORTHINGTON: Yes; if a party has newly discovered evidence he should take the remedy provided by law, a motion for a new trial.

Mr. ANDERSON: Suppose he does not discover it in time?

Mr. WORTHINGTON: That is his misfortune.

Mr. ANDERSON: You mean a new trial before the same court and judge?

Mr. WORTHINGTON: Yes; I think the limitation is three years. He ought to get it in that time.

Mr. WINN: Your argument is upon the assumption that there is an official stenographer in all the circuit courts. Do you understand that to be the case?

Mr. WORTHINGTON: No; I was not speaking of the circuit court. I was referring to the trials in the common pleas court. The transcript would be taken there.

Mr. TALLMAN: Commencing at line 56: "shall have jurisdiction to review, affirm, modify, or reverse judgment of the courts of common pleas"—when an equity case goes to the appellate court on appeal does the judgment of that court modify, reverse or have anything to do with the judgment below? Does not the appellate court render judgment of its own and that judgment simply supersede the judgment of the court of common pleas and not modify or reverse it?

Mr. WORTHINGTON: That is exactly the position I take.

Mr. TALLMAN: Does this language that you have there insure that right.

Mr. WORTHINGTON: To my mind it is absolutely repugnant to that right. The two can not coexist. To my mind the thing that we have here — that is, to review, affirm, modify or reverse the judgment of the court of common pleas — would prohibit and annul the right of appeal as we call it in Ohio, but it would permit us to have the right of appeal as known in the federal courts.

Mr. TALLMAN: It was done with the view of practically making the appeal of a proceeding in error.

Mr. WORTHINGTON: I can not say. I was not a member of the committee.

Mr. PECK: Plus the right to review the facts on the evidence.

Mr. TALLMAN: The circuit court has that right now, to review the facts.

Mr. PECK: But the supreme court has not.

Mr. CAMPBELL: It says here "No judgment of the court of common pleas shall be reversed except by the concurrence of all the judges"—

Mr. WORTHINGTON: Don't come to that yet. I am not there yet.

Mr. NORRIS: This plan is based upon the federal plan of disposing of chancery business. Is it not true in federal courts where chancery cases are tried the litigants are usually those who can afford the luxury of litigation, while in some of the districts of the state of Ohio — for instance, the district this gentleman lives in, sixteen counties — the second day in court is usually for men who are not burdened with much of this world's goods, and would it not necessitate the man who sought to take advantage of it to practically put up the costs — pay for his transcript of testimony before he files it in the appellate court, while as we have it now he can call up the witnesses and pay the ordinary witness fees? Otherwise, does he not have to pay for his transcript — and they are very expensive luxuries — and might not a man whose rights were in litigation and very important to him be practically refused entrance to the circuit court because he did not have the money to lay down for this transcript with which he must approach the circuit court?

Mr. WORTHINGTON: I don't think that would be a practical question. Because we copy the federal system is no reason why we should adopt all these abuses of the federal system; it is no reason why we should compel every case to be referred to a master and the testimony taken before the master. The testimony is still taken in the trial courts. I may be wrong about this. I have had no experience in practice throughout the state, my practice having been confined to my own county, but I do not believe there is any case tried in the common pleas court where they do not have a stenographer to report the testimony. When we have already incurred that expense certainly the expense of writing out the transcript will not exceed the cost and expense of getting the witnesses to attend the trial.

Mr. ANDERSON: Which would cost the more, the trial with the witnesses in the common pleas court or other court, which is practically the same, with always a stenographer present — never an exception — and the trial with the same witnesses or additional witnesses in a circuit court and then at last in the supreme court, or under the proposal, where you have the witnesses in the common pleas court and then end in the circuit court, with our record typewritten and which does not have to be printed?

Mr. WORTHINGTON: To my own judgment the method proposed here would be found in the end more economical for all cases. There might be exceptions where there are hardships, but I have never found any

law that did not work a hardship in some cases. We can not make general rules that will not have hardships.

Mr. NORRIS: The gentleman referred to hardships. Would not the hardship be on the people least able to stand the hardships? The stenographer takes down the notes, but when he comes to make a transcript somebody has to pay for it.

Mr. WORTHINGTON: Yes; a proper provision would be necessary in such cases.

Mr. NORRIS: I have known transcripts and bills of exception to cost $3,000.

Mr. WORTHINGTON: That is an exception, but that is in a case where the parties had plenty of money to pay for it. In those cases they can afford it, but there is no reason why the general assembly could not provide that the stenographer shall furnish the transcript for nothing in certain cases. If a man chooses to sue in forma pauperis the state protects him, and there is no reason why the state could not provide to cover extreme cases of this sort. I do not know that a man would like to confess himself a pauper, but if he could not carry on the litigation without assistance he might have to use that form of proceeding although it might be offensive.

Mr. NORRIS: Because a man has no money why should he be compelled to go to a forum in the guise of a pauper?

Mr. WORTHINGTON: It is an old principle of the law, as you know, that a man who has not got the money to pay the costs goes to the court and makes a formal application to sue forma pauperis. It doesn't mean anything offensive; it simply means he has not got the money to pay the costs.

Mr. NORRIS: That is very true, but a man who is not a pauper must pay the costs by paying for this transcript which is made a part of the costs as I have found out.

Mr. WORTHINGTON: The proposal doesn't provide for that at all; that is for the general assembly.

Mr. BROWN, of Highland: The question occurs to me whether or not in taking over the transcript from one court to another the rules of court require that all of the testimony be taken. In many of the trials there are a great many irrelevant questions that are not germane to the subject nor apropos of it. Can not the litigant who is appealing secure that part of the record which he wishes in the way of testimony and present it to the court, or does the court require it all?

Mr. WORTHINGTON: There is no rule of court that leaves it to his option as to what to take. If the litigant wishes the upper courts to see whether the court and jury below decided correctly upon the facts of the case then he has to present in his transcript all of the evidence presented in the court below. Otherwise, he could not say that the upper court was reviewing the same state of facts that the court below had before it, but if he doesn't want to review the facts, but only the law, he can cut his transcript down and only present the evidence necessary to present the legal questions.

Mr. HOSKINS: Referring to lines 57 and 58, about the power of the appellate court, it is a fact, is it not, that in an equity case the appellate court must decide that case if it goes up on the facts by the weight of the evidence the same as the jury would decide the case in the court below under the instructions of the court?

Mr. WORTHINGTON: Surely.

Mr. HOSKINS: In a jury trial the court of common pleas in giving its charge to the jury, and in giving a correct charge, is compelled to charge that jury that it is one of the rules of evidence that they must compare the demeanor of the witnesses upon the witness stand as to apparent openness and frankness — in other words, the general demeanor of the witnesses is always charged in the common pleas court with the jury, is it not?

Mr. WORTHINGTON: Yes.

Mr. HOSKINS: How would a reviewing court, having the cold transcript before it, only the words of the witness, without having the demeanor and appearance of the witnesses, whether white, black, etc., be able to judge of the credibility of that witness in passing upon the cold transcript?

Mr. WORTHINGTON: We had quite a character at our bar some years ago, a lawyer by the name of Wolf, and when he was preparing a bill of exceptions once he wanted to affix to it a photograph of a witness, because he felt when the reviewing court saw that witness it would know that the witness couldn't be believed under oath under any circumstances.

The same difficulty applies now to all cases that go on the law side of the court upon the weight of evidence.

Mr. HOSKINS: On the law side the court does not decide a verdict of a jury unless it is manifestly against the weight of the evidence and on the equity side it goes by preponderance of the evidence?

Mr. WORTHINGTON: It ought to be that way, but I have known cases where the court said they would not set it aside because of preponderance of the evidence, but would let it go to the circuit court and the circuit court would let it go on up to the supreme court and the supreme court would not pass on the weight of evidence. An equity case is a matter tried not by a jury but by a judge, and the judge sometimes decides the case while the appearance of the witnesses is fresh in his mind, and sometimes he decides it after he has forgotten all about the appearance of the witnesses, and the court above, especially in the equity practice, gives considerable weight, as a practical question, to the decision of the court below, because that court saw the witnesses and observed their demeanor and, therefore, the upper court does not rashly differ from the conclusion of the court below.

Mr. HOSKINS: Do you not believe the reviewing court would be able much more surely to arrive at a just result if they saw the witnesses and heard the testimony presented to them personally instead of looking over a cold transcript?

Mr. WORTHINGTON: No; I do not think so as a matter of fact, and if you wish to have the appellate court hear the witnesses anew, then I for one shall urge as strongly as I can that there be given a right of review of their decision, because I believe in every case there should be a review as well as a trial, and in the case you suggest there would be two trials and no review.

Mr. HOSKINS: May I suggest that it is possible that the practice in the large cities, where you have had

your experience, differs from the practice in the country, where some of us have had our experience?

Mr. WORTHINGTON: I have no doubt of that.

Mr. HOSKINS: As I understand it, in the city you very infrequently call witnesses before the circuit court and that the review there is upon the transcript. I suggest that we don't do that, that in our circuit court we have a trial de novo, so that the circuit court has the same facilities for deciding as the court below.

Mr. WORTHINGTON: As I said a while ago this half appeal is simply a survival of a practice that originated in Ohio, through failure to furnish its litigant a proper tribunal. It does not exist in any other state, and it seems to me, speaking for myself, that it should be ended.

Mr. NYE: Do I understand from your plan for the appellate court that it reviews cases upon error by taking the testimony before that court?

Mr. WORTHINGTON: Not necessarily upon error. The general assembly might provide for that, but it might also provide that the appellate court should have the testimony before it on a transcript and should decide according to the weight of it.

Mr. NYE: That was the next question I was going to ask. Under the present practice is it not true that when a case goes from the common pleas court to the circuit court, not upon appeal, the circuit court simply hears the evidence and passes upon it, but not as an original proposition, but if it goes up on appeal they then pass on it as an original proposition, and in the first instance do they not sometimes say that our opinion is that the decision in the case before us is not so manifestly against the weight of the evidence that we should reverse it, but if we had had it before us originally we would have decided it the other way?

Mr. WORTHINGTON That does happen.

Mr. NYE: Do you think that is the trouble?

Mr. WORTHINGTON: No; I am not speaking of that. This is the committee's proposal. I simply am attempting to fortify the opinion of the committee.

Mr. RILEY: Is it not true where there are different questions of fact involved in the equity case — what was originally called a chancery suit — that there is a provision for having the jury pass upon those facts?

Mr. WORTHINGTON: Surely. The chancellor may send an issue to a jury.

Mr. RILEY: An issue out of chancery?

Mr. WORTHINGTON: Yes.

Mr. RILEY: Would not that obviate the difficulty this gentleman is talking about where important questions of facts are involved and the jury ought to be brought together before the appellate court — would not that meet the objection raised, and would not those cases be put in as good a position as the cases he alluded to?

Mr. WORTHINGTON: I am not sure about that.

Mr. THOMAS: In view of the fact that this is to be a reviewing court, is it necessary that the court should move from county to county as insisted here?

Mr. WORTHINGTON: No; I don't see any reason why it should be. Of course, some of the appellate districts are larger than others. Take our court down in Cincinnati, it is probable that it would be as convenient for the lawyers in all the counties to attend court there as in any other county, or a very little more inconvenient, if at all. They arrange it generally that way They come down from Clermont and Clinton counties.

Now I am indebted for the next thing I am going to suggest by way of amendment to the proposal of the committee to the gentleman from Henry county [Mr. CAMPBELL]. He asked me to bring it before the Convention while I was on my feet and it struck me as a good idea and I am going to do it. The committee's report in lines 49 and 50 is just exactly as the constitution stands at present.

The gentleman from Henry [Mr. CAMPBELL] would add to that, and I approve of the suggestion — he is not responsible for the words, but the idea — "and provision shall be made by law for the rotation of such judges throughout such districts." The reason for that is this: We will have, taking the districts as they are, eight separate courts of last resort throughout the state of Ohio, and if those courts are composed continuously of judges who sit only in that particular district, there will be no interchange of views upon questions that arise before them except as they get them from the opinions. Therefore, the suggestion was made by the gentleman from Henry [Mr. CAMPBELL] that provision should be made by which the judges shall shift places, so that they will become acquainted with the development of law in other parts of the state than their immediate sections. There are different kinds of questions arising in different parts of the state. Take Mahoning county. The class of cases arising there will be found to be very different from those in Clinton county. The same difference obtains in other places all over the state.

Mr. PECK: Upon consultation with such of the committee as are at hand we are glad to accept the suggestion of the gentlemen from Henry [Mr. CAMPBELL] as stated by the gentleman from Hamilton [Mr. WORTHINGTON].

Mr. HOSKINS: On this matter of rotation of judges. We would have eight courts of appeal or circuit courts or whatever they are called?

Mr. WORTHINGTON: Yes.

Mr. HOSKINS. With compulsory rotation of judges?

Mr. WORTHINGTON: Yes.

Mr. HOSKINS: Would not that have the effect of making the people of a district submit to the rulings of law as decided by judges in whose selection they have had no voice?

Mr. WORTHINGTON: No; I think not. Of course, it is left to the general assembly to determine the scheme of rotation. I am one of those who believe in not putting anything more in the constitution than is absolutely necessary so that the language I suggest is that "provision by law" will be made. My idea would be to rotate one at a time, let one man from Hamilton go and sit in some other county and one from some other county come to Hamilton; scatter around so there will be an interchange of views.

Mr. HOSKINS: In order to make rotation effective, you would have to have sessions held in which all of the judges would be from foreign districts?

Mr. WORTHINGTON: Not at all.

Mr. HOSKINS: I don't see how it could be done otherwise.

Mr. WORTHINGTON: It is practicable to let a judge from Auglaize sit in Hamilton county.

Mr. HOSKINS: You couldn't get a system of rotation that way.

Mr. WORTHINGTON: Yes; we don't say rotation of "courts", but rotation of "judges".

Mr. HOSKINS: Is that made mandatory?

Mr. WORTHINGTON: Yes. Now I think I shall have to ask the Convention not to question me any more until I get through. I have occupied more time than I ought to have taken and it is nearly twelve o'clock.

Mr. HALFHILL: Will you allow one question on your amendment to see if it conflicts with one I propose? Does not the question of rotating conflict with the stationary courts?

Mr. WORTHINGTON: No; this is rotation of judges. It says that the judges shall be competent to exercise their functions in any district.

Mr. HALFHILL: And they will be exercising their functions in districts from which they were not elected?

Mr. WORTHINGTON: And this says the general assembly shall provide a scheme by which the judges do not always sit in the same district in which elected, so there can be an interchange of views on general matters.

Now, coming down to the last paragraph, as I inserted the word "prohibition" in the original jurisdiction of the supreme court, I would recommend it being inserted also for the appellate court. I have said, in speaking of the supreme court, it seemed to me a little plainer and simpler to get all of the provisions relating to the jurisdiction of the supreme court in the section that relates to the supreme court, and therefore in my proposal here I have stricken out words in lines 60 to 63, including cases under the constitution of the United States and of the state, because I embodied those in section 2, as explained yesterday, and in place of them I put in after the words "shall be final in all cases" the words "except as otherwise provided in section 2 hereof." That is a simple question of order.

Then you come to the question of unanimity of the judges of the appellate court to reverse the decision, and I should like to give more time to that than I feel justified in doing now. I put a question to my colleague yesterday which he said was a little too fine for him to appreciate, and possibly I can illustrate it by a story and make it plainer. I suppose a great many of you, if not all of you, have been to Cincinnati and observed Fountain Square. That tract of land was originally given to the city for a market house and there was a market house there. The city, fearing that the persons who dedicated it might claim the property back after that market was done away with, put a flower market in it, a place for the sale of flowers, and there never has been a flower sold there. The dedicators did bring suit to recover back the property, and they had a very diligent and persistent lawyer. They brought the case to the supreme court, and he had five grounds upon which he claimed he had a right to recover that property. The court at that time consisted of five judges and he secured four of those judges in his favor on each one of the points, but one decided the other way and he lost his case. While four decided for him on each one of the points, they held against him on the other. As a result the judgment of the court was against him, although he had a majority of the court with him upon every proposition.

Now the question I put to my colleague was this and it is one that arises all the time, certainly very frequently: A common pleas judge has a case before him. He tries it upon certain theories. He has his own ideas as to the law. When it comes up to the circuit court some of the judges think he tried it upon the right theory, but that there was a mistake somewhere else. Another judge will think that he decided it upon a wrong theory, but that he reached the right result. There the judges in the circuit court agree with the common pleas judge, but for a radically different reason from that which induced the common pleas judge to come to his decision. It seems to me that is a common thing, and I think you will all bear me witness that shows a fallacy of the supposition, because out of four men who have heard a case at different times, two are of one opinion as to the result and two of another, and therefore it is a standoff. As a matter of fact, there is no comparison, properly speaking, between a common pleas judge and the judges in the appellate court. The common pleas judge has to decide matters upon the spur of the moment. Matters are brought to him and he has no time to examine them. He has to give his first impression. He may review them upon a motion for a new trial, but the case comes before the appellate court in a different atmosphere, with time for the lawyers to examine. Some times a question is as novel and unexpected to the lawyer as to the judge, but when it comes up to the appellate court they have had opportunity to examine it and they reach a conclusion, and it seems to me their conclusion is independent of the common pleas judge. For that reason, as well as those I mentioned in requiring unanimity in the supreme court, this provision is an injurious one.

There is but one question more to which I wish to invite the attention of the Convention. My colleague has told you that this proposal is based largely upon the federal court of appeals act. There is one provision of the federal court of appeals act that has not been introduced into this proposal which seems to me a very desirable provision to prevent expense and to give speed in disposing of litigation, and that is the provision which enables the circuit court of appeals of the United States to ask for the advice of the supreme court of the United States upon questions that are pending before the circuit court. Instead of sending the whole case they will tell the supreme court, "This case presents two questions and we want your advice on how to decide those questions." Then the advice comes back and it is decided and speedily disposed of. Or the supreme court may say, "We would rather have the whole record," and it is sent up. Now the provision is:

> The appellate court may certify to the supreme court for decision questions of law arising in any case upon which it desires the advice of that court; and the supreme court may in such cases require the record of the case in which the questions arise to be certified to it, and may render judgment thereon.

Mr. PECK: Where do you put that?

Mr. WORTHINGTON: At the end. What I have

here strikes out everything after line 60. It strikes out the unanimity for the reason I have mentioned, and it strikes out the provision about certifying conflicting judgments, because I have embodied that in section 2, and then it adds this at the end.

Mr. PECK: And you also strike out the unanimous concurrence?

Mr. WORTHINGTON: Yes; I am opposed to that.

Mr. PECK: You strike that out as a matter of principle?

Mr. WORTHINGTON: Yes. Now I certainly am not opposed to this proposal. I think it is a work of high statesmanship to have gotten out this proposal. Of course, I have objected to it in some controversial ideas, admitted to be controversial by the gentleman who introduced it. But the design is approved and also the new system of court organization for your higher courts, and I want to congratulate the chairman of the committee and the committee upon the work they have done. It has been very well done, and my only object in what I have said has been to support the committee and to help carry out their proposal except in two matters in which they require unanimity by the reviewing court, which seems to me to be in error. I offer the following substitute:

Strike out all of the proposal as now amended after the enacting clause, and substitute the following:

SECTION 1. The judicial power of the state is vested in a supreme court, appellate courts, courts of common pleas, courts of probate, justices of the peace, and such other courts inferior to the appellate courts as the general assembly may from time to time establish.

SECTION 2. The supreme court shall consist of a chief justice and six judges, and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the supreme court shall be necessary to constitute a quorum or pronounce a decision. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, and in cases wherein the death penalty or imprisonment for life has been adjudged against any person by the courts below, also in cases which originated in the appellate courts, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The chief justice and the judges of the supreme court shall be elected by the electors of the state at large for such terms, not less than six years, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law. The supreme court may, within such limitation of time as may be prescribed by law, cause the record or records of any judgment or judgments rendered by the appellate courts in cases of public or general interest, or involving the construction of a statute, or where two or more appellate courts have rendered conflicting judgments upon the same or similar questions, to be certified to it, and may review and affirm or modify said judgments or any of them, or reverse the same, and render final judgment or remand the cause for further proceedings.

SECTION 6. The state shall be divided into appellate districts of compact territory, and divided by county lines, in each of which there shall be an appellate court consisting of three judges. Until altered by statute the circuits in which circuit courts are now held shall constitute the appellate districts aforesaid, and the judges of the circuit courts therein shall constitute the respective appellate courts, and perform the duties thereof until the expiration of their respective terms of office; vacancies occurring prior to such expiration shall be filled by appointment of the governor for the unexpired term. Their successors shall hold office for such term, not less than six years, as may be prescribed by law. Vacancies caused by the expiration of the terms of office of the judges of the appellate courts shall be filled by election by the electors of the appellate districts, respectively, in which said vacancies shall arise. Laws shall be passed prescribing the time and mode of such election, and the number of districts or the boundaries thereof may be altered by law; but no such change shall abridge the term of any judge then in office; and upon any such change the judges of the appellate courts whose districts shall have been altered shall be re-assigned to duty by the chief justice of the supreme court. The appellate court shall hold one or more terms in each year at such places in the district as the judges may determine upon, and the county commissioners of any county in which the appellate court shall hold sessions shall make proper and convenient provision for the holding of such courts by its judges and officers. Each judge of an appellate court shall be competent to exercise his judicial powers in any appellate district of the state; and provision shall be made by law for the rotation of such judges throughout such districts.

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

The appellate courts shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction to review, and affirm, modify, or reverse the judgments of the courts of common pleas and other courts of record within the district, in all cases, and judgments of said appellate courts shall be final in all cases, except as otherwise provided in section 2 hereof. The appellate court may certify to the supreme court for decision questions

of law arising in any case upon which it desires the advice of that court; and the supreme court may in such cases require the record of the case in which the questions arise to be certified to it, and may render judgment thereon.

Mr. DOTY: I move that the substitute of the gentleman from Hamilton [Mr. WORTHINGTON] be printed in bill form and the changes from the present proposal be italicized.

The motion was carried.

Mr. BEATTY, of Wood: I move that the pending matter be postponed five minutes.

The motion was carried.

By unanimous consent the following proposal was introduced and read the first time:

Proposal No. 327—Mr. Beatty, of Wood. To submit an amendment to the constitution.—Relative to elective and appointive officials of the state.

By unanimous consent Mr. Cassidy offered the following resolution:

Resolution No. 98:

Resolved, That the following list of bills which have been filed with the secretary of this Convention be allowed and ordered paid:

The Central Ohio Paper Co., supplies	$ 2.80
Central Union Telephone Co., toll and rental	161.65
The Columbus Citizen Telephone Co., toll and rental	168.50
The Columbus Blank Book Manufacturing Co., supplies	14.95
The Crystal Ice Manufacturing and Cold Storage Co., water	62.25
T. J. Dundon & Co., labor and supplies	5.00
The Walter J. Dwyer Co., supplies	18.00
The F. J. Heer Printing Co., printing	867.07
Hiss Stamp Works, supplies	2.20
The M. C. Lilley & Co., supplies	3.25
Carl A. Mutschler, express paid	2.36
Ada Pemberton, telegrams paid	1.22
E. H. Sell & Co., rental and supplies	5.30
A. H. Smythe, supplies	7.60
The Troy Laundering Co., laundry, service	73.38
Underwood Typewriter Co., rental	35.50
The Western Union Telegraph Co., telegraph and time service	8.85
The Doddington Company, filing cabinet	16.00
Beck & Orr, record book	13.00

On motion of Mr. Cassidy the resolution was referred to the committee on Claims Against the Convention.

By unanimous consent Mr. Harter, of Stark, submitted the following report:

The standing committee on Miscellaneous Subjects, to which was referred Proposal No. 169—Mr. Worthington, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out all after "section 10" in line 5 and the remainder of the proposal and insert the following:

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained as far as practicable by competitive examinations. And it shall be the duty of the general assembly to enact laws providing for the enforcement hereof.

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

Mr. DOTY: I move that this proposal be reprinted as amended.

The motion was carried.

Mr. BEATTY, of Wood: I want my proposal referred to a committee.

Mr. DOTY: There is a regular time for proposals to be referred to the committee, Monday night. The committee can not meet on Monday and the proposal under our rule will not be printed if it is referred at this time. There will not be any time made and attempting to do it will simply keep this proposal out of the proposal book. I move that we resume consideration of Proposal No. 184.

Mr. FESS: I move that we recess until 1:30.

Mr. BEATTY, of Wood: I have not yielded the floor.

The PRESIDENT The gentleman from Mahoning has the floor.

Mr. BEATTY, of Wood: I have not yielded the floor, but I will yield to the member from Mahoning.

Mr. ANDERSON: This is the first time I have had an opportunity to move for a recess.

The PRESIDENT: The motion before the Convention is to resume consideration.

Mr. WOODS: Before this is done I would like to offer a proposal.

By unanimous consent the following proposal was introduced and read the first time:

Proposal No. 328 — Mr. Woods. To submit an amendment to article XIII, section 2, of the constitution. —Relative to corporations.

The vote was taken on the motion to resume consideration of Proposal No. 184 and the same was carried.

The delegate from Wayne [Mr. TAGGART] was recognized and yielded for a motion to recess, which motion was put and carried and the Convention recessed until 1:30 p. m.

AFTERNOON SESSION.

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

On motion of Mr. Colton a further recess of fifteen minutes was taken. At the expiration of this the Convention was called to order pursuant to recess.

Mr. CROSSER: I move a call of the Convention.

Mr. COLTON: Before that is done I move that the proposal we are discussing retain its place at the head of the calendar.

The motion was carried.

The PRESIDENT: The secretary will now call the roll.

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

Bowdle,	Halfhill,	Pettit,
Brown, Highland,	Harris, Ashtabula,	Price,
Brown, Lucas,	Harris, Hamilton,	Read,
Crites,	Hoskins,	Redington,
DeFrees,	King,	Roehm,
Doty,	Lampson,	Shaw,
Eby,	Leslie,	Smith, Geauga,
Elson,	Longstreth,	Stamm,
Fackler,	Marriott,	Stokes,
Farnsworth,	Marshall,	Ulmer,
FitzSimons,	Matthews,	Wagner,
Halenkamp,	Mauck,	Worthington.

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

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

The motion was carried.

The chair recognized the delegate from Wayne [Mr. TAGGART] who yielded to the delegate from Marion.

Mr. NORRIS: Mr. President and Gentlemen of the Convention: I hear that many of the members of this Convention have commended me for a position upon the supreme bench of the state. I appreciate the honor of having my name associated with that august tribunal. I have not sought and do not seek the appointment. However I might prize it and desire it, with all the high esteem in which I hold the governor of this great state and with all the deep respect with which I view that great court, I say to you here and now that I would not exchange the confidence and regard evidenced by your commendation for the commission of his excellency which would make me a member of that court. I have lived long enough to know that about all there is in this life are the friendships that are builded up. I have lived long enough to feel that we should grapple them to our souls with hooks of steel and I have lived long enough to understand that I would not yield one of them up, even the humblest, for the ransom of a king. I thank you from the bottom of my heart and will cherish in fondest recollection your regard so long as my memory can look back over the past.

Mr. TAGGART: I shall trespass upon your time for a very few minutes in some prefatory remarks. And permit me to say that the proposition before this Convention contains more than a question of expedition in judicial procedure. As this Convention is attempting to define the judicial powers of the state it is desirable that the courts that are to exercise that power should be so constituted as to promote justice and not merely to reach a conclusion upon a case preferred, irrespective of the rights of the litigants, or while the case is simply before the courts that is should arrive at conclusions. It is not more desirable that procedure should be merely shortened than that there should be uniformity in jurisprudence, that there should be certainty in the declaration of the law, so that all alike, the high and the low, the rich and the poor, may know what the law is, and, knowing it, observe and not violate it, so that when the mandate of the courts goes out and the law is declared all may be informed. Therefore, we are now determining the number of courts and their respective jurisdictions, and it should not be forgotten that we are not engaged in promulgating a code merely of procedure. We are establishing courts and we are defining their jurisdiction. Many of the delays that have been denounced on the floor of this Convention are not the results of constitutional provisions of the state nor the manner in which the courts are constituted. The great part of them result from the procedure, the failure of those who administer the law, and results outside entirely of the constitutional provisions of the state. Therefore it is only right that we should be careful and prudent in respect to that which we here build today, that we do not incorporate that which belongs merely to a code of procedure (for that is for mere legislative enactment), that we may reach the evils that have been denounced and perhaps establish some foundation in the administration of justice in the state.

Let us briefly look and see what are some of the reasons for the laws' delays under our present system. A suit is instituted. Thirty to forty days are given for the filing of an answer. Then there are motions and dilatory pleas. Then the case is assigned for trial. Then there is a verdict. After the verdict many days are given for a motion for a new trial; then the hearing of a motion for a new trial and after a judgment is rendered upon the verdict four months are permitted before the losing party is required to seek a review of the action of the trial court. It then passes to the circuit or reviewing court. That court, meeting in every county in the state twice a year, passes upon the case and reviews it as it was heard in the trial court, and either affirms or reverses the judgment, and in case of affirming the judgment the losing party has four months in which to go to the supreme court. There are eight months or more of time before the successful party can realize upon the verdict and judgment. I have not said anything about the delays that may be and sometimes are worked by the unsuccessful litigant in the case, and his counsel. But with all these delays and with all the incidents of trial and review and another review in the supreme court it is strange to me that there is not more complaint than we hear on the floor of this Convention concerning the laws' delays, but that does not and cannot operate in respect to the proposition before this Convention.

Now, it has been proposed by Proposal No. 184 that you shorten the judicial procedure of this state. The first objection I have to the proposal as presented by the committee is that it leaves the supreme court of the state in the same situation it is now, except that after the discussion of the proposal on the floor of the Convention it is conceded that the supreme court may not divide and that it must sit as one court and a majority thereof declare the law of the state. I fully concur in many respects with the distinguished gentleman from Cincinnati [Mr. WORTHINGTON] that the supreme court should be increased by the addition of one judge, denominated the chief justice of the supreme court of the state of Ohio. The state of Ohio has reached that dignity and position among the states of the Union that it cannot afford to have a supreme court that is not a supreme court in every sense of the word. As it is at present constituted you have two courts of last resort consisting of three judges each, and in cases where the courts divide three against three a rule of court settles the rights of the parties and determines the rights of individuals. I submit that in any case where the judg-

ment of three distinguished judges is in favor of one side of the proposition and three judges are of opposite opinion that that is one of a class of cases which should be decided by a court and there be a declaration of the law instead of being decided arbitrarily by a rule of court.

And furthermore, with a court consisting of seven, and with the chief justice to expedite business and to control the management of that court, instead of rotating the office of chief justice from time to time, you will have one man with his hand on the helm all the time directing the affairs of court and you will have greater expedition and more efficiency and you will have the declaration of law and the principles that shall govern and control the people of this state by an authoritative declaration of what the law is.

My second objection is (and I have incorporated these in amendments which at the close of my brief speech I propose to introduce as a substitute) that as fixed by the amended proposal of the committee the jurisdiction of the supreme court is unyielding and inflexible and cannot be changed except by constitutional amendment. I do not fully concur with the gentleman who preceded me in the discussion of this question, and therefore have embodied in the substitute I will present that after the jurisdiction as it is defined in these proposals there shall be added "such other appellate jurisdiction as may be conferred by law." The legislature does not have the right to confer any other jurisdiction, but if it shall be brought to the attention of the legislature that the certiorari proceedings, attention to which was called by the distinguished gentleman from Hamilton [Mr. WORTHINGTON], are desirable, the legislature could then confer such jurisdiction as fully and as completely as the gentleman desires it to be incorporated in the organic law of the state, and confer jurisdiction to issue writs of certiorari from the supreme court so that it may call to the inferior court to send up the transcript of cases for review, or the legislature may provide that application be made for leave to file a petition in error, or any other way in which it is desired to confer additional jurisdiction.

The legislature has from time to time conferred and changed the jurisdiction of these courts and I submit, gentlemen, if you will take the real, legal and correct deduction from the history of the supreme court of the state, the correct thing is to leave the jurisdiction largely to the legislature for its determination. Leaving it there it can be abridged or enlarged; the legislature can take from or it can add to the jurisdiction of the supreme court, except in those particular matters set forth in the proposal, sent out by the committee. That being so, why should not there be a provision in this constitutional amendment for such appellate jurisdiction as the legislature may from time to time prescribe?

I have already adverted to the question of the court dividing and I shall say nothing more, because it is conceded that under the proposal as sent out by the committee and as suggested by the gentleman from Hamilton [Mr. WORTHINGTON] the court could not divide and would have to sit as a court. I am in favor of a supreme court and I am not in favor of a divided court under any circumstances, as a court of last resort.

Now, I shall not take the time to discuss further the question in respect to the unanimity of the court on constitutional matters, but I was opposed to that provision in that form, and while I fully agree with the gentleman from Hamilton [Mr. WORTHINGTON] that the majority of the court ought to be allowed to decide the constitutionality of a law as well as any other question that comes before the court, yet as yielding something to the wisdom and judgment of the committee and the Convention in the amendment I propose that no statute enacted by the general assembly shall be held unconstitutional and void by any proceedings in this court except by concurrence of five of the judges of the supreme court. There you have one more than a majority and it gives additional moral force and effect. The only force that can be given to any court is the moral influence it exerts in the enunciation of its opinions and judgment. So much for sections one and two of the proposal.

I call your attention now to section 6. In the proposal of the committee and also the substitute of the gentleman from Cincinnati [Mr. WORTHINGTON], the number of appellate districts is stricken out and left blank, thus leaving it to the legislature to determine that matter in their wisdom. It is my judgment, and I submit it for the consideration of the Convention, that this should not go in that form, and I have made this change: "The state shall, until otherwise provided by law, be divided into nine appellate districts of compact territory," etc. If nine is not sufficient make it ten, but the reason for it is simply this: You propose to make these appellate courts, which are now known as circuit courts, courts of last resort on all questions of fact and law. There must of necessity be more work cast upon those courts than they now are required to do. Certainly there will be an increased responsibility. Now they are only courts of last resort on questions of fact, and therefore, in examining the record, they may simply determine the facts of the case and how the facts in the case conform to the judgment and verdict below. But they may also determine the law. Therefore they will have more work, because it is the last tribunal of the litigant. It is the last chance that the litigant can have to secure justice in his case if this proposal goes through. There will then be more work and more responsibility and more care; and, gentlemen, if you are going to have any uniformity in the jurisprudence of this state there must be some provisions of law for reporting these cases. There will be a line of authorities in Hamilton county and another line of authorities in Youngstown and another line of authorities in Portsmouth and another line of authorities in Toledo, and unless there is some manner or means proposed of reporting the cases and squaring the determinations of the different courts and having uniformity of decision of the law there will be uncertainty in the law. There would be a line of authorities, as I have stated, in different parts of the state and no one could tell what the law is, and no attorney could safely advise his clients. No individual would know in a particular jurisdiction whether he was trespassing upon the law or whether he was conforming to the law.

But they say this is legislative, that the legislature can provide for the reporting of these cases. I submit to you, gentlemen, that the legislature cannot compel

the reporting of cases. The judicial department that you are forming is a co-ordinate branch of the government, equal in authority with any other branch, and it does not and cannot and ought not to take its commands from any other department except as provided by the organic law of the land. Therefore, when a mandate comes from the legislature to report the cases the only authority in the organic law of the land is that the court shall reverse, modify or affirm the judgments of the courts below, and when it has done that it has performed its function and you cannot command or compel further than that. That being so, you reach now the great question in this state that if you are going to fix the jurisdiction of the supreme court inflexibly and if you are going to have eight or nine or ten supreme courts in the state, you must provide in some way for uniformity of decisions for the instruction and information of the people so that all may know and obey and none offend.

There is another reason why this court should be so constituted. At present there are eight circuit courts in the state. It has been so for several years. I call your attention and read for your information briefly from the report of the secretary of state for 1910, calling attention to the growth of these various circuits since the organization, showing how some have grown:

In the first circuit, consisting of Hamilton, Clermont, Clinton and Butler counties, in 1900 there were 547,000 people; now there are 608,000.

In the second circuit, including Franklin, Montgomery, Clark and other counties, in 1900 there were 588,000 people and now there are 685,000.

In the third district, in which the gentleman from Marion formerly presided with dignity and efficiency, the Marion and Lima circuit, in 1900 there were 502,000 people and now there are 498,000.

In the fourth circuit, down on the river, the Portsmouth circuit, in 1900 there were 469,000 people and now there are 460,000.

In the fifth circuit, comprising Canton, Zanesville and Mansfield, in 1900 there were 556,000 people and now there are 614,000.

In the sixth circuit, the Erie county circuit, in 1900 there were 379,000 people and now there are 418,000.

In the seventh circuit, the Mahoning, in 1900 there were 525,000 people, and now there are 635,000.

In the eighth circuit, the Cleveland, in 1900 there were 487,000 people and now there are 845,000.

I call your attention to another thing as to the necessity for increasing the number of districts. On page 743 of the same report of the secretary of state at the close of the year July 1, 1909, there were pending in the circuit courts of Ohio 999 cases undisposed of. There were commenced and prosecuted during that year 2,358 cases. There were at the end of the year pending 1,114 cases. There were that many cases in the circuit courts undisposed of. Those are official records, and do they not demonstrate that there is an unequal distribution of courts in the state and do they not further demonstrate that if you want expedition you must have additional men to do your work? With the 1,100 cases undisposed of in July, 1910, is there any wonder that litigants are complaining?

But it is stated on the floor of the Convention that the circuit court judges were in attendance at the sea shore. That may be so. I did not know of any during my career on that bench who thus absented themselves from their work. I know that from September 1 until July it was one steady treadmill, without vacation and oftentimes without much sleep. If there are delays I do not believe that you can lay it at the door of the courts. I hold no brief for the supreme court, neither do I hold a brief for the circuit courts of the state, but this I know, that there is not a body of men that is worked harder or that puts in more hours of endeavor to give to the people of the state better service than the circuit courts of the state so far as I have known them. If you want more expedition with the 1,100 cases pending then provide the means for expedition. Two more appellate courts would mean six more judges and one additional judge in the supreme court would make seven. In a silent hour at home figure what additional cost it will be to each citizen and taxpayer of the state of Ohio for the seven additional judges. If there are six billions on the grand duplicate of the state the additional for the pay of the supreme judge if you are paying taxes on $100,000, and I don't think there is any man here who pays on less than that, you will pay an additional forty cents. Multiply that by seven and you have the additional burden imposed upon you by the extra judges of these courts. But what is seven times $6,000, or $42,000, in comparison with the expedition and with the certainty and with the knowledge that you are administering even-handed justice, that no one is denied justice in consequence of the overcrowded condition of the court? It is nothing. "Common good has common price; exceeding good exceeding." If you pay for cheap justice, you must expect to get cheap justice. If you want justice unsullied, you must pay for that character of the administration of law. Therefore, I have provided that there should be at least nine appellate courts in the state. I have not incorporated many of the provisions which the distinguished gentleman from Hamilton county [Mr. WORTHINGTON] has in his proposal for the reason that I do not believe it is absolutely necessary; for instance, that you incorporate the provision for the legislature to confer the additional jurisdiction on the supreme court. I fully concur in the opinion that the proposal as presented excludes the question of appeal from the common pleas court. I believe that if the proposal as presented is adopted there will be only one way in which you can go from the common pleas court to the circuit court and that will be by proceeding in error. This is not a great change from the practice existing at the present time. While the provision of law is that the circuit courts have jurisdiction on appeal, yet by rule of court, in all but two or three circuits of the state, litigants are required to take up the transcript of evidence taken in the court of common pleas. That is the rule in nearly every circuit in the state, and upon the failure of the appellant to thus bring forward a transcript of evidence the case is to be referred to a master to take the testimony.

Mr. NORRIS: You said it was a rule in all but two or three of the circuits. What is the rule in Hamilton county?

Mr. TAGGART: I don't know what the rule is in Hamilton county. I am not advised in that respect, but

I understood from the remarks of the gentleman from Hamilton [Mr. PECK] that that is the rule.

Mr. PECK: I don't think there is any specific rule, but that is the practice.

Mr. TAGGART: And it is in every circuit except two or three; so in reality it has been the practice for years. There has been a denial of the right to again rehear the case upon evidence in the appellate court, but the evidence is brought forward and the case is heard by the appellate court upon the testimony taken in the court below.

Mr. NYE: What right has the court in Hamilton county or Cleveland or your circuit to promulgate a rule of that kind?

Mr. TAGGART: Whether it is a matter of right or not I don't know, but it is like many other rules of court which litigants are required to obey or pay the penalty of having their cases referred to a master.

Now, there was another proposition here that there be rotation of judges. For myself I do not believe that that can be made workable. I think the judges should remain in their own circuits and districts and if the legislature attempts to rotate the judges it will only create confusion. That is one of the principal objections I have to the proposals as they have come from the committee and as they have been promulgated and brought forth to the Convention—that the tendency of the proposals if enacted into organic law will be to create such confusion that they may not accomplish anything in the way of expedition by way of advancing the correct administration of law.

Mr. BROWN, of Highland: A short time ago a committee of lawyers entered a protest because the county in which they practiced was attached to a district in which the character of the business of the people was at variance with the character of business of the people of the county in which they lived, and they said the decisions of the judges were tinctured with the environment and the business of the people with whom they were mostly associated. Do you not think that is true with all counties and all nations and all people, and that if the rotations were put into effect it would wipe out those conditions and that judicial decisions would be in accordance with general law and general practice and that the judges would gradually get together?

Mr. TAGGART: It would be very desirable if it were workable and if the Convention thinks it is workable and thinks it can get some body in the nature of a train dispatcher who can send these twenty-four or twenty-seven judges around the state on schedule and work this thing out, I have no objection to it as far as I am concerned. The only matter that suggested itself to my mind was that the matter was not workable. If it can be worked out, all right. I now desire to present a substitute.

Mr. DOTY: I move that that be not read, but that it be printed and be laid on the desks.

The motion was carried and the substitute was ordered printed as follows:

> Strike out all after the resolving clause and pending amendment and insert in lieu thereof:
>
> SECTION 1. The judicial power of the state is vested in a supreme court, appellate courts, courts of common pleas, courts of probate, justices of the peace and such other courts inferior to the appellate court as the general assembly may from time to time establish.
>
> SECTION 2. The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges, and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. A majority of the supreme court shall be necessary to constitute a quorum or pronounce a decision, except as hereinafter provided. It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, procedendo and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state and in cases wherein the death penalty, or imprisonment for life has been adjudged against any person by the courts below, also in cases which originated in the appellate courts and such other appellate jurisdiction as may be conferred by law. It shall hold at least one term in each year at the seat of government and such other terms, there or elsewhere, as may be provided by law. The chief justice and the judges of the supreme court shall be elected by the electors of the state at large for such terms, not less than six years, as the general assembly may prescribe and they shall be elected and their official term shall begin at such time as may now or hereafter be fixed by law. No statute adopted by the general assembly shall be held unconstitutional and void by any proceedings in this court except by the concurrence of five of the judges of the supreme court.
>
> SECTION 6. The state shall, until otherwise provided by law, be divided into nine appellate districts of compact territory and divided by county lines in each of which there shall be an appellate court consisting of three judges. The judges of the circuit courts now residing in their respective districts shall continue to be judges of the respective appellate courts in such districts and perform the duties thereof until the expiration of their respective terms of office. Vacancies caused by the expiration of the terms of office of the judges of the appellate courts shall be filled by the electors of the appellate districts respectively in which such vacancies shall arise and the same number shall be elected in each district. The general assembly shall prescribe the time and mode of such election and may alter the number of districts or the boundaries thereof, but no such change shall abridge the term of any judge then in office. The appellate courts shall hold one or more terms in each year in each county of the district, as the judges may determine upon, and the county commissioners of any county in which the appellate courts shall hold sessions shall make proper and convenient provisions for the holding of such courts by its judges and officers. Each judge shall be competent to exercise his judicial powers in any district of the state.
>
> The respective appellate courts shall continue the work of the circuit court and all pending cases

and proceedings in the circuit courts shall proceed to judgment and be determined by the appellate court, subject to the provisions hereof, and the existence of the circuit court shall be merged into and its work continued by the appellate courts.

The appellate courts shall have like original jurisdiction in quo warranto, mandamus, habeas corpus and procendendo and such other appellate jurisdiction to review, affirm, modify, or reverse the judgments of the courts of common pleas and superior courts within the district as may be provided by law. No judgment of the court of common pleas and superior courts shall be reversed except by the concurrence of two of the judges of the appellate court.

Mr. JONES: We are now by this proposal seeking to incorporate some changes in our organic law with reference to the judiciary.

These proposed changes are, when examined carefully, not very radical. If there is merit in them they must accomplish the purpose either of correcting something that is wrong in our present judicial system or of adding something of value to the present provisions with reference to that system. It would seem therefore that the first inquiry would naturally be, what is there wrong with our present system, and second what is there, if anything, that can be added to it that will be of value?

Those inquiries suggest a third one: What is the main purpose and object to be served by any judicial system?

Now, we all agree that primarily the main object to be served is, first, to secure correct interpretation of the law, and, second, to secure correct application of the law to the disputes and conflicts that arise between citizens of the state in their business and other relations. We need not enter upon an extended discussion of these fundamentals. I think their importance lies in the order in which I have put them.

First, the prime thing of all, and the chief object to be served by any system of jurisprudence, is the correct and efficient interpretation and application of the law to the relations of men in society.

All history with reference to that subject has tended to but one end, and that is that the most efficient service with reference to the interpretation of the law and its application to the every day relations between men can be secured by a system of courts involving what may be called trial courts and courts of review. We have had in Ohio quite a development, when you glance back over it for a hundred years, in our system of courts. Always, however, there have been those two salient features in our system, trial courts and courts of review. The great trouble and inconvenience and the objectionable features that have developed with reference to our system of courts, is that we have had too many trial courts and too many courts of review.

This change has been proposed for the purpose of reducing these courts at both ends. This proposal is simply one step further in the direction that we have been tending all these years, and it is proposed now to apply the principle in its fullest and most complete sense, that we shall in all but exceptional cases have one trial court and one court of review. Along with that should go, as we all agree, the other important feature, that that trial court should be a court efficient in the highest possible degree and that the reviewing court must be efficient in the same degree.

That brings me to another point in connection with this branch of the subject. What is, in connection with the administration of a judicial system, efficiency? What is to be the measure and the test of it? We all agree, probably, that if one man or a few men having special knowledge fitting them for that kind of work, were to be invested with the selection of the judges of the state, that we could get a much better class of judges than we now get by election, and that so far as securing correct interpretation of the law and correct application of the law to the relations of men in society is concerned there would be a great improvement over what we have. But there are other things to be considered with that. While we must get the highest efficiency possible, we must bear in mind all the time that that efficiency must be of a character which will be approved by the people who are subject to the laws. It is not more important to have the law correctly interpreted and correctly applied than it is to have the litigants believe that it is being so correctly interpreted and correctly applied. All experience has shown that nothing will conduce so much to have the people believe that their laws are being correctly interpreted and correctly applied as to have them select the judges themselves. So, while we all agree that in one sense that is not the most efficient means of securing correct interpretation and application of laws, yet for the practical purposes and ends for which these courts are created, to-wit, giving an administration of the law which will be satisfactory to the people, it is the best. The confidence of the people must be secured. No court and no government can long exist unless it has the confidence of the people and the best way to secure that confidence is to let the people select their own judges and create their own government.

There is another thing in that connection. It is possibly true, and we nearly all, as an academic question, will agree it is true, that for the mere purpose of determining what the facts are and also for the purpose of determining the rights of litigants, that a court, even of one judge, and especially a court of three or four judges who have had a lifetime of experience and training and who have therefore special education and fitness for determining those questions, is much more able to get at the facts and justice of a case than any jury possibly can be, made up as the jury often is of men who for the first time in their lives have had experience in hearing and deciding a controverted matter. Yet we find the same thing right here that I have just mentioned with regard to judges, that it is not entirely a question of getting the most efficient and best means of determining lawsuits, but the primary question is to get them determined in such a way as will best satisfy the people.

The history of the English jurisprudence has developed what we all agree is the best possible means of securing that result, the jury, which has been known to us for hundreds of years. I refer to that for the purpose of making some application of it in the discussion of this matter. Right along in line with that the

central idea, based upon the experience especially of the people in the state of Ohio, and we are dealing now, you must remember, with the people of the state of Ohio, is that in all cases where under the rules of procedure that have been developed the questions of fact are to be determined by the judges, the people of Ohio have long ago reached the settled conviction that they do not want to have those facts determined by one man; in other words, the people of Ohio not only want more than the judgment of one man with regard to the facts of the case which are to control their rights, but they want a second chance at the determination of those facts. That is a thing which theoretically, as I have said in reference to the other two matters which I have mentioned, has been wrong in principle; but we are not dealing with this matter purely as an academic question or purely upon theory, but we are dealing with it and must deal with it in the light of the experience and character of the people of Ohio as we know them. As has been already most clearly stated by Judge Worthington, we had in our early system of jurisprudence in Ohio the second trial, and then after the old district court came we had that second trial continued in actions at law and also a second trial in suits in equity on appeal to the district court where the whole matter was reheard, not as it was in the court below, by a court of one judge, but by a court wherein the litigant had the right to submit the facts of his case to three judges. So when our circuit courts were organized that same feature was carried into them, that no litigant should be required to submit to the finding of one judge as to the questions of fact involved in his case, that judge perchance having been selected right from the vicinity where the facts arose and who might perhaps unconsciously be influenced by his environment or knowledge of the parties, but they insisted upon the right to have those facts submitted on appeal to three judges who were not of the vicinity where the case arose. Now that is a thing with which the people of Ohio have been familiar during the whole history of the state. It is a thing they have insisted should be carried into all the provisions in reference to their judicial system, and I submit that while we may all agree with Judge Worthington that it is wrong, yet practically we have to recognize that the temper and the experience and the disposition of the people of Ohio in relation to this matter demands something of that sort, just as they demand a trial by jury and just as they demand a review by a higher court.

Personally I am inclined to coincide with Judge Worthington. It is true that in most of the other states the appeal will bring up both a law case and an equity case for examination in the appellate court in the same way. The evidence is brought up in each one and the reviewing court may examine the evidence in each and may render such judgment as the facts disclosed by the record seem to render proper. But after all the rule is, with reviewing courts, not to enter upon a critical examination of the facts in the case unless it becomes apparent that there is reason to believe that the judgment is manifestly against the weight of the evidence, or, as it is sometimes put by the court, is clearly against the weight of the evidence. Now, when the case comes up that rule leaves in a great majority of cases the judgment of one man upon the facts, to-wit, the trial court, as determinative upon the final rights of the parties as they may be fixed by the facts of the case.

The question with us, and we are preparing something here not for other people, but for the people of Ohio constituted in every respect just as they are to-day — the question is, whether or not we should abandon this right, which has been regarded as a valuable one by all litigants, the right to have questions of fact determined not by one man but to have the judgment of more than one man on the facts. In a case at law tried before a jury they have the judgment of thirteen men on the facts. They have first the twelve jurors. Then they have the court who has been sitting by and observing the witnesses and hearing the testimony and who upon motion for a new trial is required to review the whole of that testimony and say whether it fairly sustains the verdict or not. If the court finds it does the judgment is entered. If the court finds it does not the judgment is not entered. So when the judgment is entered the litigant can feel that he has had the judgment of twelve of his neighbors upon the facts of his case and the judgment either for or against him of a man sitting as a court who may or may not be one of his neighbors. He has, therefore, as I said, the judgment of thirteen men on the facts of his case.

What is the situation when it comes to an equity case tried in a court? It may be a case affecting a litigant's rights more than a jury case. His whole fortune, everything he has in the world, big or little, his reputation or honor, the reputation and honor of those near and dear to him, the most sacred rights that can be involved in any controversy between man and man may be heard by one man sitting as a common pleas judge. And the proposition now is that that judgment shall be made final and conclusive, practically at least it shall be made as final and conclusive as the judgment in the other case where he had not only one common pleas judge as in this, but he had in addition twelve of his neighbors to decide upon the questions of fact. The proposition now is to make a judgment in an equity case, rendered by one man, the common pleas judge, just as conclusive as the judgment in the other case rendered by the thirteen upon the facts. I am inclined to doubt whether a proposition of that kind will be favorably accepted by the bar of Ohio or by the people of Ohio. I am at least some inclined to doubt whether as a pure academic question it is sound, so I am inclined to favor retaining the present provisions with reference to trial on appeal.

It does not necessarily follow that if you retain that provision you are going to retain all of the things that have been pointed out here; not all of the things, at least. The rules of various circuits have been referred to requiring cases to be submitted on transcript of the evidence, but of course they cannot really be rules of court, because courts would have no power to make any such rules. Under the law the litigant has the right to take his case on appeal to the circuit court, and he has a right to demand of the circuit court that it hear it, not on a transcript, but on appeal; so that the circuit court cannot, if it wanted to, make an absolute rule that the litigant shall be denied that right. All the court can do, and I think all the court does do, in any case, is simply to suggest that in this particular case, unless

there is something special about the case, that it would facilitate the trial of it simply to have a transcript from the court below.

Mr. TAGGART: Don't you know that that rule is in print and adopted by nearly every circuit court in the state?

Mr. JONES: I don't know whether it is in print or not, but I do say that the courts could not make a rule denying a litigant the right to have his case heard on appeal on the evidence introduced before the appellate court.

Mr. PECK: What is to prevent the court at the opening of the case saying to counsel, "The court's time is very much occupied. We cannot sit here to hear the evidence in your case and if you insist upon hearing the evidence, we will have to send you to a master commissioner?" What is to prevent that?

Mr. JONES: Nothing at all.

Mr. PECK: Then the court can say as an alternative, "If you are willing to submit your case on the transcript of the evidence in the court below we can take it and dispose of it," and in nearly every case they do that.

Mr. TAGGART: I understand that your contention is that the court has not the power to make the rule, but you do not deny the fact that courts have made that rule?

Mr. JONES: I do not understand it to be a rule. It cannot be a rule in the sense you have mentioned.

Mr. PECK: As far as hearing and seeing the witnesses, what advantage will that be to the court? The master would hear and see them, but the court would not, and the court might just as well take the testimony below.

Mr. JONES: No, sir; the answer to that would be that if the court should undertake to adopt rules in actual practice which would deny the right to have the cases heard on appeal, it has no power or right to control that matter and prevent litigants from so doing even by the method suggested, by making an alternative that you must produce the evidence on a transcript or the case should be sent to a master. That is a rule that if it leads to any abuse or any substantial denial of right of trial upon appeal as now secured under the law—it is a matter that is easily remedied, but as I was saying, we find in practice there is no difficulty, or hardly any, in complying with the suggestions of the circuit court or the rules, if you want to put it that way, that the evidence shall be submitted on a transcript, because in a great majority of the cases that is found to be the most convenient way. We have that practice to some extent in our own circuit, but the court never goes farther. It does not undertake to force us into doing it by saying, "We will refer the case to a master if you don't agree to submit it upon the transcript." We lawyers have this reservation, that if there is any special witness we desire the court to hear, or if there is any additional testimony that we desire to present to the court, that may be done in the usual way.

Now, there is another matter that I want to refer to, and that is a thing that more than anything else has induced this effort to reform our judicial system. I think there is no ground for any serious complaint that the courts so far have not been reasonably efficient. I do not believe there is any chance of your having better courts with the three judges because you now name them appellate courts than if you should continue to call them circuit courts.

Mr. PECK: None at all.

Mr. JONES: There is nobody who will claim that efficiency, so far as correct interpretation of the law is concerned, is going to be improved by constituting this present supreme court, which can sit in two divisions, a supreme court limited to certain classes of questions that will come before it. The same court that has done the work is going to do it still. So that all arguments about increasing the efficiency of the court in interpretation of the law have little weight in them. But there is a great deal of force in what has been said with regard to the prompt application of the law to cases that arise before the courts. It is proposed to remedy that difficulty by this proposal. That involves the query right at the start as to what the cause of this trouble is now. Why is it? Is it because we have not enough courts or is it from some other cause? I am inclined to think that neither question can be answered affirmatively or negatively and be entirely correct. To my mind a great deal of the trouble with the courts at the present time arises entirely from the method of administering the law, from the practices that have grown up in courts. It has always seemed to me that in the trial courts at least, the court did not sit as an administrator of the law, but that the court sat as a mere umpire between the contending forces, a sort of arbiter, and consequently the result has been that the business has just moved along as fast in the trial courts as the litigants wanted it to move and no faster; that whatever the attorneys agreed upon or consented to, or whatever one attorney could secure in the way of advantage over the other attorney, it all went, and the result has been a great accumulation of cases in the trial courts. You are not going to remedy that by changing the system of courts at all. The remedy for that lies in a change with reference to the administration of the law by the court.

Mr. PECK: Now you are complaining about a thing that you said a moment ago there was no complaint about.

Mr. JONES: I said there is no complaint about efficiency in interpreting the law, but there is complaint as to the manner of administering the law in getting cases through the courts. No mere change in the system will reach that evil. That evil can be reached only by the courts taking a different method in administering the law. In other words, if the judge will, as the name implies, hold court and administer the law, and whenever cases come into his court gives parties to understand they have no vested right in the conduct of their cases, but that the court will push them through with all reasonable expedition to a conclusion and get them out of the way of other litigants, then this whole evil of delay in the trial courts will be remedied. That is aside, however, but I refer to it to show that a large part of the evil of which complaint is made has resulted from that cause. It is true there are some other causes for this absolute failure of courts as now constituted to make prompt dispatch of business, and where do they lie? Do they lie in the lack of power to increase the common pleas courts? No, because we can now increase them as much as we want to. If we haven't enough

judges we can have more, so that we can get cases through the common pleas courts as rapidly as we may wish, but we have one supreme court and all the cases for final review from the whole state go to that court and it has been overrun with business for more than half a century. The great cry in the constitutional convention of 1873 was that the supreme court was overburdened and an effort was made to get some relief. That constitution failed and two or three subsequent amendments on the subject also failed. I believe the supreme court commission was the first relief in 1875 and then the creation of the circuit court gave still further relief. The people were greatly dissatisfied with the old district court by reason of the fact that it was a sort of mutual admiration society, in that the same judges had to do the work of both the common pleas and district courts.

Now, here we are still with our supreme court overburdened. Even though we have practically two supreme courts at the present, they are both overburdened. There is no complaint that they have not been trying to do the work as rapidly as the rights of litigants would permit, so that there is absolute and great necessity for some relief for our supreme court. It all turns, to my mind, just upon this proposition: What is the best method of relieving the supreme court at the present? It has been suggested to enlarge the supreme court and have cases go immediately from the trial court to the supreme court. I admit that plan has some advantages, but upon the whole I think most men upon reflection will find more objections than advantages in it. This plan has been proposed of making an intermediate court of last resort with reference to certain cases, and it meets my approval with one or two objections that I will point out. Members of this Convention who are not lawyers may not be as familiar with the many delays and inconveniences in the administration of the law as lawyers who have been in practice twenty-five or thirty years. I realize that it is the judgment of a majority of the Convention that must be secured for the passage of any measure, and I think it may not be amiss at this point to call attention to some of the great delays and inconveniences that may occur under the present system and concrete examples are often more valuable than mere generalization upon any subject. We have had under our system of courts in the last fifty years this sort of a condition: A case might start before a justice of the peace; it would go to the common pleas court; then it would go to the circuit court; then the supreme court. You may have a mistrial or two before the justice or common pleas court. You may have a trial in the common pleas court and then go to the circuit court and get a reversal in the circuit court, a reversal before you reach the court of last resort, a reversal by a court which undertakes to announce the law with reference to the case, but which court has no power to make a final determination of the law applicable to the case. There are cases where the circuit court has undertaken to lay down the law applicable to the facts of the case, and we go back and try the case and then go on to the supreme court and the supreme court holds that the law laid down by the circuit court was wrong and the whole case has to be gone over again. That is what we are getting rid of. I remember one case where I brought suit against a railroad company and tried the case in the common pleas court and got a verdict. The case went to the circuit court and then to the supreme court; the corporation succeeded in reversing it and it went back to the common pleas court; it then went again to the circuit court and there the circuit court reversed the case upon a proposition of law which the supreme court had not passed upon. Then we went back to the common pleas court and tried it again and got another verdict; came on up to the circuit court and got an affirmance and then went on to the supreme court and the supreme court disposed of the case by saying that the circuit court had erred when it reversed the case. There were five or six trials before it reached a final determination. There was another case against the same company where the case had three trials before it got to the supreme court for final determination, all by reason of having that intermediate court, which attempted to lay down the law of the case, which might or might not be correct, and what aid was that in the final determination of the case? We had merely to assume that the judgment of the circuit court was right when we went back to try the case. We did not know that its judgment would be controlling. If this system proposed had been in operation in each case there would have been an end of it in the circuit court upon the first appeal and we would have avoided all that litigation. I have another case in mind that started twenty-two years ago that the supreme court just disposed of by rendering a decision a few weeks ago. Twenty-two years that litigation has been passing up and down several times through the courts and we have had affirmances and reversals by the circuit court in one branch or another until we have at last within the month just past, reached a final determination in the supreme court. Those are abuses for which there should be a remedy. The cases cited may be a little extreme, but there are a number of similar ones that have occurred in my experience, and I have no doubt that every lawyer here could cite an equal or larger number in his own experience. They are not the rule, but they are too frequently the case, and they ought not to happen. I have often hoped that I might live long enough as a practicing attorney to see the day when a litigant could commence a case in Ohio in a court of first instance and have it determined by the court of last resort in twelve months. That ought to be, and it can be, if we will change the system of courts we now have as here proposed.

Mr. PECK: And the judges will administer it properly.

Mr. JONES: And if the judges will depart from their practice of merely being arbiters and really take the administration of the law into their own hands and say that these cases must go through with reasonable promptness, due regard of course being had to the rights of the litigants to secure the prime object of efficient interpretation and application of the law, and with this change in our system of courts we can reach that thing which I think will meet the approval and judgment of every man within the sound of my voice, that every litigant ought to have an opportunity — especially those to whom litigation is a great burden, those who cannot stand long delays and long fights up and down through the courts, those men of moderate means, or men of in-

adequate means to conduct litigation through the courts — that they should have the opportunity to have any rights which they think invaded determined by a court of last resort within twelve months from the time they commence their proceedings. I heartily agree without a word of dissent to make this circuit court a court of last resort in the great majority of the cases. That will result, as has already been pointed out, in relieving the supreme court to such an extent that cases that come into it may be disposed of in three, four or six months at the farthest. That would be all the time that would be required to dispose of the cases in that court. And it will do other things — it will make provision by which, if the courts are properly administered and the proper number of terms of the court of appeals are held in each county — and I think they ought to be held in each county in the district — the cases in the court of appeals can be cleaned up each term, as they practically are now in all of the circuits every six months. It has been mentioned here by Judge Taggart that there are eleven hundred and some odd cases in the circuit courts, or were in June, 1910. I am not surprised at that. That does not mean there is any great blocking of the work in the circuit courts. Take the circuit courts of the state in eighty-eight counties and eleven hundred cases average only about twelve cases to the county. That is not a large number. That is no accumulation of cases. Why, a circuit court will come to the ordinary rural county in the state and I do not suppose that at the beginning of the term they will find an average of twenty cases. I doubt if they will find that many. I know in our county, which is probably about an average or a little less than an average in population, there are probably fifteen cases on an average upon our docket each term. The circuit court comes there twice a year and those cases are all cleaned up, save in exceptional instances of a party being sick, a death occurring, or something of that kind. Anyhow nine-tenths of them are cleaned up every term and we go on with a fresh batch of cases the next term. There is no reason why, if the court of appeals will do as well as the circuit court is doing, the cases coming to that court may not be kept cleaned up every six months all over Ohio.

Now there are some things that I object to in this proposal. The first of those is this provision that the judgments of the common pleas court cannot be reversed except by a unanimous decision of the court of appeals.

Mr. HARRIS, of Hamilton: Do I understand your whole contention is that the delay in securing justice is due to faulty judicial procedure and if that were corrected that the other conditions named in the proposal could be dispensed with?

Mr. JONES: I didn't say that. I say at present in our common pleas courts, the trial courts, the main cause of the accumulation of business is not that there are not enough courts, but the unfortunate methods we have fallen into of administering those courts, where the judge sits as an umpire and arbiter between the parties and lets the cases drift along just as the parties may want them to. I say again that a reformation in the method of administering the trial courts under which the court will be a real administrator of the law, where the judge will take charge of the cases and insist upon their going through without regard to the wishes and agreements of the lawyers or their clients, will remedy that evil in the trial court.

Mr. KNIGHT: Do I understand that there is anything in this proposal that touches that point?

Mr. JONES: No; I do not think there could be.

Mr. KNIGHT: You don't propose to offer an amendment on that point.

Mr. JONES: I have thought a good deal about the matter, but I cannot see what amendment could be offered to meet that.

Mr. KNIGHT: I would ask then if it is germane to the subject?

Mr. JONES: I think it is because I am merely referring to the clogging of business, as the foundation of the trouble, and I am pointing out what can be remedied and what cannot be. There are certain things that cannot be remedied and others that can be. There are certain things that cannot be remedied by constitutional provisions and I don't think anybody should claim that this change will cure the whole evil. I think anyone of experience will say that it cannot have any effect upon cases in trial courts; that if they are dragged along in that court they will continue to be dragged along.

Mr. PECK: That must depend upon the judge and the lawyers.

Mr. JONES: Upon the judge and the lawyers or the legislature if there can be some legislation which will expedite business. It can be reached that way, but I do not see how you can reach it by a constitutional provision.

Now I was coming to matters to which I objected in this proposal, and the first and principal objection is this provision that a case cannot be reversed except by the unanimous judgment of the court of appeals. Let us see what that involves —

Mr. PIERCE: I want to inquire upon that point whether you would have that apply to questions of fact and law both, or just to the law?

Mr. JONES: The objection goes to all. If the case is to be reversed because the judgment is against the weight of the evidence, the reason of the rule would apply just as much as if it were reversed upon some question of law.

Let us see what that involves, and that will become more apparent by taking a case right in the common pleas court: A case is tried in the common pleas court and the jury agree. The trial judge overrules a motion for a new trial and renders judgment on the verdict. The case goes on error to the court of appeals. Two judges of the court of appeals say that case ought to be reversed because the lower court took a wrong view of the law. Of course the lower court said that he took the right view of the law. One of the appellate judges says that the lower court took the right view of the law, and here is a litigant in this situation: He has two judges saying that the right view of the law was taken in his case and two judges saying the wrong view was taken. How is he to make up his mind which is correct? How as a practical proposition are you going to satisfy that litigant that he has had justice administered by due process of law? How are you going to satisfy that litigant that he has had a determination of his case by a tribunal in which he can have confidence? And that is one of the necessary things, in the correct

administration of any law, as I have said, to have a tribunal in which the litigant can have confidence that the law applicable to his case has been correctly interpreted and correctly applied. When two judges take a position one way and two judges take a directly contrary position, what is the litigant to think about the matter? Do we want that sort of a situation? Where are his rights going to be determined by that situation? This proposal says that is an end of the case, he cannot go up further, he cannot go to the highest court. He cannot go to a court that may not be influenced by locality or the particular temper of the people of a certain district or other influences or environments which sometimes unconsciously work to make up the minds of men. He cannot go to a court where he can secure and must secure a majority one way or the other on his case. He must stop right there in the court of appeals when you have two judges on one side saying the judgment is wrong and two judges on the other saying it is right. Now I submit that is all wrong, that you will never be able to satisfy litigants by any such determination of their cases.

Mr. STILWELL: Are litigants ever satisfied?

Mr. JONES: Never entirely satisfied, but it is true that litigants all feel, whether defeated or not, and they ought to be made to feel if it is possible to do so, and in a great majority of cases they are made to feel, that they have had a fair trial. If you cannot make them feel that they have had a fair show in the determination of their rights, they will never have any confidence in the courts that determine them. However we may feel the sting of defeat at the time, we lawyers as well as litigants, all reflect after the excitement and feeling of the moment have passed away that probably the courts did the right thing after all; that while we were contending the judgment was wrong, yet here is a majority of the triers of our case who have taken a different view, and they may be right. Twelve men decided against us, and there is the trial court and here are three judges of the court of appeals that have all decided against us. Maybe, after all, I was wrong and they were right. That is the way the average litigant feels about it. The conditions ought to be made so that he can feel that way; but when you have a case submitted for trial to one judge of the common pleas court and then go up to the appellate court and one judge takes a stand along with the common pleas judge and two take a stand on the other side, you are not going to have a litigant satisfied with that sort of a determination of his rights.

Mr. PECK: What ought to be done?

Mr. JONES: I suggest that in that sentence beginning on the 28th line "in cases of public or great general interest the supreme court may," that you insert, "and in cases where the decision of the court of appeals is not unanimous, shall upon application of a party in interest" — that ends my insertion — "direct the court of appeals to certify its record," etc. That will entirely cure that objection and it will not interfere with the efficient and prompt disposition of cases, which was the main purpose and object of this proposal, because it will not burden the supreme court to such an extent but that it will be entirely able to take care of all the cases that will be brought to it by this additional amendment.

It has already been stated by the gentleman from Hamilton [Mr. WORTHINGTON], than whom no one in this Convention is in a better situation to know whereof he speaks, that the work of the supreme court under this proposed system will not be heavy at any time, that it will have plenty of time on its hands, that the amount of work it will have to do will probably not be one-fourth of what it now has, much less than that I understand. It will therefore have abundant opportunity to dispose of all those cases in which the judgment of the court of appeals is not unanimous.

There is another reason why that ought to be so. As I said in opening, the temper of the people of Ohio is such that they will not be satisfied with the judgment of one man on their case, no matter who he is, no matter how wise or how honest or how conscientious he may be; the average man will not be satisfied with the judgment of one man upon his case. What have you in the present provision with reference to the supreme court and what is its purpose? The purpose is to meet the demand to which I refer. In our present system we have the court divided into two divisions of three judges each, but you must have three judges to try each case. Two judges cannot try a case; and, more than that, you demand the unanimous judgment in all cases of at least three members of that court of six. Why do the people want the judgment in the last instance of three judges upon their cases? Simply for the reason I have mentioned, that their disposition and temper is not to be satisfied with the judgment of one or two men, no matter how good. That reason has led us, and nobody is objecting to that, to adopt our present rules with reference to the supreme court. Does anyone want to change the present rule with reference to the supreme court providing that two judges of the supreme court may not determine their rights? Does anyone want to abolish that provision?

Now whenever the three judges sitting in one division of the supreme court cannot agree upon a case, what do they do? They refer it to the whole court and then the majority determine. The three in that kind of a case cannot determine it. It takes a majority of the whole court of six judges.

Mr. SHAFFER: In view of your objection that adds quite a large class of cases that will go to the supreme court, how do you take care of the provision in line 63 that no judgment of an inferior court shall be reversed except by the concurrence of all the judges of the court of appeals sitting in the case?

Mr. JONES: I would eliminate that.

Mr. SHAFFER: What about the provision in lines 28 and 29?

Mr. JONES: I would put the provision in lines 28 and 29 which I have mentioned.

Mr. PECK: I don't see any reason to object to that.

Mr. SHAFFER: That means the elimination of lines 63, 64 and 65.

Mr. JONES: In line 63, commencing with "no judgment of the court of common pleas shall be reversed except by the concurrence of all the judges sitting in the case," I would strike out.

Mr. ANDERSON: If I understand your amendment it means if the three judges now of the circuit court do not agree — if all do not agree — that case

shall go up to the supreme court for decision. Is that true?

Mr. JONES: Yes. In other words, I do not think we ought to change what we have now with reference to the final disposition of cases by the court of last resort. Now we are entitled to have and receive the concurrent judgment of three judges of the court of last resort in the disposition of any case, and I think that is a valuable provision and that we ought to retain it, because we are not making this change for any other purpose than to relieve the supreme court and secure a more prompt disposition of the business in that court. That being so, there is no reason why you should change the rule that upon a decision by the court of last resort the party should be entitled to the concurring judgment of at least three judges.

Mr. ANDERSON: You understand the object of the committee in recommending this, that it was to permit litigants to find out quickly whether they had a lawsuit or not — if they had a lawsuit they would get their money and if not they wouldn't? Would not the amendment that you suggest defeat that, and would not this result occur under your amendment, that you would take more cases to the supreme court than now because your amendment would mean that you could take questions of fact to the supreme court, which you cannot now, if the circuit court disagreed?

Mr. JONES: No; I don't think that would follow at all.

Mr. ANDERSON: If the three judges stood two to one, under your amendment if they disagreed it would go to the supreme court?

Mr. JONES: Yes.

Mr. ANDERSON: You cannot take questions of fact to the supreme court?

Mr. JONES: No.

Mr. ANDERSON: Under your amendment you could.

Mr. JONES: It would not necessarily follow that you would take questions of fact to the supreme court.

Mr. ANDERSON: You use the word "shall".

Mr. JONES: Yes; but it is easy to provide, if it is desired so to do, that the case when it shall go to the supreme court should not burden that court with the determination of controverted questions of fact.

Mr. WORTHINGTON: You will recollect that a provision similar to that was in the federal statutes for many years applying to the circuit court of appeals, by which when the circuit and district judges differed it had to go to the supreme court?

Mr. JONES: Yes.

Mr. WORTHINGTON: Don't it result in practically the judges disagreeing whenever the lawyers want to carry it up?

Mr. JONES: I don't believe so. I don't think the opinion of judges would depend upon the wishes of the attorneys and we all know that there is a small per cent of cases now in the circuit court in which the circuit court disagrees, probably not one in twenty. I know in our own circuit, in twenty odd years that we have had the circuit court, there has not been one case in twenty where the circuit court disagreed.

Mr. SHAFFER: It has been said that perhaps that provision would have a tendency to make the court of appeals in a certain class of cases shift the responsibility of deciding the case and that there would be more cases where there would not be unanimity than there are now?

Mr. JONES: There might be some force in that suggestion. I can see how there might be some, but should that outweigh the other considerations in favor of the proposition, simply because the court might in a class of cases do what in many cases it ought to do where the court of appeals was in doubt as to the judgment it should render? I submit it would be entirely proper to certify to the supreme court in this kind of cases and the provision Judge Worthington introduced tends to meet that situation. Whenever the court of appeals might be in doubt as to the judgment it should render it should have a right to call on the supreme court for its instruction. Now where they are so much in doubt that they cannot agree and one is one way and two the other, there is all the more reason why you should have the judgment of the supreme court upon the question.

Now there is another matter, and I am not sure but what this is covered in a large measure by Judge Worthington's substitute. "And in cases where the judgment of the court of appeals is in conflict upon the same question with any other court of appeals of the state" — it might be well to insert, "The supreme court may within the time prescribed by law, require the records in the cases in which the questions arise, to be certified to it.

Mr. PECK: Do you think you could reach both cases? One might have occurred several years before.

Mr. JONES: There might be a conflict in which one case had been decided so far back that it could not get the benefit of the law as announced by the supreme court.

Mr. PECK: Why not bring up the last one?

Mr. JONES: It may be that an intelligent determination by the reviewing court would necessarily require it to have before it both cases.

Mr. PECK: It would not have to have the petition in the first case.

Mr. JONES: It might have to have the record in the first case to render an intelligent decision on the question of conflict, and it might be better not to undertake to have the supreme court determine the matter of conflict unless the situation was such that it could have both cases in which the conflict had arisen.

Mr. PECK: It never occurred to me that way. The original provision was that they should certify the record of the last case and not have the first case except as to the law of the first case.

Mr. JONES: Even the law in one case depends on the particular facts and we can never satisfactorily determine what is the real law the court has laid down unless we have the whole of the facts of that particular case before it.

Mr. PECK: I do not see how that rule would be workable.

Mr. JONES: I concede there are some objections to it and I merely make it as a suggestion.

Mr. KNIGHT: I move that the consideration of the pending proposal be suspended until 3:26 o'clock p. m.

The motion was carried.

Mr. KNIGHT: I ask unanimous consent to introduce a proposal.

By unanimous consent the following proposal was introduced and read the first time:

Proposal No. 329—Mr. Knight. To submit an amendment to article VI, section 3, of the constitution.—Relative to organization of the boards of education in school districts.

Consideration of Proposal No. 184 was resumed.

The delegate from Richland county was recognized.

Mr. KRAMER: I think I can say all I have to say on this proposition in a quarter of an hour or, if not, in twenty minutes. I do not think from the appearance of things that there is very much of value being gained from the discussion and I do not know that I should say anything at all were it not for the fact that I stand here not representing alone myself but representing the members of the bar of Richland county, and I have a duty to perform not only to myself and to the Convention but to those attorneys of Richland county whom I might be said to represent more particularly in the consideration of this proposal.

I can say in the beginning that there is not an attorney at the Richland county bar who is in favor of this proposal — that is, so far as they have been able to express their opinion in the meeting of the bar association. They called a meeting of the attorneys of Richland county especially to consider this proposal and without any dissenting voice they adopted a resolution instructing me to vote against the proposition. And I am here in hearty accord with their resolution. I cannot say like the member from Scioto that I have been acquainted with Judge Peck since 1861, and therefore have great respect for his opinion, but I can say that I have been acquainted with him long enough to have great respect for his opinion and also great respect for the opinion of the committee, and I cannot for the life of me see how that committee or Judge Peck of Hamilton county arrived at the conclusion that this proposal is a solution of the difficulties which confront our courts and which confront the people of the state of Ohio. I want simply to note one or two features which are especially objectionable to the bar of Richland county, and which it seems to me ought to be apparent to any man, whether a layman or attorney.

You will notice in this proposal there are two kinds of jurisdiction. I was a school teacher for a long time and I am going to consider that there are a good many laymen who would be in the first reader on this proposition, and I want to explain a few things a little more particularly than I would if we were all attorneys.

There are two kinds of jurisdiction, original and appellate jurisdiction. Original jurisdiction includes those cases which you can begin immediately in a court, for instance in the supreme court. Appellate jurisdiction embodies those cases which must come up from another court and find their way into the supreme court. I would like to ask your attention just for a minute to see what jurisdiction is conferred upon our supreme court in this proposal. The only original jurisdiction conferred upon the supreme court is jurisdiction in cases of mandamus, habeas corpus, quo warranto and procedendo and if the suggestion of the gentleman from Hamilton county [Mr. WORTHINGTON] is adopted, prohibition. This is the only original jurisdiction that the supreme court of Ohio would have under this proposal.

Mr. PECK: That is copied from the present constitution.

Mr. KRAMER: Yes; that is just the same as the present constitution. Now I want to call the special attention of the laymen in this Convention to the fact that the original jurisdiction of the supreme court in those cases amounts to almost nothing, because there is no attorney who will come from Richland county or Holmes county of Wyandot county to the supreme court at Columbus, Ohio, in order to get any one of those writs, because the courts of common pleas as well as the court of appeals under this proposal have the same jurisdiction as the supreme court, and hence, when an attorney wants one of those writs, universally he goes to the court of common pleas because the court of common pleas is always in session in his own county and he need not appeal to the supreme court to get relief on any one of those different propositions that have been mentioned. It is not necessary to explain what the different writs mean. They are all remedies that are rare and some of them so rare that an attorney doesn't know what they are unless he looks them up every year. Take procedendo; there is not one attorney in fifty knows what procedendo means unless he looks it up, and just the same with the writ of prohibition. They are rarely used and when we do want to use them we go to the court of common pleas instead of to the circuit court or the supreme court.

Mr. PECK: In quo warranto you have to go to the circuit court.

Mr. KRAMER: You may have to go to the circuit court. That is when we want to find out whether the lower court had a right to do something —

Mr. PECK: Is not that the most used?

Mr. KRAMER: Yes; I would think that was more frequently used than any of the other writs. Now I will call your attention to the appellate jurisdiction of the supreme court. You will notice in this proposition that the supreme court has appellate jurisdiction in these same matters provided they were begun in the court of appeals. I call your attention again to the fact that the attorneys rarely go to the court of appeals or to the circuit court for these remedies, because they can get them in the common pleas court. Hence, the appellate jurisdiction of the supreme court would be very limited in reference to those five different writs which I have mentioned. It is rarely that the supreme court would have to exercise appellate jurisdiction in reference to those matters. Now what other jurisdiction has the supreme court? The supreme court has appellate jurisdiction in constitutional matters and it has appellate jurisdiction in questions that arise in reference to capital punishment or life imprisonment. Those cases are rare. Of course the constitutional questions might arise oftener than the others, but those cases are comparatively rare. What do we find then? We find that the supreme court —

The VICE PRESIDENT: There are only ten living members of the third constitutional convention of Ohio. One of those, Judge McCauley, of Seneca county, is in the hall. I am sure the Convention would be glad to have a few words from him.

Mr. McCAULEY: Gentlemen of the Convention: I did not have the faintest idea of coming in here to say anything. I just came in to look on a little bit. Really, the only part of your duties in which I am interested is that pertaining to the formation of a judicial system and upon that I have very decided opinions, and while I had not expected to say anything, if you will allow me a minute or two I will address myself briefly to that, and after that you can do with it, of course, as you please.

I think one thing that should be done is to reduce the supreme court from a court of six to a court of five, or increase it to a court of seven, one or the other, and I would reduce it to five. I would leave the probate court alone. I would not touch that. I would leave the circuit court alone. I would not touch that. I would reduce the supreme court to five judges and I would liberalize the provision that authorizes the governor to appoint a supreme court commission when one is needed. They have been running two supreme courts in the last few years with three judges on each one. It has really reduced the court to two courts of three each. Now the system I heard the gentleman talking about and the jurisdiction the gentleman proposed ought not to be adopted, in my opinion. That is a mistake and the effect will be to destroy the supreme court. You will put an appellate court in the state in place of the present supreme court, and that appellate court will have nearly all the jurisdiction the supreme court now has, as I understand the proposition. The result of that will be that they will work all right in Cincinnati, Dayton, Toledo and Cleveland, but in some of the smaller counties it will be a bad thing when a case comes to be reviewed and considered by the supreme court or in the appellate court. They won't have time to properly consider it. That is what a supreme court ought to do and that is what it generally does. If you adopt that kind of a court in the smaller counties there will be trouble. In the large cities they can sit all the time and they can have access to extensive libraries, but in the smaller counties they can not, and the courts in the smaller counties would not have the facilities for disposing of cases that the same court would have in Cincinnati, Cleveland or Columbus, where there are libraries. I think that court is all wrong and I would leave the circuit court just as it is. I would much prefer five on the supreme court and liberalize the provision that authorizes the governor to appoint a supreme court commission, and that ought not to be done unless the court gets further behind with its docket than it has been for some time. The supreme court ought not to be too fast on the cases. Cases ought to be a year in the supreme court. I think any of the judges of the supreme court will tell you that. They ought not to be rushed through. The provision you have, as I understand it, limits the jurisdiction of the supreme court to habeas corpus and procedendo and doesn't amount to anything. There is not a lawyer here that ever knew of a case of procedendo. There is no such a thing in Ohio. That is common law. In England that is a writ and it was in Ohio under the first constitution, but it does not exist now. There is nothing of that. Then how often do you suppose the supreme court has had a case involving habeas corpus before it? Not a case in a year. The last case I remember in the supreme court of that kind was years ago under the fugitive slave law. I do not believe they have had one since. Then you have the supreme court jurisdiction limited to procedendo, habeas corpus and cases involving life or life imprisonment. That is all right. That court has always had that and ought to have it. Leave the supreme court alone and take away one of the judges.

I don't think the system proposed here is a good one. I have had to do with courts for half a century and I was in the convention of 1874 and there was quite a sentiment in the smaller counties to do away with the probate court, but that ought not to be done. Some of the counties in the state do not elect lawyers as judge of the probate court. I know counties where they never had them, but no man ought to be elected who has not a legal education, even in the smaller counties, because occasionally serious questions arise. I would leave that court alone. Of course you won't think of touching the common pleas court and you ought not to think of touching the circuit court. That includes all the ideas that occur to me with reference to this matter. I hope the Convention will not spoil the judicial system by a series of changes when there is no need at all for them. The judicial system of the state is a good one. Some minor changes should be made and that is all.

Mr. ANDERSON: Will the gentleman permit a question? There is a matter in which we are all interested. I remember that you submitted four things as separate amendments to the constitution and then you submitted a constitution as a new constitution. Do you attribute the large vote against the adoption or ratification of the constitution to submitting those separate amendments, or how would you advise submission by us, separately or in what manner?

Mr. McCAULEY: I do not know that I can answer you very definitely on that. I remember this partly as a fact and partly from history and partly something else. The democrats of the state for a few years after the war had to stand out in the cold a good deal of the time. The republicans had the offices. I remember that the Cincinnati Enquirer said, "Let us have a system brought into existence that the minority can represent somebody for the purpose of getting some democrats into office." I am a democrat myself and always have been. The Enquirer said, "Let us have a system by which some democrats can get in. Let us join hands and kill this constitution." And they did it. We submitted some proposition of railroad aid. Now nobody in this Convention would ever think of railroad aid, but Thomas Ewing, the member from Lancaster, was prominent in that convention and he had some railroads that he wanted built, and we submitted railroad aid and minority representation, and I think those separate submissions beat the constitution. The constitution as a whole, outside of the separate submissions, was a very good one. Minority representation was a humbug. It was not known to be a humbug thirty-eight years ago, but it is now. I believe they have it in Colorado yet. I have not heard any proposition from this Convention to elect anybody by a minority. I think they have it in Illinois too. I saw one of the Chicago papers denouncing it the other day as one of the nuisances in the country, but I think separate submissions are weakening and I am inclined to think that is what beat that constitution. I think if it

had been submitted on its merits with those things cut out it would have been adopted.

Mr. STEVENS: There is another question upon which I would like to hear from the Judge. Does he remember whether during the sessions of the constitutional convention of which he was a member there was any pronounced sentiment among the people as to the adoption or rejection of the then making constitution?

Mr. McCAULEY: My recollection about it is that there was none in the state. I never heard of any objection to it at all. The first thing that I remember in reference to it was the proposal of the Cincinnati Enquirer that we join hands all around and beat it, and they did. Before that I never heard any objection to it, and you will have to be careful too.

Mr. KRAMER: If I had a manuscript I would say that the Judge got hold of it and read it, because what he said is just about what I had in mind, and hence I can say it more briefly than if he had not spoken.

You will remember I said in the beginning that the original jurisdiction of the supreme court under this proposal amounts to almost nothing, and that the appellate jurisdiction under this proposal also amounts to a little more than nothing. Here we have the supreme court surrounded by magnificent libraries, by everything that is necessary to enable a court to give mature consideration to any question coming before it, and the court has scarcely any jurisdiction. They have nothing to do. The supreme court is the court that ought to have an abundance to do, so that the final law of our state may be respected by all the lower courts and the courts of other states too. That is one of the main objections I have, and the bar of Richland county has, to the proposal. It almost robs the supreme court of all jurisdiction, both appellate and original.

Now let us take the appellate court being established by this proposition. We will have eight appellate courts and possibly nine, every one exercising final jurisdiction in almost all kinds of cases. We will have eight or nine courts of final jurisdiction, eight supreme courts in the state of Ohio, all of them giving to us finally the law of the state and every one of those decisions will have to be published in reports.

Mr. ANDERSON: Would you not be willing that the law should be finally decided in your circuit by such men as Judge King and Judge Taggart and Judge Norris, who are men who have sat on the circuit court bench? And I don't say this as a compliment to them, but as a fact—do you think we could get any better judges than that kind of men?

Mr. KRAMER: I think not. I will say as to Judge Taggart—I can not say as to the other two gentlemen, but from all appearances they are on a par with Judge Taggart—and I will say for Judge Taggart I would as soon risk a decision he would render as any supreme judge who ever sat on a bench, provided that he had the same opportunity to arrive at a just conclusion in the matter; but I will say for any judge, when he has no library, when he is compelled to run off twelve or thirteen decisions per week, no judge living can render those decisions in a manner in which they ought to be rendered and I don't care whether it is Judge Taggart, or Judge Norris or Judge King or Judge McCauley. Now here is another thing I object to. Just so sure as this proposal is adopted there will be but one place in a district where courts will be held. It can not be otherwise, and it will build up a great library in that place if the appellate courts are given an opportunity to render just and fair decisions. There will have to be a large library for the attorneys. When the attorneys come to Columbus to argue a question we find the reports from every state in the Union and almost all nations of the earth, and it makes no difference what kind of information we want we find it in the supreme court library. Suppose we were compelled to go to Mt. Gilead, where possibly they have not one hundred volumes, or to Mt. Vernon, where possibly they have not five hundred volumes. We could not argue cases intelligently nor honestly and neither could the appellate court render decisions intelligently, because they would not have the books or authorities to consult. And hence, instead of building up one great, strong library like we have, upon which the supreme court of the state of Ohio can render well-considered opinions, we would be compelled to build up nine great massive libraries in order that the appellate court may render decisions honestly and conscientiously.

Mr. KNIGHT: I understood the gentleman three or four minutes ago to speak about courts deciding thirteen to fifteen cases a week. Are you not aware that the average number of cases decided by all the circuit courts per week is only about seventeen, which makes about two hundred for each circuit. According to the gentleman's figures it is eight hundred or a thousand and he has it about five times too large.

Mr. KRAMER: I have not the figures, but I can talk from experience as far as Richland county is concerned, and Judge Taggart will bear out the statement that they rush into Richland county on Tuesday and hike out on Friday and have stored away in their minds from nine to thirteen cases, unless they have delivered themselves of those some time during the week. How do they do that? They will hear cases during the day, and at night they will burn oil and arrive at a conclusion as to what is the law in a case without a law library. We have a fair law library in Mansfield, but in most of the counties they have no law libraries and what good will a law library do, when they have not the time in which to make a just and conscientious decision?

Mr. ANDERSON Is it your idea that the circuit court is practically worthless because of the great amount of work?

Mr. KRAMER: No.

Mr. ANDERSON: Don't you think something ought to be done to make it a better court or do away with it?

Mr. KRAMER: I don't think you can do away with it, but you can not make it better by giving it more duties than it has now.

Mr. ANDERSON: Is not this true, that by reason of the fact that the cases do not stop there it hardly amounts to more than a sieve; that it doesn't filter anything and that it all goes on to the supreme court and the court is not of the dignity that it ought to be?

Mr. KRAMER: I don't say that it has too little dignity. Further, it sifts out a good many cases, especially in Richland county.

Mr. HOSKINS: May I ask Mr. Anderson a question? It is on that subject of a sieve.

Mr. ANDERSON: I have seen that. I can answer

myself that eighty per cent. of those cases are of minor importance, and in Cincinnati and Cleveland and Youngstown there is hardly an important case stopped, especially where there is an individual on one side and a corporation on another. They all go up and I am prepared to prove that.

Mr. HOSKINS: Is it not a fact that the demand for this change comes from the large cities like those you have mentioned?

Mr. ANDERSON: Yes, and the opposition comes from places where the lawyers want the extra fees from the farmer for taking cases to the circuit court.

The VICE PRESIDENT: The member from Richland county has the floor.

Mr. HOSKINS: I want to rise to a question of personal privilege.

The VICE PRESIDENT: What is it?

Mr. HOSKINS: The member from Mahoning [Mr. ANDERSON] has no right to say the opposition comes from any source or is influenced by any such motives as that.

Mr. ANDERSON: I was not referring to you, but I have the same right to assume that the opposition comes from that source as you have a right to assume that the other side comes from the large cities.

The VICE PRESIDENT: This is all out of order. The member from Richland has the floor.

Mr. KRAMER: It didn't bother me, only I promised to get through in ten or fifteen minutes and I won't do it.

Now I think the member from Auglaize [Mr. HOSKINS] didn't come far from hitting the mark, but I did not intend to suggest that. I think that the member from Mahoning widely missed the mark when he imputed to me —

Mr. ANDERSON: I didn't mean you.

Mr. KRAMER: I will take it in good grace — when he imputed to me the reason why I oppose this proposal is that I may get bigger attorney fees because of protracted litigation. That never came into my mind, although like other lawyers I don't object to the attorney fees when they come honestly. But that didn't enter my mind at all. Now I have suggested that you can not make the circuit court better by loading it down with a whole lot of work. I want to suggest, as Judge McCauley did, that if I were in Cincinnati, Cleveland or Youngstown, or even in Toledo or Columbus, I think I would be in favor of this proposition. Why? It would bring a supreme court right to my door. Don't you see it would bring a supreme court right into my town and the decisions would be rendered there finally? Don't you see how nice it would be? And if I don't mistake it very much a great amount of argument in favor of this proposal — and I am not impugning any one's motives — does come from those who live in these large centers of population.

Mr. KNIGHT: Explain to us what there is in this proposition that adds large burdens to the circuit court over what it has now? What cases go into the circuit court under this that do not go there now? Is it not true that a large majority stop there? Are there any cases that can go there under this proposal that can not go there now?

Mr. KRAMER: There will not be any more cases go to the circuit court under this proposal than under the present condition, but there is no circuit court judge who wants his findings to go into a record as final adjudications of an appellate court with no more consideration than I think is given to the cases now.

Mr. KNIGHT: Then the gentleman admits that under the present system the circuit court does not give the consideration to the cases that should be given them?

Mr. KRAMER: I don't want to say that.

Mr. KNIGHT: You have to take one side or the other.

Mr. KRAMER: Yes; I say they are given all the consideration they can possibly give. I am not saying a word against the circuit court. They are doing the best they can possibly do, but you can not make them do better by saddling a whole lot of responsibility upon them and making them every one an appellate court with final jurisdiction without any library and without any chance to render decisions that express the fair ability and intelligence of the court. You can not make them better by that means. Where you ought to stop the case is in the common pleas court and not allow every fool case to go from the common pleas to the circuit court. A case involving eight or ten dollars in the common pleas court can go to the circuit court. There is where we ought to make the change and not cut off the jurisdiction of the supreme court of Ohio, but cut off some of the jurisdiction of the supreme court of Ohio and also cut off some of the jurisdiction of the circuit court and not allow cases under $100 or $200 to find their way into the circuit court and take up the valuable time of that court.

Mr. KNIGHT: Then why don't you put in an amendment to that effect if you want to relieve the circuit court of a whole lot of unnecessary work? That would relieve them; don't you think it would help out?

Mr. KRAMER: Yes, but I am not an amendment maker. I think you have noticed that.

Mr. TANNEHILL: Why not put in your amendment and cut out those smaller cases and take away all of that jurisdiction from the circuit court?

Mr. KRAMER: I like the circuit court and I do not like to see the circuit courts done away with. They are the people's courts, but I believe their jurisdiction ought to be cut down rather than increased.

Mr. ANDERSON: If it is the people's court ought it not be made a better court so as to properly consider questions? And did you not admit that if they had final jurisdiction they would do better work, and therefore ought they not do it on account of the people?

Mr. KRAMER: I say you can not make them do any more than they can do. They are doing everything that is possible to be done now, and to add a whole lot of responsibilities won't improve things, because in the end they can not accomplish any more. Now I want to refer to one more question, one I hardly like to mention.

Those of you who are attorneys know that the final law of the state of Ohio is not in very good repute. I am sorry when I go through any digest, the American and English Encyclopedia of Law or the Encyclopedia of Law and Procedure and run over decisions to prove or disprove any legal proposition, one will find a dozen cases in Illinois, Pennsylvania and Michigan, and will find West Virginia cases, but rarely ever a case from

Ohio. I never shall forget the statement of one of the finest men with whom it was ever my pleasure to associate, Judge Hunter, who was the dean of the law college of Ohio State University. He was talking to me one day and he said, with tears in his eyes: "I am ashamed when I am compelled to look over a digest or an encyclopedia and find that the little state of West Virginia eclipses the state of Ohio when it comes to the standing of their decisions in courts of the land."

I never shall forget that statement. I think of it every time I look for an authority and find that his statement is borne out.

Now here is the point: What standing do you suppose the decisions of Ohio will have in the courts of the land if we are going to have nine supreme courts finally passing on the law? What respect will any court in the land have for judgments or opinions rendered by nine supreme courts in one state? Why, they can not have any respect. What we want to do is to arrive at a remedy in some other way than by the proposition submitted to this Convention for consideration. Nine courts will never be able to solve the difficulty.

Another thing, there will be nine sets of supreme court reports. Lawyers here and lawyers elsewhere who desire to consider the opinions of the state of Ohio will be compelled to buy the reports of nine supreme courts in Ohio.

Now I feel that I have done my duty to myself and I have tried to do my duty to the bar of Richland county. I have brought before you some of the vital objections they have raised to this proposition, and when I say the bar of Richland county I want to call your attention to the fact that we have in Mansfield some of the ablest attorneys in the state of Ohio. Take the Honorable W. S. Kerr. There is not a finer legal mind in the state of Ohio than his. He said at the meeting that he could see nothing but holes in the proposition, and while you have remedied a few of them they are there still to a great extent. We have other talent of almost the legal standing of the Hon. W. S. Kerr, and all of those attorneys were unanimous that this proposal is not a proposal that should be adopted. I simply mention this fact for fear this thing is going to be rushed through without consideration, because I know that the laymen in the Convention can not understand it as they should, and I do not know that the attorneys are paying the attention to it that they ought to pay to it. It seems to me when the member from Fayette [Mr. JONES] spoke there were only about thirty members in their seats, laymen and all. I didn't count them, but just say there were twice that many — say there were sixty, and what are sixty out of one hundred and nineteen men? Every one ought to be here listening and trying to do the best he can on this proposition.

I tell you, gentlemen from the rural districts, if you will go home and explain this proposition to your bar and ask them what they think of it you will get some pretty valuable information in reference to the adoption of this proposal.

Mr. BOWDLE: Mr. President and Gentlemen of the Convention: I expect to support with my vote the Peck judiciary proposal, now approved by the Judiciary committee, after protracted consideration.

Of course this does not mean that its form may not be improved at points, pursuant to the suggestions and criticisms of Judge Worthington. Such corrections the committee I am sure will welcome. I approve also of some of the suggestions of Mr. Jones.

One can be so close to Pike's Peak that he cannot see it. A ten-mile perspective is required on that peak. So with us. We have been so close to this proposal that its form may not at points have duly impressed us, and hence Judge Worthington on the floor, enjoying a perspective, may have perceived some important errors in form.

I am especially gratified with the provision which requires unanimity of the judges of the supreme court before a legislative act can be declared unconstitutional or void.

Personally I stand ready to vote for any proposal that takes away altogether such power from the courts, but I fear this would appear as too radical, so I support, with much satisfaction, this plan. And that committee is to be congratulated on the fact that this plan, as new as it is, received the warm support of Judges Dwyer and Peck, men of ripe experience and wide observation, whose long judicial service, were they ordinary men, would now find them victims of the petrified mind, which is the common disease of so many in American life today.

I am gratified, I say, with this provision, and for two the three potent reasons:

1. The assumption by the courts of power to override the legislative branch of the government was a usurpation of power, taking its rise in 1883, when the United States supreme court decided a case of Marbury vs. Madison.

2. This usurpation of power has now extended itself into all the courts of the land, so that today one judge of a court of common pleas in Ohio may override the house of representatives, the senate and the governor, whose jointly made law is declared by that one judge to be unconstitutional. This action, or this assumption of power, has extended itself, as it was bound to extend itself, to all the courts, and the common people of this country have been greatly scandalized thereby.

3. To measurably withdraw this power from the courts will protect the courts from much criticism, and will go a long way toward allaying the present popular dissatisfaction and unrest.

This provision, though new, aids and protects the court. Its protection to the people is always obvious, for it insures them against the undoing of the legislative work of their duly chosen representatives.

If it be urged that the legislature and the legislative act may be corrupt, it may be said in reply that the people may get rid of one and thus change the other. But when a court assumes power to destroy the act of the legislature because of some construction of the constitution, of which it regards itself the peculiar guardian, the people have no way of getting rid of either the court or the decision — this side of a constitutional convention. A crooked legislature may be recalled, but a narrow-viewed court leaves us with no remedy.

Judge Worthington has said, and truly said, that a search of the law books will reveal the fact that but few legislative acts have been disturbed by our courts. This is true in point of quantity. It is the overthrow of

some of the most desirable legislative acts that has caused much of our unrest today.

Take the income tax case. The score in that case was five to four, and of course the decision was against the home team by a majority of our judicial umpires. This single decision caused a vast amount of hostile criticism from the bleachers occupied by the common people, and many respectable persons in the grandstand were highly scandalized.

What a protection to the court itself would have been such a provision as that under consideration!

Take the case of Downes vs. Bidwell, decided in 1901, by the United States supreme court, commonly known as the "Insular case." Now that case was known in the street as "does-the-constitution-follow-the-flag case." It involved the island of Porto Rico and its status as an alleged part of the American Union.

Had you or I in 1900 asked any person over eighteen years of age this question, "My friend, in your opinion would the constitution of the United States be operative in Porto Rico should the United States acquire Porto Rico?" What answer would he have made? Why he, and the whole nation, would have answered in concert, "Why, it is simply unthinkable that this free country could own territory to which its constitution would not immediately apply." But in view of what the court decided such an opinion would have been utterly erroneous.

Briefly, the court said that the constitution did not follow the flag. Justice Brown, in deciding the case, said, "The Island of Porto Rico is not a part of the United States within that provision of the constitution which declares 'that all duties, imposts and excises shall be uniform throughout the United States.'"

In that case Justices Fuller, Harlan, Brewer and Peckham dissented vigorously.

Again the score stood five to four against the home team, and again a wave of protest went up from the common people occupying the bleachers in the game of life.

Mr. WATSON: Is it not a fact that the court first decided one way and then Judge Shiras, on rehearing, changed over, and thus those occupying the bleachers in American life lost out?

Mr. BOWDLE: The excitement among those persons called "Huns and Vandals" was simply terrific. Some vulgar persons actually suggested that the Sugar Trust was influential in securing this decision from our judicial umpires, but this of course is simply unthinkable, at least by those who occupy the private boxes at the national game of life.

Mr. KNIGHT: Does the gentleman think the game of baseball would be more aggressive if it didn't have an umpire and every play were decided from the bleachers?

Mr. BOWDLE: No; we must have an umpire, but since ninety-nine per cent. of the people of life occupy the bleachers morning, noon and night, and are engaged incessantly with the bread and butter problem, it seems to me we should listen very intently to what the bleachers have to say, especially when the score is uniformly five to four against the home team.

Mr. LAMPSON: Don't you think the decision ought to be in favor of the home team right or wrong?

Mr. BOWDLE: No, I do not think so.

Mr. TETLOW Don't you think if the bleachers stayed away from the game the umpire would soon lose his job?

Mr. BOWDLE: I am sure the umpires are entirely dependent for employment on the bleachers, and the bleachers are very much complimented when the umpires are engaged in getting their employment.

It does not require many such cases to greatly excite an entire nation. These cases were of deep interest to the whole people.

It would burden this argument on this point — and I do not attempt to cover other points — to cite the large number of cases of interest to more or less large groups of men whose mutterings over decisions occupied their own journals of limited circulation. The thing itself is a very great evil.

A withdrawal of all such power from the courts would be precisely within the letter of both the state and national constitutions. Article II of our constitution provides that "the legislative power in this state shall be vested in a general assembly." Under the power assumed by our supreme court to declare invalid any legislation that does not square with its view of the constitution the legislative power is not so vested. The article should read, "The legislative power in this state shall be vested in a general assembly, subject to a veto power in the supreme court."

In article I of the federal constitution it is provided that "all legislative powers herein granted shall be vested in a congress of the United States." This is not so under the power assumed by the supreme court in the aforesaid case of Marbury vs. Madison. The article should read, "All legislative powers herein granted shall be vested in a congress of the United States, subject to a veto power in the supreme court." It is thus evident that this assumed power to invalidate legislation involves writing something into the constitution.

Therefore, gentlemen, instead of being scandalized by this new scheme of things suggested by the committee, I approve of it heartily. I believe that it is in the best interest of the courts themselves. I believe it would be an immense protection to them from much of the hostile criticism that is now being heaped upon them and upon the administration of justice which is in their custody, and I believe it would go a very long way toward allaying the unrest of the American people, which is now a very menacing thing. Indeed, gentlemen, I tremble when I reflect that the most serious fact of modern times is that the plain people of the United States seem to have lost confidence in the last bulwark of our liberty, which is the courts of this land. I believe, therefore, that the proposal of Judge Peck, which has now been accepted by the committee, is a reasonable and just proposal and one that should meet the approval of the Convention.

Mr. ANDERSON: I move that the proposal be printed as it would appear if this amendment were agreed to.

The motion was carried.

Mr. MILLER, of Crawford: Under the rule is not the next meeting Friday?

Mr. KNIGHT: Yes, but I propose to follow this with a motion to adjourn until Monday night, and I now move that further consideration of Proposal No. 184 be

postponed until tomorrow and that it retain its place at the head of the calendar.

The motion was carried.

Mr. KNIGHT: I now move to adjourn until Monday evening at seven o'clock.

Mr. PECK: I move that we recess until Monday at seven.

Mr. KNIGHT: That would defeat the object of this.

The PRESIDENT: The motion to adjourn has precedence over the motion to recess.

Mr. FESS: May I ask of the member from Franklin [Mr. KNIGHT] if we have the assurance we will not occupy more than a short time Monday night on the other matters?

Mr. KNIGHT: We have no absolute assurance.

Mr. FESS: I fear that it will take all of Monday night.

Mr. PECK: We have decided that we will vote on this proposition on Tuesday afternoon and we will want to have a long discussion Monday night. I am opposed to the adjournment.

The motion to adjourn was lost.

Mr. PECK: I now move that the Convention take a recess until Monday evening at seven o'clock.

Mr. KNIGHT: Then it is necessary to reconsider the motion just passed, that the consideration of the matter be postponed until that time.

Mr. PECK: Then I move that we reconsider that vote.

The motion was carried.

Mr. PECK: Now I move that we recess until seven o'clock Monday evening.

The PRESIDENT: The motion before the Convention is the motion of the member from Franklin [Mr. KNIGHT] that further consideration be postponed until tomorrow.

Mr. WORTHINGTON: I move that further consideration of this proposal be postponed until Monday night at eight o'clock.

Mr. ANDERSON: Then if this motion is carried this matter will be resumed at eight o'clock?

The PRESIDENT Yes.

The amendment was carried.

The PRESIDENT: The question now is on the motion of the member from Franklin [Mr. KNIGHT] as amended by the motion of the gentleman from Hamilton [Mr. WORTHINGTON].

Mr. FESS: We have not fixed eight o'clock Monday night to take this matter up. Suppose we are discussing something at eight o'clock. All we can do is to rise and call up that special order and when that discussion is over we will resume this work, but the other discussion may take all night.

Mr. STILWELL: That doesn't help the situation at all.

Mr. LAMPSON: Having fixed the time for voting on Tuesday we need all the time to debate this proposition that we can have.

Mr. KNIGHT: There are certain urgent matters that will take about fifteen minutes.

Mr. LAMPSON: Why not allow them to take fifteen minutes. Nobody will object to their taking ten or fifteen minutes and we want to preserve the right of way of this pending proposal.

Mr. KNIGHT: I have no intention of shutting off or limiting time. I am in favor of the pending proposition, but there are some business matters that must be attended to.

The PRESIDENT: The president does not wish to take part in the discussion, but some members appear to have voted without understanding.

Mr. PECK: I don't understand the situation.

Mr. LAMPSON: I call for a rising vote on the motion.

The PRESIDENT: The question is on the adoption of the motion offered by the member from Franklin [Mr. KNIGHT] as amended by the motion of the member from Hamilton [Mr. WORTHINGTON] and if this motion is carried we will be on the regular order of business Monday evening until we reach eight o'clock, and then, as stated, attention could be called to the regular order, but the other business would go on until finished. If that is not desired the remedy is to vote down this motion.

The motion was lost.

Leave of absence for the remainder of the week was granted to Messrs. Fackler, Harter, of Stark, and Norris.

Mr. PECK Now I move that we recess until seven o'clock Monday evening.

The motion was carried.