

FIFTIETH DAY

(LEGISLATIVE DAY OF APRIL 2)

MORNING SESSION.

WEDNESDAY, April 3, 1912.

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

Consideration of Proposal 51 was resumed.

Mr. HOSKINS: Mr. President and Gentlemen of the Convention: I feel that Proposal No. 51 did not have the attention and consideration of this Convention yesterday that it demands. And while it is not a proposal that is necessary to discuss for a great length of time, yet it is one to which we should pay attention when we are discussing it, and dispose of on its merits and not otherwise. It should not be disposed of on the idea that it is a small or inconsequential matter. This matter involves an expenditure of hundreds of thousands of dollars by the people of Ohio. There was no one from the committee heard. The author of the proposal was heard for a few minutes, but no one from the committee had a chance to be heard. The committee gave it careful consideration and investigated the situation more or less, and we feel that when the committee made a unanimous report on this proposal to the Convention it should receive favorable consideration from the Convention. The question has been raised whether or not the Convention should pay attention to the opinion of the attorney general. I want to say that in my judgment the opinion of the attorney general is correct on this matter, and that under the constitution of this state, as now written, public property can not be insured in a mutual fire insurance company or in a mutual association under the terms of article VIII, section 6. The reason it can not be insured in a mutual company or association is that there is a contingent liability attached to a policy of insurance in a mutual company or association. Somebody might say that is objectionable, but we must look at it in its practical operation to see whether or not it is objectionable. Section 6 of article VIII of the constitution was not written with any such situation as the present in view, and as a general proposition the section is all right, but since the constitution was written we have had the development of mutual insurance companies in the state of Ohio and by statute the liability of policy holders in mutual fire insurance companies is limited to not exceed five times the annual premium. To illustrate: If the annual premium is \$10, the ultimate liability could not be less than \$30 nor more than \$50 on any policy holder in that company.

Now it is a practical situation that confronts us. The old line companies will not insure country property or country school houses. That class of insurance has been taken care of largely by mutual companies and by one large foreign company. Even the Ohio Farmers Insurance Company is excluded from insuring public property in the state of Ohio because it is a mutual company. It has been said that the Convention ought, instead of providing a method for insuring in mutual companies, prohibit insurance of public property altogether. The

argument of Mr. Doty yesterday was more or less forcible on that proposition, but the answer is that the people of the state would not adopt that policy and the Convention has already answered it by tabling the amendment offered by the delegate from Cuyahoga [Mr. Doty]. It is ingrained in the people of the state that they want their property insured. It is almost universal. Now there is no reason why the large class of home insurance companies should be deprived of insuring this class of property. There is no reason why the public, in a school district or in a county or in a municipality, should be deprived of insuring its property in this kind of a company.

Mr. THOMAS: Have you knowledge as to the extent to which public property is insured in Ohio?

Mr. HOSKINS: I have no knowledge except in my own home district. I have no figures on that proposition, but I think almost without exception our public property in the county is insured. I know the county court house and different school houses and the public property without exception in our section of the state is insured. Now, an illustration: The Home Insurance Company of New York is the largest writer and practically the only writer of country property in Ohio among the foreign insurance companies, and the business outside of that is largely done by the mutual companies. Last year the Home Insurance Company of New York paid out in dividends, salaries of officers, etc., almost \$1,000,000. There were \$900,000 in dividends paid upon the stock of \$3,000,000, practically a thirty per cent dividend upon the stock of that company, largely derived from Ohio patrons. Now it is somewhat startling when you think about the amount of money paid out and that goes outside of the state of Ohio for insurance. The Home Insurance Company is the company writing country property largely, and it will write country public buildings. That company collected in Ohio last year \$632,325 of premiums from the people of Ohio — almost two-thirds of a million dollars was taken out of the state of Ohio for premiums to this one company.

Mr. DOTY: May I ask a question?

Mr. HOSKINS: In a minute.

Mr. DOTY: On that very point.

Mr. HOSKINS: Wait until I finish this point. The people of Ohio got back in losses paid \$293,000, or less than one-half or a little over one-third of the premiums that went out of the state of Ohio to this foreign insurance company came back. The balance went to pay the dividend of \$900,000 of the Home Insurance Company and was loaned back to the farmers and borrowers by this foreign insurance company.

Mr. DOTY: Do your figures show how much of this \$630,000 was premiums on public property in Ohio?

Mr. HOSKINS: No.

Mr. DOTY: It includes all the business they did in Ohio?

Mr. HOSKINS: Yes.

Mr. DOTY: You have no knowledge of how it was divided between public and private property?

Mr. HOSKINS: No.

Regulating Insurance.

Mr. DOTY: The chances are the public part was pretty small?

Mr. HOSKINS: The chances are it would not be a large percentage of that probably, but there is no reason why the power to insure public buildings should be kept from the mutual insurance companies. The mutual insurance business has grown enormously in Ohio, and the operation of the mutual company is the one thing that has held down the rates of insurance in the state of Ohio. The author of the proposal yesterday gave figures showing how much less the rates of the mutual insurance companies were than those of the old-line companies. Now, I think this proposal is important enough to have consideration at the hands of the Convention. We are throwing a large amount of insurance to foreign old-line insurance companies in Ohio. If we had a system by which no public buildings are insured that would be a different proposition. But we haven't got it and can not get it. All we ask and all the committee had in view in reporting favorably on this matter was to put the local mutual insurance companies on an equal basis in getting this business.

This is all I care to say, except this one proposition: I believe, and I think it is largely the opinion of others, that there may be a number of amendments to the constitution submitted in a group. I think we have arrived fairly at a conclusion that a majority of the amendments will be submitted separately. We have determined that as to one or two. I don't think this is so minor a proposition, however, that it should be passed by. As it is we have an arbitrary rule in Ohio, and by it we are depriving our home companies, that should have a right to go in and insure this class of property, from going in and getting it.

There is no difference in the practical operation of the old-line companies and of the mutual companies. They are all under the directions of the insurance department and must comply with the statutory laws of Ohio. For these reasons, because the rates are so different, and because it is a discrimination against the people of Ohio, and because the constitution was never intended to meet this kind of a proposition, we have reported this matter favorably and believe opportunity should be given to our people to keep this money at home. In fact, at the time this clause was put in we did not have this class of insurance companies at all, so it could not have been intended to apply to them.

Mr. DOTY: Assuming that, your opinion of the correct solution of the whole matter is to prohibit insurance of public buildings—

Mr. HOSKINS: I have explained that.

Mr. DOTY: Just assume that that is your opinion, because it is the opinion of some others; don't you think if this Convention were to do anything toward correcting that evil, as you say it is—and I say it is, too—that it would be much better to put the right thing up to the people of Ohio rather than a subterfuge to continue a wrong?

Mr. HOSKINS: No, sir; I don't say it is a subterfuge to continue wrong.

Mr. DOTY: I assume that you and I agree on the lack of wisdom of this policy.

Mr. HOSKINS: But I don't agree to that assumption.

MR. DOTY: You have enough imagination to imagine things that you can't agree to, haven't you?

Mr. HOSKINS: I am not imagining things this morning. I am talking on practical matters.

Mr. DOTY: Living in this world as you do, you can not be without imagination?

Mr. HOSKINS: I am not writing a novel.

Mr. DOTY: I am wanting to get at what ought to be done if we recognize that there is an evil. Now, in that state, what would be a proper solution of the evil? We think that it would be a line of action of which we do not think the people will approve, but one that is right. Now what is the best thing to do, the right or the politic thing?

Mr. HOSKINS: The best thing is to put it up to the people and then if the legislature thinks it best to take away this power to insure let it do it.

Mr. DOTY: I don't catch your idea.

Mr. HOSKINS: I think what you propose is a wrong thing. I don't think the constitution ought to say that public buildings ought not to be insured.

Mr. DOTY: If it is right ought it not be put in?

Mr. HOSKINS: No.

Mr. DOTY: We are putting a lot of things in down here.

Mr. HOSKINS: Yes; and there are a lot of things that are right that ought not go into the constitution.

Mr. WOODS: I offer an amendment.

The amendment was read as follows:

At the end of the proposal add:

The general assembly shall provide by law for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state or doing any insurance business in this state.

Mr. WOODS: This amendment means just what it says. If there is in this state a monopoly of any kind, it is the fire insurance business. For all practical purposes there might just as well be only one company in the state. If a building is erected in Medina or at any other place in Ohio, before I can get one cent of insurance on it in any old-line company a man is sent from Columbus and he fixes the rate. The people don't have anything to say about what that rate shall be. If it is necessary to have a bureau of that kind let the state be the bureau and not the insurance companies themselves. The people of the state are just as helpless as children so far as insurance rates are concerned. This amendment simply provides that the legislature shall regulate these matters. It is something that affects every man in the state of Ohio who carries any insurance. I believe if you will put this in the proposal you will have something that every man in the state will be in favor of. It does not purport to wrong the companies, but the idea is that the state will regulate them. They are creatures of the state and anything that the state creates I believe it should keep control of and regulate.

Mr. HALFHILL: Is it not a fact that the state has ample authority to do just what your amendment proposes now?

Mr. WOODS: That may be, but I have tried in the legislature a good many times to regulate certain crea-

Regulating Insurance.

tures of the state, and it was argued that we didn't have any authority to do it. If we are going to amend this section why not say in plain English that we have that right.

Mr. HALFHILL: Is it not a fact that the matter of insurance is a state franchise and there is no common law contract made?

Mr. WOODS: That is true and it is true of other public utilities in the state, and still they argue we haven't a right to control them.

Mr. HALFHILL: That argument is not correct, is it?

Mr. WOODS: I argued here in the general assembly that it was not, but a lot of people claimed I was wrong, and I want to fix it now so that they can never throw that argument at us when we are trying to regulate them.

Mr. HALFHILL: If you are convinced that power is in the constitution you do not want to duplicate it?

Mr. WOODS: You can't point out where it is now.

Mr. HALFHILL: Do you admit that the question of insurance is a state franchise in Ohio now?

Mr. WOODS: The corporations are created by the state, and I always argued because they are created by the state the state had a right to regulate them, but the attorneys for those concerns will argue differently.

Mr. HALFHILL: Is it not the fact that under the Valentine law they can not fix a system of rates or maintain a bureau of rates — that it is illegal?

Mr. WOODS: Is it not a fact that they do fix rates? Do you deny that the companies fix rates through a bureau in Columbus?

Mr. HALFHILL: I do not deny it. I know it is the fact; but if they are fixing illegal and oppressive rates, I say there is ample power at all times to control it.

Mr. WOODS: I agree to a certain extent with your argument, but what I seek to do is to fix the constitution so that when the attorneys stand on this floor and on the floor across the way, when we are trying to fix rates, and argue that we are trying to do something that we have no right to do, we can point to something clearly giving us the right.

Mr. STEVENS: I offer an amendment.

The amendment was read as follows:

Strike out all after line 9 and insert the following:

"Provided, however, that the general assembly may establish and maintain a bureau of insurance for the purpose of furnishing fire, life, accident or other insurance to the citizens of the state."

Mr. STEVENS: I have offered this amendment for its obvious purpose. It was contended a short time ago by the member from Medina that the business of insurance in the state of Ohio needs control and regulation, and if that is true, and it certainly is, then every member of this Convention ought to be in favor of that method of control which will be most effective. Now, it has been true for a number of years that we have been attempting to control the insurance business in the state of Ohio. We have an insurance department which regulates the business of foreign companies and does other things to keep the insurance companies from running away, but we have not been able to do anything that has had any

effect. If we adopt this amendment it confers on the general assembly the power to establish and maintain a bureau of insurance for the purpose of furnishing insurance to the citizens of the state. What could be more effective in the way of regulating insurance rates than to give the general assembly the power to go into the insurance business itself? That will be the first objection that they will raise — do you propose to put the state of Ohio in the insurance business? Exactly that and nothing less. You are in the education business; you are spending millions for the purpose of establishing and maintaining schools to insure against the evils of ignorance. You are establishing hospitals for the insane and for the tubercular for the purpose of insuring the people against the evils of insanity and consumption. You are in the public highway business whenever you build a highway for the people to travel over. You may say that is reactionary, that it is socialism. That may be true, but I don't think I can be charged very strongly with being tainted with socialism. I am an old-line republican and I think there never was a movement in Ohio or elsewhere for the betterment of conditions when the same charge wasn't made —

Mr. HOSKINS: Will you permit a question?

Mr. STEVENS: Yes.

Mr. HOSKINS: What is your definition of an old-line republican?

Mr. STEVENS: If I were to stand here for an hour and proclaim my principles it would be my definition of an old-line republican.

Mr. HOSKINS: I move that he be given the hour.

Mr. STEVENS: Why, when the gentleman's ancestor back in the cave-dwelling days called on my ancestor to help him roll away the stone from his cave because it was too heavy for him alone to move, it was socialism. Whenever you try to do anything collectively that you can not do individually you are a socialist, and the difference between socialism and the old-line republican party and the democrats is that some of them are ready to go a little farther than others. This amendment gives legislative power to establish and maintain such a department. If in the wisdom of the legislature the necessity should never arise to do it, the legislature of course would not establish it, but if the evil which is claimed and which will not be disputed continues to increase, as nearly all evils do grow and increase, here is a weapon in the hands of the legislature to stop effectively and forever the evils that now exist and that may keep on growing.

Now I did not propose at this time to enter upon a discussion of what the details in the insurance business should be in case it is established. That will be for the members of the legislatures to do whenever they shall exercise the power here given to them, but if the evil which it is sought to remedy exists, and if it is competent by the original proposal to allow the mutual companies to get in on the ground floor, why not go to the end of the line and finish up the evil at one stroke? Why not give everybody the right to have their property insured and insured at the lowest possible rate?

I was interested a short time ago in a statement of a member that of all the thousands and thousands of dollars that go out of the state every year in the payment of insurance premiums only about one-third of it comes back. That is true in the case of the insurance company

Regulating Insurance. Change in Judicial System.

he cites, and doubtless it is true as to all other insurance companies. Insuring with foreign companies is a losing game and why should not the legislature have power to keep those millions at home?

In conclusion, I want to say that the bureau of insurance established by the state legislature will fit more nicely into the common affairs of our counties and municipal governments than any other proposition you can put up. We have in every county in Ohio an auditor's office and in that auditor's office is the valuation of all the property in the county, something that must be maintained wherever insurance can be had. Why can not the auditor's office be used as a basis for establishing the bureau of insurance? Again, can you conceive of a more healthy check on over-valuation or over-insurance of property than the fact that the valuation for taxation and insurance must run parallel! I suggest those things to show how easily this bureau of insurance would fit into the present order of things.

I presented this matter to a distinguished member of this Convention this morning and he said "We are not ready for that now. It will be all right in ten years from now." I submit that what we are doing now is for ten years from now. We do not expect to have another constitutional convention in ten years, and we have to establish principles. We have to put things in the constitution for which we are not ripe now, but for which we will be ripe in ten or fifteen years, and the surest way to educate the people up to this or any other good principle is to give the people their schooling on correct principles to establish good ideas.

Mr. WORTHINGTON: I rise to a point of order. Rule 53 provides that "no motion or proposition upon the subject differing from that under consideration shall be admitted under color of amendment." Neither the amendment offered by the delegate from Medina nor that offered by the delegate from Tuscarawas relates to the subject matter of Proposal No. 51.

The PRESIDENT: The president would hardly like to rule in accordance with the suggestion as both amendments bear on the subject of insurance.

Mr. PECK: I was going to suggest that this proposition seems to be expanding very rapidly. It came in here as a very modest proposition, relating to a comparatively small matter, and now it has grown to a proposition to establish a state bureau of insurance and have the state of Ohio go into the insurance business. It seems to me that is too large a proposition to be adopted on short consideration and in one meeting. I therefore move that the whole matter be recommitted to the committee on Corporations Other than Municipal—the proposal and amendments and such other amendments as may be proposed for further consideration and report by the committee.

The motion was seconded.

Upon which the yeas and nays were regularly demanded.

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

Those who voted in the affirmative are:

Antrim,	Collett,	Doty,
Beatty, Morrow,	Colton,	Dunlap,
Bowdle,	Cordes,	Dunn,
Brattain,	Davio,	Dwyer,
Campbell,	DeFrees,	Elson,

Evans,	Knight,	Redington,
Farrell,	Kunkel,	Roehm,
FitzSimons,	Lambert,	Rorick,
Fluke,	Leete,	Smith, Geauga,
Fox,	Leslie,	Smith, Hamilton,
Hahn,	Longstreth,	Stamm,
Halenkamp,	Malin,	Stevens,
Halfhill,	Marshall,	Stewart,
Harbarger,	Matthews,	Stilwell,
Harris, Hamilton,	McClelland,	Taggart,
Hoffman,	Miller, Ottawa,	Tannehill,
Holtz,	Moore,	Tetlow,
Hoskins,	Norris,	Thomas,
Hursh,	Nye,	Walker,
Jones,	Okey,	Watson,
Kehoe,	Partington,	Worthington.
King,	Peck,	

Those who voted in the negative are:

Anderson,	Harris, Ashtabula,	Pierce,
Baum,	Harter, Huron,	Read,
Beatty, Wood,	Harter, Stark,	Riley,
Beyer,	Johnson, Williams,	Rockel,
Brown, Highland,	Keller,	Shaffer,
Cody,	Kerr,	Solether,
Crites,	Kilpatrick,	Stalter,
Crosser,	Kramer,	Tallman,
Cunningham,	Lampson,	Winn,
Donahey,	Ludey,	Wise,
Earnhart,	Miller, Crawford,	Woods.
Fackler,	Miller, Fairfield,	
Farnsworth,	Peters,	

The roll call was verified.

The motion to recommit was carried.

The PRESIDENT: The question is now on the adoption of Proposal No. 184, which the secretary will read. The proposal was read the second time.

Mr. PECK: Mr. President and Gentlemen of the Convention: I presume there is no one here who does not appreciate the importance of this proposal. Of course, what is nearest a man is the most important to him, and as I have spent a large part of my life in the practice of law, questions that relate to the organization of courts seem to me quite important, and especially so when they relate to the highest court in the state. I think I am not wrong in saying that these are important questions and deserving of your careful consideration. I invite you to look over the proposal with me, and I shall endeavor to explain the reasons why it has been recommended to you by your committee on Judiciary after careful consideration.

Perhaps before I do that I had better state some of the reasons which induced us to do anything in the matter. It was felt by all of the committee that it was very desirable to do something to relieve the courts from their present condition and to assist the people of Ohio to a mode of administering justice which would produce more speedy results. There are complaints from all quarters of the state of the courts being clogged, being overrun with business of which they were unable to dispose.

The supreme court is far behind with its docket. Though it has been working hard and disposing of a good many cases, they accumulate faster than it is possible for the courts to dispose of them. This has been a constant grievance with the people and the bar of Ohio. I do not know of any time in the last generation when the supreme court has been up with its docket, and it has generally been from two to five years behind, always at least two years. I know of three cases it disposed of in February

Change in Judicial System.

that were taken there two years before, and they were advanced, so that you will know how far the regular cases are behind.

Some complaints are made about the circuit courts; in fact, the complaint came louder about the circuit courts than as to any other part of the judicial system. There was complaint about the circuit courts from all over the state and for different reasons. In some circuits the courts were overrun with business and could not dispose of it. In others, there was not enough business, and one gentleman wrote us from a certain part of the state and said that the judges of his circuit spent their time loafing around watering places. That only came from one circuit. Most of the circuits have more business than they can take care of. I know it is so in the circuit in which I practice, which includes Cincinnati, and I have heard it is the same in several other circuits that I could name.

Unquestionably something should be done to relieve this condition of things and to create a better distribution of judges and business so that speedy justice may be rendered. A long delay of justice is a denial of justice. Everyone who is familiar with the practice knows that. It wears out particularly the plaintiff, and he is ready to take anything he can get rather than wait any longer, and that is not justice.

The supreme court and the circuit court are so connected that we found we could not deal with them separately. It was necessary in order to deal with the supreme court to also deal with the matters pertaining to the circuit court at the same time. Therefore, we took them up and they are included in this proposal, which has been recommended, as I say, by the Judiciary committee after long and careful consideration, and this proposal has been before the people for several weeks. It has been generally circulated throughout the state, and extra copies have been printed and the bar and the judiciary have generally received them, and so far as we know there has been very little opposition. Nearly all the letters I have received, and I have received a good many, are in commendation of the proposal, and these letters are from the judges and leading members of the bar throughout the state.

Some of the bar associations have had the matter under consideration. The Hamilton County Bar Association has discussed the matter and has recommended the proposal with certain changes to which I shall call your attention, but the general outline of the proposal is indorsed by a large majority, if not almost unanimously, so that the criticism which has come from the people has resolved itself into commendation.

The committee felt that what is wanted in Ohio is less litigation of the same case. There are too many courts and too much litigation of the same controversy. The ideal system is a system which gives a prompt trial of a case before a competent judge and an impartial jury, and then, if the litigant is dissatisfied with the result, a competent court to review the record and say if any error has been committed. With those two things, if he does not get justice, he never will. No more is necessary and that is the system we have tried to propose to you here.

There is another thing to be said about it. We do not create any additional judges. We do not legislate anybody out of office. We simply redistribute the judicial

force of the state in such a way as to secure, as we believe, much greater efficiency.

The first section as it now stands is no amendment of the present constitution at all. As it originally stood it omitted some words that we finally restored to it. The first section is verbatim the same as the present constitution. The real amendment begins in the second section. You observe that there we have not recommended any change in the constitution of the court. The judges are the same in number and are to continue as they have heretofore and under the same provision. The real changes commence when we reach the jurisdiction of the supreme court. It begins at line 12: "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 courts of appeals."

You will observe that the appellate jurisdiction conferred upon it leaves out one — and perhaps you think the most important — and certainly the most numerous class of cases, and that is ordinary litigation. It gives the supreme court jurisdiction of all constitutional questions, whether arising under the constitution of the United States or the constitution of Ohio, and of all cases involving the extreme penalties of the law, death or imprisonment for life, and also the class of cases, of which there are a good many, originating in the court of appeals, as we call it now. It has heretofore been called the circuit court. The circuit court, you will notice, has the same original jurisdiction in mandamus, habeas corpus, procedendo and quo warranto as the supreme court, and most cases of this class originate in the circuit court and those cases can go directly to the supreme court, as can also all other cases of which the circuit court has original jurisdiction, of which there are quite a number.

There are quite a number of cases arising under statute, special cases that the circuit court of the circuit in which Franklin county is included has special jurisdiction. I am told nearly one-half of the time of the circuit court of this circuit is taken up by that class of cases, and, as they are cases of original jurisdiction, under this provision there would be a right of appeal to the supreme court. The supreme court under our system, as we have endeavored to outline it, will operate as a balance wheel, regulatory of the whole system. The idea is that a man shall have his trial in the court of common pleas and if he is dissatisfied he shall go to the court of appeals, now the circuit court, and there have his case reviewed, and if it is affirmed by that court that is an end of it. There is no further trying or reviewing about it. This was found to be the case in considering that matter. There was a great complaint about the circuit court from all over the state. The lawyers say, "Why go to the circuit court? It is only a sieve through which everybody goes to the supreme court." There were also other complaints about the circuit court.

Mr. BROWN, of Highland: You say if it is affirmed by the proposed court of appeals that is an end of the case. Suppose it is reversed?

Mr. PECK: It would go back to the common pleas court for a new trial. If it is affirmed that is the end

Change in Judicial System.

of it, but if it is reversed it goes back to the common pleas court for a new trial. There would not be any taking of it to the supreme court. In other words, the man would not have to go through three courts. That is the proposition, to have a trial and a review of any ordinary case involving money.

I was going on to say that the complaints about the circuit court were such that we determined after consideration that something must be done about that court, either to elevate it and strengthen it or to abolish it. We could not see our way clear to abolish it, and we could not see anything that could be substituted for it. The suggestion was frequently made, "Let them take their cases directly to the supreme court from the common pleas court." Everybody within the sound of my voice recognizes that that system would be impracticable. If the supreme court can not dispose of the business it now has, how could it dispose of all the business coming up now to the circuit court? The truth is, the state of Ohio is so large and populous and rich and there is so much litigation that a system that was once satisfactory will not now do at all. We must have a number of tribunals of last resort in order to do the business.

Then the suggestion was made that there should be a supreme court created of a large number of judges. One suggestion was for fifteen and one was for twenty-one, and then, in the latter case, divide them into seven branches of three. But what is the difference between that and this except in name? Seven supreme courts of three judges each would not differ much from eight courts of appeal with three judges, and you would not have any supreme court at all if you divided it up in that way, whereas we now retain the supreme court, which will have charge of all the great questions of state and of constitutionality, and all of the great questions that arise can go to the supreme court and there receive careful and deliberate investigation and judgment. But the system of dividing the supreme court into a multitude of little supreme courts would not be an improvement upon the proposition we submit to you, and in our opinion there are serious objections to it that do not pertain to this proposition.

Now, going on with the provisions commencing with line 19:

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

This grows out of the fact that the supreme court consists of six judges. There was considerable discussion and difference of opinion as to whether that condition of affairs should obtain or whether there should be seven judges or five judges, so that they could not be divided

equally. Finally, our conservative instincts came to the front, and we decided to let the number remain as it is. We finally decided that if they were equally divided that would constitute an affirmance. If the Convention is of the opinion that a supreme court should be seven or five judges, I am quite sure the committee will not object and that would necessarily remove all of that provision.

Mr. ROEHM: While you are talking upon that point, suppose one court of appeals decides the case one way and another court of appeals decides it in a different way? There is then no provision whereby the record is sent to the supreme court.

Mr. PECK: Yes, there is.

Mr. ROEHM: Suppose that supreme court should then divide equally on those two cases?

Mr. PECK: You are going a good way to get to a difficulty. That is a matter that very rarely arises.

Mr. BROWN, of Highland: That would be obviated by changing the number of judges.

Mr. PECK: I don't think a case of that sort would be likely to happen. The judges by careful study would find a way out of that. They usually do when they have to decide something. That reminds me of a story I once heard of a man who went to stop at a hotel and he wanted all sorts of things in his room. He wanted double windows and he wanted eiderdown coverlets, and this, that and other things. Finally the clerk said, "My friend, you are mistaken. This is only a hotel. This is not heaven." We can not make things absolutely perfect. We are doing the best we can; we are all men, and courts are courts and judges are judges, and they are human. And these institutions are human, and we may as well recognize that it is impossible to provide against every imagined difficulty.

Mr. BROWN, of Highland: I wanted to inject that the reason the committee hesitated to change the number to five was that they did not want to remove from office any one already in office. That objection, so far as the committee had it, has now been obviated by the death of one of the supreme court judges and that matter might be changed.

Mr. PECK: You will have to move very quickly or there will be another.

Mr. BROWN, of Highland: But that gentleman will not be an elected officer.

Mr. PECK: That was one of the reasons why we didn't want to change. We didn't want to legislate any man out of office, and did not want to create a new judgeship. We did not want the cry raised that the lawyers were creating new offices for themselves to fill. That is what killed the constitution of 1874. This doesn't increase the expenses one cent.

Mr. BROWN, of Highland: An appointment would only be a temporary matter anyway.

Mr. PECK: I understand it would only last a few months—until the election occurs—but that is for the Convention. We have not recommended any movement along that line. If the Convention sees fit to change the number of judges of the supreme court I should certainly acquiesce and I think the committee would. But we think we can get along very well as it is. We have gotten along very well a number of years. I do know of one case where they did divide equally and the judgment was affirmed in that way. That is the rule now, if they divide

Change in Judicial System.

equally they enter up an affirmance. That is just what they do. If a man offers a proposition here and there is a tie vote, the proposition is lost, because the burden is on the man offering the proposition. So if a man takes any matter to the supreme court and there is a tie vote there, the man appealing has lost.

Mr. BROWN, of Highland: In view of the suggestion of the member from Montgomery [Mr. ROEHM], if a case of that kind came up and the decision was a tie, that would affirm the decision and exclude the other decision, would it not?

Mr. PECK: I do not catch that.

Mr. BROWN, of Highland: The gentleman from Montgomery [Mr. ROEHM] wished to know what would be the situation if two decisions from the courts of appeal varied and each came to the supreme court at the same time and the supreme court was a tie on one of them. What would that do? Only one case, of course, would come up for consideration, and if it were a tie in that case that would affirm the decision?

Mr. PECK: That would affirm the judgment below.

Mr. BROWN, of Highland: That would exclude the other?

Mr. PECK: Yes, but that would not be satisfactory to the bar. I do not anticipate that that will arise. These cases in which the supreme court conflicts are rare, and the other cases exceedingly rare, and the courts would work it out some how or other.

Now we come to some provision about which there has been some discussion and controversy. After passing over the provision about an equal vote, begin with line 26:

— and no statute adopted by the general assembly shall be held unconstitutional and void except by the concurrence of all the judges of the supreme court.

There has been a good deal of discussion about that and a good deal of opposition. It is only fair that I should state to you that the Hamilton County Bar Association voted against that proposition and a great many lawyers are opposed to it, but the committee, having all the matters before it and having this matter under consideration at several different meetings, finally came to the conclusion to let that stand as it is. The reasons assigned were that there has been too much of this thing of off-hand setting aside of legislation of the state by the supreme court. There have been too many judgments that have been made by the court which seem to the people not well grounded, in view of existing circumstances, and which operate as stumbling blocks to progress, upsetting statutes which were desirable in themselves, and for that reason we decided to let the provision remain as it is. A case comes into court. Here is an act of the legislature that has been adopted by the house after the usual discussion and has passed through the senate also after the usual discussion. Those bodies contained lawyers, and those things are considered as they usually are considered, and now, after full consideration, adoption by the legislature and approved by the governor, it goes to the supreme court in litigation. The court divides and four of them say that law is unconstitutional and two of them say, "No, we think it is all right." Two men of that

majority upset all the others — the general assembly, the governor and their two colleagues. Looking at it in that way we don't think it is right. If the supreme court were of an odd number, one man would overcome all the judgment of the legislative bodies and the governor, and we don't think that sort of thing is right.

Mr. WORTHINGTON: Haven't you just reversed what you wanted to say?

Mr. PECK: No. If it stands four to two against the constitutionality, as it is now, the act is declared unconstitutional. If one of those four were to change over to the two and divide the court three and three, it might be held constitutional, so that really one man in the court outweighs the general assembly, the governor and everybody else.

Mr. ANDERSON: Could not this happen: Say a bill is introduced in the house of representatives and it passes there and it goes to the senate and passes there. Then it goes to the governor and is approved by him. It then becomes a law of Ohio. The constitutionality of that act is questioned in the court of common pleas and the judge there holds it is constitutional. It then is taken to the circuit court and there two of the judges hold that it is unconstitutional and one that it is constitutional. It then goes to the supreme court and the court stands three to three, and that would declare that law unconstitutional, because it would affirm the decision of the lower court?

Mr. PECK: Under present conditions.

Mr. ANDERSON: Then we would have this situation: The house of representatives and the senate and the governor have approved it. One common pleas judge, one circuit court judge, and three judges of the supreme court say it is constitutional, and yet that law would be held unconstitutional.

Mr. PECK: That might happen under the present situation.

Mr. ANDERSON: Has it not happened?

Mr. PECK: I do not know, but I can see how it might happen. Somebody might suggest that this is novel and that it would be difficult in administration. I do not see how or why. It is just as easy to poll the supreme court as it is to poll a jury and the vote should be taken. In such a case as that the judges should enter upon the record their separate conclusions.

Mr. KRAMER: That wording there "adopted by the general assembly." Suppose the people adopt something under the initiative and referendum; could a law enacted by the people be declared unconstitutional by a fewer number than a majority of the court?

Mr. PECK: I think you are right about that, and that probably requires amendment. This was drawn long before the initiative and referendum matter was brought up and we didn't think of that.

Mr. DOTY: Would not the words "according to law" instead of "by the general assembly" make that all right?

Mr. PECK: Yes; "no statute adopted according to law" — that would cover the whole thing.

Mr. KNIGHT: Is it contemplated that no case involving a constitutional question can be heard by any less number than six judges? Suppose that one of the judges is ill and is off the bench for six or eight months; does that necessarily preclude a decision upon a constitutional question until he is able to resume his position?

Change in Judicial System.

Mr. PECK: I think it is intended that we shall have a full bench. They generally fill those places pretty promptly.

Mr. KNIGHT: As it stands it requires a full bench.

Mr. PECK: Yes.

Mr. CUNNINGHAM: Suppose one of the supreme court judges is disqualified by reason of interest in a matter. What provision have you made for that?

Mr. PECK: I do not know that there is any.

Mr. CUNNINGHAM: Wouldn't there have to be some provision?

Mr. PECK: I am under the impression that it should provide for a case of that sort. It should require a concurrence of all the judges sitting.

Mr. JONES: In the case just put, how would you provide against the disqualification by reason of interest? Might not there be two judges?

Mr. PECK: Oh, you might go on and suppose the whole court is disqualified.

Mr. JONES: It often happens that one judge is disqualified by interest and there might be two. Unless you have some provision for filling up the supreme court, you never can dispose of a constitutional question under such circumstances.

Mr. PECK: We have been longer than that in the supreme court on a good many cases now.

The delegate yielded to Mr. Doty, who moved to recess until 1:30 p. m.

Mr. HARTER, of Stark: The committee on Miscellaneous Subjects desires unanimous consent to file a report on the proposition of Judge Worthington.

The consent was not given and a vote being taken the Convention recessed.

AFTERNOON SESSION.

The Convention met pursuant to recess and was called to order by the president. Mr. Peck, having yielded the floor for a motion to recess, resumed.

Mr. PECK: Mr. President and Gentlemen:—

Mr. NORRIS: I think the judge is entitled to a full hearing and there are too many members absent.

Mr. TAGGART: I demand a call of the Convention.

The PRESIDENT: It takes ten to demand that call. The proper number united in the call.

The PRESIDENT: The sergeant at arms will close the door and the secretary will call the roll.

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

Brown, Lucas,	Hoffman,	Miller, Ottawa,
Cassidy,	Johnson, Madison,	Pettit,
Cody,	Jones,	Price,
Crites,	Keller,	Roehm,
Eby,	Kunkel,	Shaw,
FitzSimons,	Leete,	Smith, Hamilton,
Harris, Ashtabula,	Longstreth,	Stokes,
Harter, Stark,	Marriott,	Ulmer,
Henderson,	Mauck,	Wagner.

The president announced that ninety-two members had answered to their names.

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

The motion was carried.

Mr. HALFHILL: May I ask a question before you proceed, Judge Peck?

Mr. PECK: Certainly.

Mr. HALFHILL: In lines 26, 27 and 28 there is a provision that no statute adopted by the general assembly shall be held unconstitutional except by the concurrence of all the judges of the supreme court. Do you not think that is making too much of a certainty and too much of the dominance of one man on the court?

Mr. PECK: I think there is too much dominance now. Suppose that three of them hold an act unconstitutional and two say it is constitutional. Then there is a majority of one against the constitutionality of the act and it is declared void really by the vote of one man, an act which has been passed by both legislative bodies and approved by the governor and which is sustained by two-fifths of the court. That act would be declared unconstitutional by the three-fifths. I think that is giving too much power to one man and that is the reason for this provision.

Mr. HALFHILL: If one judge by reason of his training and association really believes that there should not be such a thing as declaring a law unconstitutional, that would affirm the constitutionality of any act of the general assembly?

Mr. PECK: Yes, but I never met such a judge and I doubt whether there is any such. We have to assume that judges will do their duty and decide questions according to law, and the law of the land has unquestionably made it a judicial question whether the law is constitutional or not.

Mr. HALFHILL: I would like to ask if from your long experience you know of any time that the supreme court has declared a law unconstitutional in Ohio where the people suffered thereby?

Mr. PECK: I know where certain things that the people of the state would like to have done have been defeated by the judgment of the supreme court in these matters. I do not know to what extent they have suffered, but I do know of cases in which the law has been held unconstitutional by a bare majority of the court. I was in one such case myself.

Mr. HALFHILL: Would not the reverse of that proposition be true, that of the many laws that have been declared unconstitutional by the supreme court the court has conserved the best interests of the state of Ohio?

Mr. PECK: I do not know. It all depends on whether you look at it as a judicial or as a legislative proposition. There is no question a good many of those acts should not have been declared unconstitutional. For instance, the act which provided for the payment of miners for the coal they mined before it was screened. The supreme court decided that was unconstitutional. That was wrong. We have here a proposition to correct that act by constitutional amendment. That was an act plainly, it seems to me, in the interest of justice.

Mr. HALFHILL: Now I want to call your attention to a case in 66 O. S. where the court declared the classification of cities unconstitutional. That was a case in which the court was not unanimous, and yet do you not think it conserved great good in the state of Ohio?

Mr. PECK: The trouble in that case was that the court had gone wrong in early days and had gone on affirming decisions and all of a sudden made a revolutionary decision which prompted the remark of Judge Harrison that he believed in evolution of the law but not in revolution. That is just what happened. They made

Change in Judicial System.

a revolutionary decision affecting nearly every municipality in the state. I think if that decision had been made at first as it was finally made it would have been right, but it caused great trouble when it was made. I think now we are on a better basis than if it had not been decided.

Mr. HALFHILL: Then you think it did achieve something?

Mr. PECK: Yes; we got back to the original position they should have taken at the outset.

Mr. HALFHILL: Now there is another question: In line 32, section 6, you provide that the state shall be divided into eight appellate districts of compact territory. Would it not be advisable to say "not more than"?

Mr. PECK: I think it would be wiser to leave it at eight. We simply take the number that there is now. There are eight circuits now, and I wanted to convert them into appellate districts. But I am willing that the eight shall be stricken out. That was one of the suggestions that was made by the Hamilton County Bar Association in passing on this matter. The word eight occurs in the thirty-fifth line also. I think to strike it out in both places would be all right.

Mr. BROWN, of Highland: Apropos of this discussion anent the proposition to have the entire court agree in a judgment declaring "unconstitutional any law, do you know of any record of a decision that has been secured by a majority of the supreme court as a matter of pure political expediency where there were dissenting members of the court whose opinions had been rendered the other way?

Mr. PECK: In these matters you cannot attribute motives to the courts. We cannot look into the breast of a judge to see whether a matter of political expediency has influenced him.

Mr. BROWN, of Highland: If there were such a possibility would it not be well to provide against it?

Mr. PECK: That is one reason we didn't want the legislation of the people tinkered with too easily. We were afraid it had been in fact in some later decisions. This coal-mining decision was one of them, and there was a great deal of kicking about the mechanics' lien law. An act in identical terms has been sustained by the supreme court of the United States and the supreme courts of half a dozen other states, yet the supreme court of Ohio has declared it unconstitutional.

Mr. CUNNINGHAM: Can the gentleman inform this Convention how many laws have been declared unconstitutional since the adoption of the present constitution?

Mr. PECK: I do not know, but a good many. There seem to be as many as there are volumes of the court reports. I think it will average at least one to each volume of reports.

Mr. THOMAS: Did not the supreme court of Ohio nullify the safety law with reference to children?

Mr. PECK: Was that a constitutional question or only a question of law?

Mr. THOMAS: It was a statutory question.

Mr. PECK: Did they decide that statute unconstitutional?

Mr. THOMAS: They decided that the child assumed the risk and so nullified the operations of the law.

Mr. PECK: I do not remember the case, so that I cannot answer that question accurately.

Mr. THOMAS: They also declared the eight-hour law on public works unconstitutional and the United States supreme court declared a similar law in Kansas to be constitutional.

Mr. PECK: All of which points to the necessity for greater care in deciding on those questions.

Mr. ANDERSON: The decision Mr. Thomas refers to is in 67 O. S., page 76. They did not declare the law unconstitutional, but they nullified it by legislation.

Mr. PECK: In order to meet the objection made this morning to this provision I would suggest that at the end of line 28 we put in the words "sitting in the case". It will then read, "no statute adopted by the general assembly shall be held unconstitutional and void except by the concurrence of all the judges of the supreme court sitting in the case." That would meet the case of a judge absent or disqualified.

The next clause after that has occasioned a good deal of discussion and I want to call your attention to that:

In case of public or great general interest the supreme court may direct the court of appeals to certify its record to the supreme court and may review and affirm, modify or reverse the judgment of such court of appeals.

The words "In cases of public or great general interest," have been partially construed, and what the committee means is cases of "public interest" in which the public is interested—state, county or city, some public body—or of "great general interest," cases which involve questions affecting a good many people and that have aroused general interest. It would be for the supreme court to decide whether a case came within those classes. In those cases the supreme court may issue a writ of certiorari to the court of appeals to send up that case for final decision. That is a practice which prevails in the supreme court of the United States, and I might say right here that this act is largely modeled upon the present judicial system of the United States, which is the most successful judicial system in operation that I know of.

The United States circuit court of appeals, whatever you may think of it, is always up with its business and ready for new business, and that is what we want to have in Ohio. I have not attempted to follow the language of the federal law because it would not fit in Ohio. In this provision we have limited the right to certify up cases of public or great general interest.

The supreme court of the United States under the federal act has a right to direct any case that is pending in one of the lower courts to be certified up to it by a writ of certiorari, but we do not open the doors so widely. We confine it to cases of public or great general interest. We fear if that door were thrown open, it would put things back to where we were when we got into the supreme court on motion. After considering and discussing that a good deal the committee determined to leave it as it is here.

The bar association of Hamilton county voted in favor of an amendment to make the rule the same as the federal act, but I submitted it to the committee and the committee unanimously disagreed with the bar asso-

Change in Judicial System.

ciation of Hamilton county, and I am of that opinion personally. I do not care to have the supreme court burdened with a continuous stream of motions to let in cases the decision of which motions would be pretty nearly equivalent to a decision of the case. Every fellow beaten in the court of appeals would be running to the supreme court for a writ of certiorari.

Mr. OKEY: I want to ask a question relative to a section. Have you gotten through with this yet?

Mr. PECK: No; just wait a minute.

Mr. FESS: Do you not think the definition of "public or great general interest" might nullify a good deal that you are trying to do here?

Mr. PECK: No; I do not think so. I have confidence in the supreme court. They will, no doubt, endeavor to decide that fairly, according to its spirit.

Mr. FESS: I wanted to ask if it would be left to the supreme court whether or not a matter is of great public and general interest?

Mr. PECK: Yes; that is the only place where it can be decided. It is with that court whether it shall send down the writ of certiorari or not. You will observe that even if they think the case is of great general interest or great public interest they don't have to issue the writ. They may find a case of public interest that was of small moment and decline to issue the writ. We have to rely upon the courts. I have great confidence in the supreme court. While we criticise their mistakes, they are honest and conscientious and will undoubtedly endeavor to construe this and all other questions in a proper spirit. I have always found them so.

Mr. FESS: This may display my ignorance, but those words "sitting in the case" — what is the legal interpretation of that phrase, "judges sitting in a case"?

Mr. PECK: It means those judges who have taken part in the hearing of a case.

Mr. FESS: Could any one be absent when a case is argued and be considered as sitting in the case?

Mr. PECK: No; any judge who is absent and doesn't take part in the hearing would not be sitting in that case.

Mr. FESS: Suppose two-thirds of the judges of the court were absent — suppose they absented themselves —

Mr. PECK: I cannot assume any such case.

Mr. DWYER: Judges "sitting in a case" has a legal significance. It is clearly understood in the law.

Mr. FESS: That is what I wanted to know.

Mr. SHAFFER: You say in cases of "public or great general interest" the supreme court may direct the court of appeals to certify its record to the supreme court. Do I understand you to mean by that that the supreme court itself must take the initiative in having that certified up?

Mr. PECK: Yes. The way that is done generally is on motion of one or the other party, the party that loses, of course.

Mr. SHAFFER: Then the operation starts by motion of a party to the litigation appealing to the supreme court for this writ?

Mr. PECK: Yes; that is the way it is done in the supreme court of the United States.

Mr. KNIGHT: Going back to lines 11 and 12 of section 2, in view of the suggested modification, it says a majority of the supreme court is necessary to constitute a quorum or to pronounce a decision. That means

that under no circumstances can there be a decision unless there are four judges?

Mr. PECK: Yes; if there were four sitting in the case they would have to be unanimous. It would take the whole four to make a majority.

Mr. WINN: Was it the intention of the committee to do away with the rule now prevailing, that the supreme court may be divided into two sections and if all of the members of one section agree they can render a decision?

Mr. PECK: I don't understand that is the law.

Mr. WINN: Section 2 of article IV of the constitution of 1851 provides:

And whenever the number of such judges shall be increased, the general assembly may authorize such court to organize divisions thereof, not exceeding three, each division to consist of an equal number of judges; for the adjudication of cases, a majority of each division shall constitute a quorum, and such an assignment of the cases to each division may be made as such court may deem expedient.

Then it goes on:

But whenever all the judges of either division hearing a case shall not concur as to the judgment to be rendered therein, or whenever a case shall involve the constitutionality of an act of the general assembly or of an act of congress, it shall be reserved to the whole court for adjudication.

Mr. PECK: There has been a good deal of discussion about that. This does away with that. This requires four judges.

Mr. WINN: I want to ask whether or not the effect of this proposal is to do away with the division of the court into two divisions?

Mr. PECK: That would be the effect of it, for they could not render a decision except by a majority of the court, and they could not operate with three.

Mr. WATSON: In regard to a certain line of cases in which there is public interest or general interest, don't you suppose that there might be cases in which the supreme court would bring about injustice to the litigant?

Mr. PECK: That is always the case; anybody who is decided against thinks the decision is unjust and ought to be reviewed. If you will open that door you will let them all go up, because every fellow who loses a case knows the decision was wrong.

Mr. HOSKINS: It has been stated that the judgment of the Hamilton County Bar Association was that the supreme court should pass upon whether cases were of great public interest or not?

Mr. PECK: They wanted to take out the words "of great public interest" and substitute "any case".

Mr. HOSKINS: And leave that to the discretion of the supreme court?

Mr. PECK: Yes.

Mr. HOSKINS: As to what cases should go up?

Mr. PECK: Yes.

Mr. HOSKINS: The same as leave to file a petition for rehearing in a criminal case?

Mr. PECK: Yes; and the same rule held in civil cases until the law was changed some years ago.

Change in Judicial System.

Mr. HOSKINS: This may be a repetition, but do you not believe that the judgment of the Hamilton County Bar Association is pretty fair upon that proposition and that it will only be a question of a very short while until the supreme court will have laid down the lines of cases they will hear on propositions of that sort and that the discretion on the part of the supreme court would not be abused and might afford relief in cases where gross injustice was done in the other court?

Mr. PECK: You might imagine a number of cases where relief might be afforded, but the question was to afford relief and shorten litigation.

Mr. HOSKINS: Of course, but there is one object to be preferred to ending litigation and that is to secure substantial justice.

Mr. PECK: Yes. If you have the judgment of two courts you ought to have substantial justice.

Mr. FESS: If it takes at least four members to pronounce a decision either adversely or favorably, and that will prevent dividing the court into two sections —

Mr. PECK: That was done for the purpose of expediting the work that comes to the court.

Mr. FESS: Do you think if the supreme court is relieved of such an amount of work by establishing the court of appeals as a final court that it would need to divide into sections?

Mr. PECK: No; I don't think you would need any division in that case. This takes away about three-fourths of the business of the court and the supreme court will have ample time to sit as a court and hear all the cases left, and it is to be hoped it will have ample time. Hurrying cases leads to incorrect decisions. Only the higher class of cases will go to the supreme court.

Mr. TALLMAN: When the circuit courts have decided a case two ways and the case goes to the supreme court and the supreme court stands three for affirmance and three for reversal, that would be an affirmance of the decision of the court below?

Mr. PECK: Yes; of the appellate court from which the case went to the supreme court.

Mr. TALLMAN: Would that interfere with lines 11 and 12?

Mr. PECK: You had better wait. We have special provisions directed to that matter. Let us wait until we come to that provision.

Mr. TALLMAN: You know then the question I intended to ask?

Mr. PECK: There is a discussion with reference to that very matter and we will discuss it when we come to that point. Now, coming to section 6, we have agreed to leave out the word "eight" in lines 32 and 35.

Mr. CROSSER: I didn't agree to that.

Mr. PECK: Why? I think that has no effect, and the way the state is growing you will need more very shortly.

Mr. DWYER: I propose when the time comes to offer an amendment to increase the number of appellate districts. Eight districts were made thirty years ago when Ohio didn't have more than two-thirds the population we have today. Eight is not sufficient today and we are building for thirty or forty years. I claim today that ten districts divided properly would not be as many proportionately as eight districts were thirty years

ago, and I think the districts are now too few. Our lawyers are complaining that the judges of the circuit courts cannot give the attention to the cases that they should; they have not the time, there are too many cases. I think instead of leaving it eight we ought to increase the number and make it ten.

Mr. PECK: We are not trying to fix the number. We are leaving that to the general assembly. We will leave it stand as it is until the general assembly acts upon it.

Mr. SHAFFER: In line 44 provision is made that the number of districts and the boundaries shall be prescribed by law.

Mr. DWYER: Why cannot the Constitutional Convention do that? It takes two-thirds of each house of the legislature to do anything and they won't agree. We can do it here, according to my judgment.

Mr. PECK: I have no doubt it would be better done here than in the general assembly. In a general assembly politics would enter and each member would be endeavoring to gain an advantage, and so far we have succeeded in keeping the political devil out of the Convention. That is the reason the legislature cannot agree as to congressional districts — there is always a pulling and searching for advantage in that.

Mr. HOSKINS: The relief you seek to give to the supreme court would necessarily throw the burden taken from the supreme court upon the courts of appeals?

Mr. PECK: I do not think it would throw any additional work. Those cases go to the circuit courts now. The court of appeals will do the same work that the circuit court does now.

Mr. HOSKINS: But you would expect the circuit court or the court of appeals to give a great deal more careful attention than they do now?

Mr. PECK: That reflects upon the present circuit court, but I would expect the court of appeals would give more careful consideration than the circuit courts do now because now they know their judgments will not be final. When the judgments are final they will be more careful with them than they are now, because now they know if they are wrong the supreme court can right the wrong.

Mr. HOSKINS: Our experience is along the line suggested by Judge Dwyer. While we have not a great deal of circuit court work, yet the circuit has sixteen counties and we have never been able to get sufficient time from that court to try our cases under existing conditions. If they have this added work we will have added difficulty.

Mr. PECK: They won't have added work. They may feel conscientiously impelled to give careful consideration, but the number of cases will not be increased.

Mr. OKEY: I want to call attention to lines 45 and 46:

The court of appeals shall hold one or more terms in each year at such places in the district as the judges may determine upon.

It seems to me that when that was before the committee that language escaped my attention. I do not know whether the other members of the committee noticed it or not, but I regard that as a little objectionable. I should think that it should be amended so that the

Change in Judicial System.

court of appeals should hold one or more terms each year in each county.

Mr. PECK: That brings up in addition to your question the same objection that has been made by the gentleman from Auglaize [Mr. Hoskins], namely, that there are sixteen counties in his district and the judges are always traveling around. The ex-judges on the committee complained a good deal of the necessity for continuous traveling in such districts; that so much of their time was wasted that they hardly got seated and at work in a place before they would have to jump out and go to some other place; that they are kept continuously on the wing and have to do a great deal more work than if they didn't have to jump about so. The idea was to let the judges fix the places where they wanted to hold court. We could leave it to the general assembly, but we thought it better to leave it to the judges. They will fix the prominent towns in the circuit. There is every inducement to have the court meet there.

Mr. OKEY: Do you think it is right in an appeal case to require a litigant to go out of his county? He might be taken two hundred miles.

Mr. PECK: We have to do that when we come to the supreme court.

Mr. OKEY: A judge might fix a place that was exceedingly inconvenient and costly to the litigants to attend.

Mr. PECK: If you want to restore the present system you may say that we shall have a term in each county and then you would be up against the same trouble that men here are complaining of.

Mr. OKEY: I shall offer that amendment at the proper time.

Mr. BROWN, of Highland: The chairman will remember that when the argument was made to the committee in favor of making the court of appeals with final jurisdiction that it was upon the ground that it was more convenient for the indigent to have their cases there tried and finally disposed of than to have to go to the expense of coming to the capital on the final appeal. I believe the provision in lines 45 and 46 will defeat the best argument that there was in favor of this change in the judiciary of the state, and I think it ought to be provided now that they shall hold court in each district of the circuit once a year.

Mr. PECK: Each county you mean?

Mr. BROWN, of Highland: Yes; each county.

Mr. PECK: It is easy to put that in, but I do not believe in it. There may be three or four places where they could hold the courts, but I do not believe the court should be kept on the wing all the time.

Mr. BROWN, of Highland: If that is not provided what is the advantage to the litigants in having that as a final court of appeals?

Mr. PECK: A great many that I will explain. The finality of the judgment is one great advantage.

Mr. BROWN, of Highland: Exactly so; but if he has to go two hundred miles away to get it he might as well come to the supreme court.

Mr. PECK: But he doesn't want to wait so long. The argument you mention may have been made, but I don't remember it and it did not influence me. The real argument in favor of giving final jurisdiction to the court of appeals, as we call it under this proposal, is that

it will put an end to a great quantity of litigation that ought to be ended. A great many of the people have said, "Let us have a court of common pleas and a supreme court." You have the common pleas court in this proposal and another court above to decide the cases. It would be all right to have the supreme court as the one appellate court if they could do the business, but the supreme court cannot, and we have put in a court here to do that business and to make the judgment final. It will take away the necessity of going to the third court which exists under the present law.

Mr. TALLMAN: Under the organization of the appellate court that court will have the same jurisdiction upon cases of appeal from the court below and equity cases heard on the testimony that the circuit court has, will it not?

Mr. PECK: I do not know. That depends on the general assembly.

Mr. TALLMAN: If a case comes before them by appeal and they leave the home county and go to some other county selected by that court it would be a great tax on the litigants to take their witnesses with them.

Mr. PECK: If that mode of trial is adopted, of course there ought to be a session in each county—if questions or facts have to be determined by evidence before the court of appeals, but it was not contemplated.

Mr. TALLMAN: It would be a trouble to take the witnesses to the court of appeals.

Mr. PECK: But it was not expected to take the witnesses there to be heard by the court of appeals.

Mr. ANDERSON: The object was to save time. Where the circuit court has to go into a certain county and hold court they have to give that county a whole week, whereas in a case where the attorneys have the record on appeal they can save that time.

Mr. PECK: Yes; that is a matter that could be handled by the general assembly. A great many of these things have been left open so that they can be adjusted by the general assembly. We cannot decide everything here. What we provide here is fixed and it cannot be unfixed. The trouble with constitutional rules is that they are sometimes too rigid. You cannot move them and the legislature ought to be left a large discretion in such matters, so as to make changes that experience demonstrates are necessary.

Mr. ROCKEL: Does not the present constitution permit the legislature to handle all those matters?

Mr. PECK: Yes.

Mr. ROCKEL: Why not leave them there then?

Mr. PECK: Leave what?

Mr. ROCKEL: About jurisdiction and all those other matters?

Mr. PECK: Some things we have to fix. We have to tell which court is different from the others. You cannot leave all those things to legislation, but the general rule is that matters of detail should be left to the legislature. Now, in line 36:

And the judges of the circuit courts therein shall constitute the respective courts of appeal and perform the duties thereof until the expiration of their respective terms of office, or until they are removed by death, disability, impeachment or resignation. At the next election after the occurrence of any vacancy—

Change in Judicial System.

There I think the words "by expiration of term" should be inserted to avoid the idea of vacancy by death or resignation — "the electors of the district shall elect," etc.

The purpose of that is to provide that the successor shall be a judge of the court of appeals, and it is not intended for the filling of a mere vacancy that may happen by death or resignation. That is provided for in another part of this proposal.

Mr. WORTHINGTON: Is not there a slip of the pen there? Ought not that word "after" be "before"? Where an election is to be had to fill a vacancy that arises by expiration of term, the election evidently would be before the term expired; otherwise the term would expire and there wouldn't be anybody elected to fill the office until the following election.

Mr. PECK: Yes. That should be at the next election "before" the occurrence of the vacancy. I am glad you called attention to that. I will continue:

At the next election before the occurrence of any vacancy the electors of the district shall elect a citizen and resident of the district to the office of judge of the court of appeals for the term of six years, 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. The number of districts and boundaries thereof shall be prescribed by law. The court of appeals shall hold one or more terms in each year at such places in the district as the judges may determine upon, and the county commissioners of any county in which the court of appeals shall hold sessions shall make proper and convenient provision for the holding of such courts by its judges and officers. Each judge of a court of appeals shall be competent to exercise his judicial powers in any district of the state.

Mr. HALFHILL: Under the present constitution, section 6, article IV, it is provided that such courts shall be composed of such number of judges as may be provided by law and shall be held in each county at least once in each year. There is an additional provision. The general assembly has passed a statute requiring two terms of the circuit court to be held in each county in each year. Why could not this proposal provide for holding one term in each county and then for holding court for error proceedings at such place and time as the court may fix?

Mr. PECK: Leave it to their discretion?

Mr. HALFHILL: That would leave about one-third of the time for holding sessions in each county and the other two-thirds of the time for holding them where the courts determine.

Mr. PECK: I have no objection to an amendment of that sort. You draft it. There is no objection to putting it in. Now go on down to line 51:

The respective courts of appeal 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 court of appeals, subject to the provisions here-

of, and the existence of the circuit court shall be merged into and its work continued by the court of appeals.

You catch the idea? It is to merge the circuit court and the court of appeals together without a break. We do not want to abolish one court and have a transfer of the papers and all of that sort of a thing — a formal proceeding necessary in the closing up of one court and the establishment of another, but we just want to let the court of appeals judges be elected as the terms of the circuit judges expire, and go right along with the business. That is the idea. It is the same court with another name as far as that goes, except that it has a considerable acquisition of jurisdiction, and I think also some acquisition of dignity. I think the change of name we have suggested is a good one. There is no doubt in the world that names do affect things. It is a common remark that "It is the same thing under another name", but names do mean a good deal after all. When it comes to a question of dignity and consideration names mean something, and when you give a litigant to understand that his case goes to the court of appeals, he understands that it is going to one of the highest courts, because by common consent the court of appeals is one of the highest courts in all the states and nations. The word circuit does not give proper dignity. That word is used in several of the adjoining states to mean the same thing as our courts of common pleas. That is the general meaning throughout the West and South. The court of appeals is a better name and we have taken the word from the United States court system, leaving out the word circuit.

Mr. HOSKINS: You are merging the circuit court into the court of appeals?

Mr. PECK: Yes.

Mr. HOSKINS: When this constitutional provision becomes effective would all cases then pending in the circuit court have the present right to go on to the supreme court, or would those cases be transferred with the list of cases in which the court of appeals would have the final say?

Mr. PECK: I think as soon as this constitution is adopted the name of that court will be changed to the court of appeals and its jurisdiction would then attach to all cases pending.

Mr. HOSKINS: You think that the final jurisdiction of the court of appeals would attach to those cases now pending in the circuit court and that are not decided when the court of appeals is established?

Mr. PECK: Yes. I don't see any way that you can prevent that without abolishing the court as a circuit court and creating a new court of appeals. For the purpose of avoiding that and saving all that trouble, we have made the provision as you find it. The difficulty you allude to is not sufficient to justify going through all that trouble.

Mr. NYE: Is it your plan whenever a term of one of the circuit judges expires to elect a judge of the court of appeals?

Mr. PECK: Yes.

Mr. NYE: And leave the other two circuit judges to perform the duties of the judges of the court of appeals?

Change in Judicial System.

Mr. PECK: Yes; they all go together. They are judges of the same court.

Mr. NYE: You do not elect three judges, but simply one.

Mr. PECK: Yes. Each man serves out his term, but his name is changed and he gets married to another court.

Mr. NYE: Do you expect that there would be a set of reports for these courts of appeals so that the bar and the people would have their report?

Mr. PECK: That is a matter of legislation. I do not think we can go into those details. Then we provide:

The courts of appeal shall have * * * original jurisdiction in quo warranto, mandamus, habeas corpus and procedendo and appellate jurisdiction to review, and affirm, modify, or reverse the judgments of the courts of common pleas and superior courts of the district, in all cases, and judgments of said courts of appeal shall be final in all * * * cases, except such as involve questions arising under the constitution of this state, or the United States, or cases of the infliction of the penalty of death, or of imprisonment for life, or cases of which it has original jurisdiction.

That corresponds with the provision for the supreme court.

Now, here is a provision that has been considerably discussed and I want to call your attention to it and ask your judgment on it: "No judgment of the court of common pleas shall be reversed except by the concurrence of all the judges of the court of appeals sitting in the case." Of course, it could not possibly be reversed by any less than two.

Mr. BROWN, of Highland: In that case if there were dissent from the opinion of the circuit court or the court of appeals, that would be ground for asking for a writ of certiorari by the litigants, would it not?

Mr. PECK: No; not under this provision.

Mr. BROWN, of Highland: Could it not be made so?

Mr. PECK: It could be made so, but I have not provided for that. The litigant usually does not know what is going on in the court after the case has been argued and submitted. Ordinarily there is no provision for him to know. He only knows when the opinion is announced.

Mr. HOSKINS: I would ask whether or not the committee gave consideration—I assume they did, but I ask the question—to that provision in which you require a unanimous decision to reverse the common pleas court?

Mr. PECK: We gave a great deal of consideration to that and that is the reason I invited your attention to it. We have had a great deal of consideration in the committee and outside, and I have listened to many discussions of that. The Hamilton County Bar Association had a discussion on that.

Mr. HOSKINS: You approve of that?

Mr. PECK: I did finally. A judge of the common pleas court has decided the question. The jury has heard the case and returned the verdict and the judge

hearing the case entered a judgment on that verdict. It is taken by the defeated litigant to the court of appeals. When it comes there two of the judges of the court of appeals think it has been decided erroneously and favor a reversal. One of them does not. He thinks that it has been correctly decided and should be affirmed. Now, where is the weight of opinion? Here is a judge of the common pleas, who heard all the evidence and knew more about the case than anybody else, and one of the judges of the court of appeals who feel that the judgment is right, and here are two judges of the court of appeals who believe the judgment is wrong. In considering that we came to the conclusion that it would be wrong, especially if you throw into the scale on the other side the verdict of the jury, to have that judgment reversed by two judges.

Mr. HOSKINS: In that case you would have the common pleas judge and one circuit court judge holding one way and two circuit court judges holding the other way?

Mr. PECK: Yes.

Mr. HOSKINS: In view of the fact that that reversal would not be final, but would go back for a retrial, don't you think the right of retrial should be given to the litigant?

Mr. PECK: That would be given in case the decision was against the plaintiff.

Mr. HOSKINS: One judge would have a right to hold up and affirm the common pleas court and make it final, while the reversal by two would not be final, but would send it back for trial?

Mr. PECK: Not in all cases. There are cases in which the two can render the judgment that the court below could have rendered.

Mr. ROCKEL: You could have a final decision by two judges?

Mr. PECK: Contrary to two others.

Mr. ROCKEL: You could have a final decision by two judges alone?

Mr. PECK: Those are the reasons that determined the committee and we talked this over, not at one meeting of the committee only but at several meetings, and we were all heard upon the subject. I think nearly every member of the committee took a hand in that discussion. And it is contrary to precedent and everything that is contrary to precedent goes against a lawyer's grain.

Mr. HOSKINS: Why should the opinion of the common pleas judge who has passed upon it upon the motion for a new trial be set up along side of one of the court of appeals judges for the purpose of overbalancing the judgment of two members of the court of appeals who were there for the specific purpose of reviewing the case?

Mr. PECK: We are not setting up, but we are considering whether the judgment should be reversed or not. Here has been a court, the judge presumably competent, and he has heard the case conscientiously and he has decided it and has decided it a certain way, and here comes the case to another judge and another court who agrees with him, but two other judges do not agree. Now, shall these two judges who do not agree override the decision of the one who does when he has behind him the judgment of the court below?

Change in Judicial System.

Mr. HOSKINS: Is not that the very essence of a court of appeals, that a majority at least of the judges of the court of appeals might have the right to correct the errors of the lower courts? If you are not going to give that right, why have the court of appeals at all?

Mr. PECK: They can act unanimously. There are not many cases where they divide.

Mr. HOSKINS: Do with the judges as we have done by the jurors, let one hold them up?

Mr. PECK: We presume they are all influenced by conscientious motives.

Mr. HOSKINS: Sometimes men's motives are not.

Mr. PECK: Yes.

Mr. ANDERSON: Will Judge Peck permit me to ask a question of Mr. Hoskins?

Mr. PECK: Yes.

Mr. ANDERSON: A jury of twelve have passed on a case before it gets to the circuit court. The common pleas judge has reviewed it on the law and the facts and then the circuit court can review it as to the law and the facts. Do you think that two judges of the circuit court ought to put their judgment up against the judgment of fourteen men, the jury, the common pleas judge and one of the circuit judges?

Mr. HOSKINS: No; there is no question about that.

Mr. ANDERSON: I am glad you think that.

Mr. PECK: The judges of the court of appeals, like other judges, must have their business regulated by rules. They must agree on a decision to render the judgment.

Mr. NORRIS: As suggested by Mr. Anderson, here is a judgment of a court of common pleas and the litigant is seeking his second day in court before a different tribunal. The purpose for which he seeks the different tribunal is to correct the judgment of the court below. Why should the judge of the court below and his opinion be carried up and set side by side with a member of the appellate court in which the litigant has sought to correct the judgment of the man whose opinion you are setting up and balancing off? That is something I cannot understand.

Mr. PECK: Is not there always a presumption of law that the judgment of the court is correct? The judgment of the common pleas court comes into the circuit court accompanied by a presumption of correctness and you have to overcome that before you can overthrow that judgment.

Mr. NORRIS: It is not accompanied by infallibility.

Mr. PECK: No.

Mr. NORRIS: It is accompanied by the strength of legal decision and the legal decision is attacked in this tribunal of which the gentleman who presided in the court below is not a member. It is his opinion that is being assailed.

Mr. PECK: It is not provided that his opinion in the court below shall cut any figure other than that there must be more than two judges to overcome the weight of his opinion.

Mr. NORRIS: It takes three judges to overcome the weight of his opinion.

Mr. PECK: If there is one dissenting opinion.

Mr. NORRIS: It takes three judges to overcome the weight of his opinion.

Mr. PECK: If one of the judges does not agree with his colleagues.

Mr. NORRIS: Would not that be allowing weight to be given to the opinion of the judge whose opinion is attacked?

Mr. PECK: That is about it. The weight of the two judges is offset by the one that is dissenting, the judge of the common pleas court and the jury.

Mr. WORTHINGTON: Take the case where all three judges of the circuit court think that the common pleas judge was wrong in his reasoning, but one of the judges thinks he reached the result which should have been reached by another line of reasoning. There you have three judges thinking the judge below reached the conclusion by a wrong process and yet that judgment would be affirmed under this language.

Mr. PECK: I don't understand the question in the court above is ever as to the process by which the lower court reaches a judgment. The question is whether the judgment is correct.

Mr. WORTHINGTON: But doesn't that take away the force of the argument you have made in support of the proposal as it stands now, that you have two judges against one? Two judges who reach the same results by a different process of reasoning are not as strong as two who reach the results by the same process of reasoning.

Mr. PECK: That is too fine for me. I will consider it and give you an answer later. As a general proposition it must strike one that there is no great preponderance of weight in judicial opinion where there are two judges on the one side against two judges on the other.

Mr. ROCKEL: Don't you think in those cases where you have two judges one way and two another they ought to have a right to go to the supreme court?

Mr. PECK: Possibly you might put in a provision that where the judges do not agree they should certify the case up to the supreme court. That is a good idea and that is the reason I am going over this matter so carefully with you all.

Mr. ANDERSON: Would there be any objection on the part of Judge Norris and these other gentlemen who suggested cases if you permit a reversal on questions of law, but not reversals on the weight of the evidence without a unanimous concurrence of the judges? The supposition is, you know, that men on a jury are better judges of fact than men on the bench. That would permit two men to reverse the judgment of fourteen men on questions of fact. I think a majority of judges should rule on questions of law, but not on questions of fact.

Mr. HOSKINS: I would like to state my answer to that. The rule already is that the verdict of the jury must be manifestly against the weight of the evidence before it is disturbed.

Mr. ANDERSON: Are you humorous?

Mr. HOSKINS: No.

Mr. ANDERSON: "Manifestly against the weight of the evidence" has gotten to be humorous. One of the troubles about it has been in its application.

Mr. PECK: As Captain Cuttle said in Dickens, "The hearings of this observation lays in the application on it." The rule as the gentleman from Mahoning has indicated is one that is frequently adverted to and to which not much attention is paid. If the judge feels the ver-

Change in Judicial System.

dict is against the weight of the evidence, he sets aside that verdict without stopping to consider the shade of evidence he has before him.

Now, passing on to the next provision, that also was somewhat discussed and there was some objection made to it, but it struck the majority of the committee very strongly as all right. It begins at line 65:

And whenever the judges of a court of appeals find that a judgment which they have agreed upon is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall reserve and certify the record of such case to the supreme court for review and final determination.

That is the provision I spoke about a few moments ago—that in case of conflict it should be certified to the supreme court for final determination.

Mr. HOSKINS: Do you not think there should be a certain provision made here, just in the last section that has been read? For instance, the judge in one district or the court in one district will decide so and so. After two or three years the court of appeals in another district will decide differently.

Mr. PECK: Yes; this provision requires that the court shall certify that up if that happens.

Mr. HOSKINS: Don't you think that great harm might come from this to the people? Business will have been transacted according to the decision of the appellate court that decided it first. Then after two or three years another court will reverse that or decide it differently. All the contracts and everything that has taken place in the interim between the decision of the first court and the decision of the other court—what shall become of those?

Mr. PECK: I don't think we can provide for every possible contingency that you can imagine. It is the same way with questions that go from the circuit to the supreme court. Perhaps a half a dozen circuit courts decide one way and those cases are carried to the supreme court and after an interim of two or three years the decision is reversed. Now what about the things that have happened in the meantime? We can't provide for all those things.

Mr. HOSKINS: I admit as the circumstances are at present we cannot provide for it, but we could provide for it in the new constitution. Suppose one legislature passes a law and the next legislature repeals that law. All the transactions that have taken place in the meantime are valid in law. Could not the Constitutional Convention here make a provision to that effect, that all business or contracts that have been made after the case was first decided shall hold good just as in the case of acts of legislatures, until the supreme court shall decide differently?

Mr. DWYER: The supreme court did not follow that rule in the tax inquisitor case. At one time the supreme court thought the tax inquisitor law was constitutional and under that tax inquisitors were appointed and they expended a lot of money and incurred some expenses in preparing for their office. The supreme court finally decided the law unconstitutional and did not allow anything for the expenses the tax inquisitors had incurred. I think that was a great injustice.

Mr. HOSKINS: Could not we provide for that in the constitution? I think there is merit in my claim. There is another question here, Judge Peck. Don't you think it would be a great benefit to the judicature of Ohio if all these appellate courts or courts of appeals were obliged to report their cases?

Mr. PECK: I think it would be desirable that they should, but that is a question for the legislature. I don't think we should undertake to decide those questions here.

Mr. HOSKINS: I don't think the legislature will pass anything concerning the appellate courts or the supreme court and if anything of that kind must be done it should be done here. The legislature can never bind or restrict the supreme court.

Mr. PECK: I don't believe in that kind of law. I think we will put something into the constitution that will make all courts amenable to the legislature. There is nobody and no institution that should be above the law.

Mr. HOSKINS: If that is done my question is answered. Now I have another question: At present any decision that is rendered by the supreme court is published in the reports, but in case this proposal should pass and there should be eight or ten courts of appeals in the different districts, will there be any place where we can look for all the decisions? Will there be required an official magazine or official report so that we may know exactly in what district a decision was rendered?

Mr. PECK: That is a matter for the general assembly. We cannot go into all of those details. Those are all matters of legislation and if the legislature attends to its business it will attend to those. I have no doubt there will be ample publication; in fact, there has been too much publication of the decisions of the circuit courts. Anybody knows there are too many different series of circuit court decisions. We have a half dozen. If we only had one series of reports we would be much better off.

Mr. HALFHILL: I see you have now gone pretty thoroughly over this proposal and I want to go back to lines 12, 13 and 14. That relates to the jurisdiction of the supreme court—that it shall have original jurisdiction in quo warranto, mandamus, habeas corpus 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 courts of appeals. Why would it not be a good idea to add to that, as is provided in the present constitution, the words "and such other appellate jurisdiction as may be provided by law", so as not to make this a hard and fast constitutional rule, because there may be cases such as have been suggested here wherein appellate jurisdiction could be additionally given the courts in order to carry out the ends of justice?

Mr. BROWN, of Highland: How would that shorten the work of the courts if they all went up—

Mr. HALFHILL: Just a second—let us conduct this regularly.

Mr. PECK: The answer of Mr. Brown is one an-

Change in Judicial System.

swer, and the fear was that the general assembly would throw that door open and we should be right back where we have been with the circuit court.

Mr. HALFHILL: Do you think it wise to make it an absolutely limited court, as you have done in this proposal?

Mr. PECK: That was our intention. If you do not approve of it we cannot help it, but we are afraid of the general assembly on that subject and we fear it will constantly pass acts—that there will be a special interest seeking to have acts passed and that the whole thing will be thrown open and we would be back where we are now. The idea is to make the jurisdiction of the court of appeals final and keep it so.

Mr. HALFHILL: Is not there a well known principle that in all our laws and in all the laws of any civilized nation the ends of justice require more trials than they do in nations that are not so thoroughly civilized?

Mr. PECK: I don't know that that is so. I never heard that announced as a doctrine, that the higher you get in civilization the more courts you have to pile upon each other. At any rate that does not strike me as correct, and again some things are better in the lower civilizations than they are in the higher. For instance, the simple life of the humbler civilization you lose by too much civilization. That leads me to say what I was going to say in conclusion about the matter. Our idea, and it was firmly fixed in the minds of the committee, was that the system that provides for a trial by a court of competent jurisdiction and a competent judge, with an impartial jury and a review by a competent court of appeals, is the ideal system. It is enough. If a man doesn't get justice in that way he never will. You and I have several times tried the same case more than once, and my experience was that the case never was benefited, that the last trials were no better than the first and the last decision no better than the first. There was nothing gained by a continual running back and forth from one court to another without any great change in results, and it is that sort of thing we want to avoid.

Mr. NYE: I would ask whether it is not true that all the appellate jurisdiction of the supreme court now is dependent upon legislative enactments?

Mr. PECK: I rather think so, but I am not sure.

Mr. NYE: Is it not true that all the appellate jurisdiction of the circuit court is dependent upon legislative actions?

Mr. PECK: I think so.

Mr. NYE: Is it not true that for years there has been an attempt made to limit the appellate jurisdiction of the supreme court and it has been prevented by the lawyers in the legislature?

Mr. PECK: Very likely.

Mr. NYE: And consequently we have embodied in the constitution what the lawyers in the legislature refused to give?

Mr. PECK: You get a matter like this before a lot of lawyers in the legislature and each fellow is thinking of his own cases, not caring how it will affect the general public.

Mr. WINN: Is it your intention in drafting this proposal to provide that where a case has been tried by the common pleas court it may be appealed to the courts of appeals?

Mr. PECK: The mode of going to the courts of appeals is left to the legislature, whether by appeal or petition in error. My own idea is it should all be reduced to petition in error. I do not think the circuit court ever tries a case. They simply take the typewritten report of the testimony from the common pleas court, and call that a trial.

Mr. WINN: They may do that in some jurisdictions.

Mr. PECK: They do in a great many I know.

Mr. WINN: You provide in line 56 and subsequent lines as follows:

The courts of appeal shall have * * * original jurisdiction in quo warranto, mandamus, habeas corpus and procedendo and appellate jurisdiction to review, and affirm, modify, or reverse the judgments of the courts of common pleas and superior courts within the district in all cases, and judgments of said courts of appeal shall be final in all * * * cases, except such as involve questions arising under the constitution of this state, or the United States, or cases of the infliction of the penalty of death, or of imprisonment for life, or cases of which it has original jurisdiction.

Was it your intention to use such language as would preclude so far as this amendment is concerned any right of appeal—I mean an appeal and retrial upon the merits of the case?

Mr. PECK: It says appellate.

Mr. WINN: It says appellate jurisdiction to review.

Mr. PECK: Yes. It certainly was not my intention to do anything of the kind suggested by you. My idea was, and I think the idea of the committee was—and I want you to understand that there is not a line in there that the committee did not carefully discuss—that there was only to be appellate jurisdiction. In the first place this was gone over and prepared by a subcommittee composed of Mr. Anderson, Mr. Dwyer and myself, and then gone over by the general committee in the same way, and we intended that the jurisdiction of the courts of appeal should be appellate.

Mr. WINN: You will remember we had a discussion last week on an important measure that had been drafted by a distinguished lawyer and had been considered by some other distinguished lawyers and had been considered a long time by a caucus and then a long time by a committee and a subcommittee, and it was found so full of errors when it came on the floor of the Convention that there was not a section that would stand.

Mr. PECK: Yes, but that doesn't prove that that is always going to be the case.

Mr. WINN: What I am trying to find out is this: It is provided in definite terms that the appellate court may have appellate jurisdiction to review the decisions of the court below. I want to know whether, if the constitution gives appellate jurisdiction to review decisions of the court below, we should not give the appellate court jurisdiction to retry cases from the courts below. Why leave that to the general assembly?

Mr. DWYER: That would apply to equity cases.

Mr. WINN: I have in mind equity cases where they have been tried upon the evidence.

Mr. PECK: The idea was to give the court above

Change in Judicial System.

jurisdiction to try those cases or not as the general assembly may direct.

Mr. WINN: Then the idea is, so far as reviewing cases is concerned, that the general assembly would have nothing to do with that, but so far as the equity cases are concerned, there should be no jurisdiction in the appellate court without the intervention of the general assembly?

Mr. PECK: No. It was intended that the word "review" should be broad enough to include trial on facts or merely a review of the records.

Mr. WINN: I call your attention to the fact that it is not broad enough to include a retrial on the facts.

Mr. PECK: I would not say that. I think it is broad enough. I think, taking the whole sentence together, it would be broad enough. If the general assembly provided for a retrial, it would be broad enough to cover it. It would not be unconstitutional for that reason.

Mr. WINN: Now turn back to line 22:

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

Mr. PECK: That grew out of the fact that the supreme court under this proposal is to consist of six judges and I think some provision such as that would be necessary, and I believe that is the rule of the court now.

Mr. WINN: That was intended to cover any case in which the supreme court had original jurisdiction?

Mr. PECK: It could not, of course. Where it has original jurisdiction there is no judgment below to be affirmed.

Mr. WINN: That is right.

Mr. PECK: It could not apply to any such case as that. There is no provision touching that sort of a case.

Mr. WINN: The first language I read, "whenever the judges of the supreme court shall be equally divided in opinion as to the merits of any case", indicates that it was intended to refer to any sort of a case.

Mr. PECK: But it is limited by the language that follows: "Such entry shall be held to constitute an affirmance of the judgment of the court below". That necessarily refers to matters appealed. Whatever the meaning of the words in the beginning might be, they are limited by the words following in the same sentence; and we are to presume that when the court, which consists of six judges, has before it any case of original jurisdiction and is equally divided in opinion, the court will try by argument and discussion among themselves to reach some decision of the matter. I have rarely known it to fail, when judges come up against such a condition, that they find a way out. They would carefully consider until they found what was the real line of decision and follow that.

Mr. DWYER: That does not interfere with original trials.

Mr. RILEY: In such a case, whether of original jurisdiction or otherwise, if the court is equally divided, would not the plaintiff fail?

Mr. PECK: Of course, if the court is equally divided the plaintiff fails.

Mr. RILEY: What is the necessity of a further provision if on appeal they are equally divided and the judgment below is affirmed? Is not the whole clause unnecessary?

Mr. PECK: I am not sure you are not right, but we wanted to make it clear. I understand the present rule of court where they are equally divided is that the decision of the court below is affirmed.

Mr. RILEY: That is the rule in several states. It is akin to the parliamentary rule that where a vote is equally divided the motion fails.

Mr. DWYER: This provision does not change the original jurisdiction of the supreme court at all, as I understand it; it remains the same as it was?

Mr. PECK: Yes.

Mr. DWYER: And however they may divide it will be just the same as it is now; it is not affected by this at all?

Mr. PECK: No, sir.

Mr. KING: I want to offer an amendment to correct the words that have been referred to and I want to suggest another matter and ask your opinion about it.

Mr. PECK: I am glad to hear it.

Mr. KING: In section 1 there is a provision that has been the law since 1851. It was not changed when the circuit courts were added to our judiciary. "Such other courts inferior to the supreme court, as the general assembly may from time to time establish."

Mr. PECK: Yes.

Mr. KING: Now it is my judgment if that had been reviewed at the time the circuit courts were established, the courts authorized would have been made inferior to the circuit court, but they were not; and the section of the statute establishing the circuit court does not make it superior to the superior courts of the state, but this section as now proposed does make the appellate courts superior to all the present established courts of the state except the supreme court.

Mr. PECK: Yes.

Mr. KING: Now, if the legislature should be permitted to establish new courts and the appellate court is to be a court of final jurisdiction as to all general litigation, should not the legislature be confined to the establishment of courts inferior to the court of appeals?

Mr. PECK: I think that is a good suggestion. I am ready personally to adopt it. Draft such an amendment.

Mr. NYE: Do you not think it would be unjust to permit a litigant who perhaps has but a small amount involved, but who can raise a constitutional question, to go to the supreme court, and let a litigant whose entire property—the savings of a lifetime—is involved, be deprived of the privilege of going to the supreme court, although there may be ten times as much involved in his case as in the constitutional question raised by the other party?

Mr. PECK: I do not think so. If his rights depend on the common law and legislation, the court of appeals ought to be able to determine them without further controversy, and he would probably get as good a judgment and as near right as in any other way. If his rights depend upon a constitutional question which is of interest to all the people it should go to the supreme court and

Change in Judicial System.

be decided. It is rather out of consideration for the people who are affected by constitutional questions than out of consideration for the interests involved in a particular case that those cases are allowed to go up. That is the reason constitutional questions should be decided by the highest court.

Mr. NYE: Don't you think it would be unjust to deprive the litigant whose lifetime accumulation of property is involved of the right to appeal to the court of last resort?

Mr. PECK: No; he could get just as accurate a judgment in the common pleas court and from the three judges of the court of appeals as from the six judges of the supreme court, whether his property was accumulated in a lifetime or was gained yesterday in successful speculation.

Mr. NYE: A question has been asked here with reference to a decision made by some other court of appeals. Suppose that another court of appeals had decided a case one way and the court of appeals that my case is in decides the other way and I am permitted to take my case to the supreme court and the other man has allowed his time to expire to take his case there and cannot take it there. It is *res adjudicata* as to him. Is it not unjust to him to have the court of last resort pass on my case?

Mr. PECK: He has nothing to do with the last court. His case was decided by the court before which it was tried. It is just as in the supreme court. They may decide the same question differently at different times. The man who lost the former case would say, "If they had decided that question that way in my case I would have won instead of having lost."

Mr. NYE: But if the other man gets to the supreme court with his case and the supreme court decides for him and such decision would make me win my case if I could get it there but cannot because the time has elapsed, is not that a hardship?

Mr. PECK: I can't see how you can imagine all these difficulties. I cannot see how they present anything practical.

Mr. NYE: Haven't you really eight separate and distinct courts of last resort?

Mr. PECK: To a certain extent, yes, but not altogether. They are tied together by the knot of the supreme court which is there as a balance wheel for the whole system.

Mr. NYE: If you cannot get there I cannot see how it is a balance wheel.

Mr. ANDERSON: Has not the thing suggested by Judge Nye existed for many years in the federal court; that is, where there is a question of the constitutionality of an act it is decided first in a circuit court and then in the United States circuit court of appeals and then by the supreme court of the United States?

Mr. NYE: Yes.

Mr. ANDERSON: But if it were a question of money or property—it made no difference how much—the litigant has to stop at the United States circuit court of appeals.

Mr. PECK: That is exactly the law.

Mr. ANDERSON: And not only that, but has it not been true that he might go to the supreme court of the

United States when there was a flat difference between two United States circuit courts of appeals?

Mr. PECK: Yes.

Mr. ANDERSON: And those conditions have existed for years and years without any hardship to anyone?

Mr. PECK: I know the conditions have existed and as far as I know without hardship. I want to say it is intended through this proposal to have our system operate as the federal system does. There a man brings his suit in the circuit court and it is tried there. Then he may carry it to the circuit court of appeals and have a final judgment. Ninety-five per cent of the cases in the federal courts end there. The other five per cent constitute cases on constitutional questions and some matters that are taken up on certiorari. Now we want something of that sort in Ohio. We want to have a limit to litigation and we want to have particularly more equality on the subject of litigation. We want to give a man a fair chance so that he will not be worn out in protracted litigation by men of large means.

That is one trouble with our litigation. Of course litigation is expensive and troublesome under any circumstances, but the trouble and expense can be reduced a good deal by a proper system, and we want to make our system as prompt and as efficient as the ends of justice require. This thing of beginning a suit and going through the court of common pleas and then at the end of two or three years getting up to the circuit court and staying there two years and then three or four or five years in the supreme court is all wrong. The people of Ohio have suffered from it and litigants have been worn out by that sort of persistent litigation. They worry themselves over it at night and they run about and talk it in the day time until they worry themselves into such a state of mind that they will take any thing they can get. That is what we are trying to remedy. It is wrong, for we all know that justice delayed in that way is justice denied. The common law boasts that it has a remedy for every wrong, and if we have a remedy for every wrong we ought to put it within the reach of every man. Let all people have a chance at the remedy and not those only who have large means and can spend ten years in litigation. This proposal is distinctly reformatory in the interest of the people.

We have heard a great deal about the people and popular rights, and we want to do something that is of practical benefit to the people of the state, that will give them easy access and prompt results in the courts and correct the wrongs from which they have suffered. If you want to do something right for the people, something that will benefit them, adopt this or some similar system. This is a movement directly in the line of those things we have been doing here, directly along the line of the three-quarters verdict, of the initiative and referendum and of all the popular steps we have been taking. This is in the interest of the people just as definitely as those measures were, and if there is any opposition to it, it comes in part at least from the very same interest that opposed those reforms.

Mr. JONES: In line 19, after defining the jurisdiction of the supreme court, provision is made with reference to the number of terms that shall be held, at least one in each year, at the seat of government—

Change in Judicial System.

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

Mr. JONES: "And such other terms as may be provided by law." I notice you have thrown in there one term in each year at the seat of government and such other terms there or elsewhere as may be provided by law. What reason is there for providing that terms of the supreme court may be held elsewhere than at the seat of government? Why not leave that as it is?

Mr. PECK: I imagine there might be a reason why there should be a temporary removal of the court to another part of the state. There might be an earthquake here that would destroy a large part of the city or there might be an epidemic which would make it objectionable to come here. There might be many reasons why the supreme court should be held temporarily at Cleveland or Cincinnati.

Mr. JONES: That would be temporary?

Mr. PECK: Yes. That language "there and elsewhere" is copied from the old constitution. You are criticising the fathers now.

Mr. JONES: Is not the reason you find it in the constitution of 1851 the fact that the supreme court before that was held everywhere around over the state and that it is merely a sort of fossil that has come down and no longer has any meaning?

Mr. PECK: I am not as young as I once was, but I was not a member of the convention of 1851.

Mr. DOTY: That may be a safeguard that has come down from the ages.

Mr. JONES: I don't think it is a safeguard. It is rather to the contrary, and I cannot see the reason for it.

Mr. PECK: I can understand why it might be desirable to remove the supreme court temporarily at least.

Mr. ROCKEL: Recently the legislature has provided that certain cases shall go directly from the probate court to the circuit court. This would prevent that.

Mr. PECK: I do not know. I have not considered that.

Mr. ROCKEL: Would not lines 58 and 59 prevent cases from going directly from the probate court to the court of appeals?

Mr. PECK: I think where there is nothing said the legislature would have power to provide for those cases going from the probate court to the supreme court.

Mr. MILLER, of Crawford: I have been listening as a layman to the discussion and I may require more explanation than would be necessary for a lawyer. In the first part of line 59 you mention a "superior court."

Mr. PECK: There is a superior court sitting all the time in the city of Cincinnati, created by act of the general assembly in 1854. It is an old court and one that has been very distinguished in its time. It has had a great many distinguished men among its judges, among others the present president of the United States. Of course, I do not count, but Judge Worthington is one of them and as it stands now the judgments of the superior court are reviewed by the circuit court and this proposal preserves the status on that.

Mr. HOSKINS: I do not know anything about the operation of the superior court in Cincinnati, but would not the operation of this give you people in Cincinnati

the right to one more trial than we would get in the other courts?

Mr. PECK: No, sir; the superior court is on a level with the common pleas court. It used to have a right to review some decisions, but it doesn't do that now, and it is on a level with the common pleas court. The three courts sit separately. They have only civil actions before them and certain classes of those. Their jurisdiction is limited. They cannot hear appeals from justices of the peace and cannot hear divorce causes.

Mr. HOSKINS: What is the advantage of having that?

Mr. PECK: It was originally started as a commercial court and its jurisdiction was—

Mr. WATSON: Why not abolish it?

Mr. PECK: Ask the general assembly. The general assembly made it and I don't care to abolish it.

Mr. NYE: You go from a judgment of that court now to the circuit court?

Mr. PECK: Yes. It is exactly the same as the court of common pleas, but originally we had what was called a general term where all three judges sat together.

Mr. JONES: What is the objection, if this is a plan for simplifying the administration of justice, providing for a transfer of cases directly from the probate court to the court of appeals? Why should not that be done? What disadvantage could there be?

Mr. PECK: I do not see any objection to that.

Mr. JONES: What advantage could there be to trying matters relating to real estate in the probate court?

Mr. PECK: We had in our minds—the committee who were engaged in preparing the proposal—that committee had in mind the proposition that would involve the amalgamation of the probate court and the court of common pleas, and this would carry all the cases up except those abandoned. The members of the committee have changed their views on that. At any rate there is considerable difference of opinion where at the outset they were pretty nearly unanimous.

Mr. JONES: Since the idea has been abandoned would it not be wise to provide for appeals from the probate court?

Mr. PECK: It might be. Those words could be inserted right there.

Mr. HOSKINS: Would you be willing to enlarge the scope of the words "public or general interest," in line 28, so as to leave the class of cases that should be certified to the supreme court to the discretion of the supreme court?

Mr. PECK: I think the committee would not agree to that. We had a great deal of discussion about that, and I don't think the committee would agree to the change.

Mr. HOSKINS: Your own view—

Mr. PECK: Personally I would be inclined to leave it to the supreme court, but in the long run I would rather have it this way. I am afraid to leave that door open. I am afraid it would be pushed open too wide.

Mr. HOSKINS: They are not inclined to hunt work.

Mr. PECK: No. Now, I want to assure you that this proposition is, as Mr. Jones has said, a simplification of the judicial system and distinctly in the popu-

Change in Judicial System.

lar interest, and that is what we are here for, at least that is what I am here for.

Mr. HALFHILL: I desire to offer an amendment which was agreed to by the chairman of the committee. The amendment was read as follows:

In lines 45 and 46 strike out the words "one or more terms in each year at such places in the district as the judges may determine upon," and in lieu thereof insert: "at least one term annually in each county and such other terms at such places at a county seat in the district as the judges may determine."

Mr. HALFHILL: That was agreed to by the chairman of the committee when I suggested it here and I will explain it and see if it will not be unanimously agreed to right now. In districts like the one in which I reside, where there are sixteen counties, there is a great deal of time consumed in holding two terms of court each year in each county, and with the provision of the present constitution which requires them to hold one term in each county, plus the requirement added by the legislature fixing two terms in each county, we have no time in many counties to get the work actually out of the way as it should be done by the circuit court. In our county we are nearly always behind, and it makes it a great hardship for a court to be constantly traveling. With this amendment, the appeal cases could all be heard at the one term which is held in each county, and then the judges could determine upon some place or places in the district to which we could carry to them the error cases, a thing that has been long a crying necessity, but which we have never been able to accomplish. I think in four months, or one-third of the year, this single term that is required by this amendment could easily be held in each county and we would have two-thirds of the working year in which to bring our cases to this court. I think it would be undoubtedly established in some county where there would be a law library and they could apply themselves, as any reviewing court should apply itself, and they could hear cases, dispose of them and make regular assignments of their work. They would not be compelled to be on the wing carrying cases from county to county in order to meet the terms now imposed upon the court by the present constitution and the present legislative acts.

Mr. DWYER: Judge Peck accepted that?

Mr. PECK: Personally I am inclined to accept the amendment, but I would like to hear from Judge Okey and Judge Norris on the subject.

Mr. OKEY: I suggest to leave out "such other places." Just leave it "such other terms in the district." I have no objection to that.

Mr. TALLMAN: I offer a substitute.

Mr. DOTY: Is this a substitute for the amendment just read?

Mr. TALLMAN: Yes.

The substitute was read as follows:

After the word "year," in line 46, strike out the words "at such place in the district as the judges may determine upon" and insert in lieu thereof the words "in each county in the district, but any case for hearing upon testimony shall be heard in the county where the petition is filed;

but cases for hearing upon petition in error may be heard in any adjoining county in the district as the judges may determine upon."

Mr. KING: I move that the substitute be laid on the table.

The motion was carried.

Mr. PECK: I have no objection to the amendment offered by Mr. Halfhill.

Mr. KING: It is suggested that the words "at a county seat" should be inserted.

Mr. HALFHILL: I will put that in.

By unanimous consent the words were added to the amendment. The amendment as thus changed was agreed to.

Mr. KING: I offer an amendment.

The amendment was read as follows:

In line 6, strike out the words "supreme court" and insert in lieu thereof "courts of appeal".

In line 26 strike out the words "adopted by the general assembly".

In line 28 after the word "court" and before the period insert the words "sitting in the case".

Mr. KING: I want to call attention to the second proposition. There may be a difference of opinion as to the form that ought to take, but it strikes me that the words "adopted by the general assembly" are not necessary at all.

Mr. PECK: That is agreed to.

The PRESIDENT: Do you want those put separately or all together.

DELEGATES: All together. The amendment was agreed to.

Mr. Worthington was here recognized.

Mr. PECK: I want to offer the two amendments of which I spoke, and this is a good place to put them in.

The PRESIDENT: Will the gentleman from Hamilton yield?

Mr. WORTHINGTON: Yes.

Mr. PECK: I want to strike out the word "eight" in lines 32 and 35.

The amendment was agreed to.

Mr. PECK: I wish also to substitute "before" for "after" in line 39 and insert in the same line "by expiration of term" after "vacancy".

Mr. WORTHINGTON: Mr. President and Gentlemen of the Convention: I most heartily am in favor of the fundamental principle which underlies this proposal as I understand it, that is, the principle of one trial and one review. I think there are some things in the proposal, however, that should be changed. I allude to what Judge Peck has called controversial questions. There are others that may not be controversial. I do not suppose some of them at least would have been contested in the committee if the matter had been brought to their attention.

I shall not go over the reasons why one trial and one review are for the benefit of the people of a community, because Judge Peck has stated them admirably, and until he is answered there is no occasion for me to take up any time upon that point. I shall not take up first the controversial points in this proposal because I think it will be easier for me, and possibly for you in following me, to take up the suggestions I have to make in

Change in Judicial System.

reference to my proposal in the order in which they appear in the proposal itself, for at the close of what I have to say I intend to offer a substitute which will embody all the essential ideas, as I understand them at least, of the proposal except upon those controversial points and my own ideas upon those points as well, and the other matters which the committee either have not considered or else thought not advisable to introduce into the proposal. And the very first change I propose in the substitute is the smallest of them all, a matter of no importance at all. It is simply a matter of convenience. In reading over the proposal I found this new court was called in some places a "court of appeals" and in other places a "court of appeal." Now, while I will not be positive as to this, I think in most places the word is plural. I know it is only such a slip as will occur in writing, and it seems to me it would be better to use a phraseology or form that will not give opportunity for a slip of that kind and instead of calling it a "court of appeals" call it the "appellate court." That has the advantage of simplicity and has the advantage of following the style we have. We call the last court the supreme court and now we call the intermediate court the circuit court. In the proposal of the committee it is called the court of appeals and I suggest calling it appellate court. The court of appeals would have to be called the court of appeals of Ohio to distinguish it from the court of appeals of the United States. The name appellate court, therefore, has that additional advantage. That is a matter of small significance, however.

The next thing I would change, and here we have a matter that is controversial, is the number of judges that shall compose the supreme court. My notion is that that court ought to be composed of an odd number of judges, whether five or seven is a matter of indifference to me. Judge Peck has shown some reasons why it should be an odd number, and if you have an odd number you get rid of those lines, 22 to 26, which are inserted necessarily if the court is to consist of six judges. It was suggested that they might be eliminated, but those words are necessary because of the provision in line 11 that a majority of the court should be necessary to constitute a quorum or pronounce a decision. The judges must pronounce a decision and when they are equally divided it can not be done. Judge Peck properly said that these words were inserted to cover that point.

Mr. DWYER: Was not that provision made so that the courts could sit in two divisions?

Mr. WORTHINGTON: No; that was not it. Three is not a majority of the court.

Mr. DWYER: I mean was it not contemplated by the law to have them sit in two divisions?

Mr. WORTHINGTON: Three judges in a division can make a decision, and less than three can not. The language of the amendment that increases the number of judges says:

For the adjudication of cases a majority of each division shall constitute a quorum and such assignment of cases to each division may be made as such court may deem expedient, but whenever all the judges hearing cases shall not agree to the judgment rendered therein, or whenever a case involves the constitutionality of the act of a gen-

eral assembly, or an act of congress, it shall be reserved for the whole court for adjudication.

So you see the language is changed and changed purposely, as I understand it, so as to require four judges at least to concur in a decision.

Mr. ANDERSON: The reason that they permitted the court to divide and hold separate sessions was because they had so much work. If this proposal becomes the organic law, the work will be much reduced, and therefore it would be proper to have the court an odd number and all sit together.

Mr. WORTHINGTON: Yes; if this proposal goes through the court can no longer sit in divisions. This is a substitute for section 2 of article IV. Although I said in the beginning that I am very much in favor of the general system outlined in the committee's proposal.

Mr. JONES: Might it not be desirable to frame this provision so that if a situation arises to make it desirable to have two sessions it could be done?

Mr. WORTHINGTON: I think not, because I can not conceive that this court with the limited jurisdiction it will have under this proposal can ever be crowded with work. It is inconceivable to my mind, how that could happen.

I have said that I am very much in favor of the fundamental principle of one trial and one review which underlies this proposal. When I came here I had in my own mind that that result could be reached better in another way. I had thought that the supreme court might be increased to nine judges and sit in three divisions, three judges to a division, and abolish the circuit court. In that way you would have created a sufficiently strong and a sufficiently numerous supreme court to dispose of all the business that would come to the supreme court, but I have been satisfied in conversation with other lawyers upon the subject that that probably is not a wise solution of the matter. There are matters of doubt in the first place as to whether three appellate courts could dispose of all the business that could come from the common pleas court; and secondly, it is advisable to give opportunity to the litigants to save some of the expenses of coming to the supreme court by bringing the appellate courts near to them and admitting them to a court where it is not necessary to print the record and brief; so I have changed my own point of view to the extent that I am willing to concede that the committee's judgment was wiser than my own first impression on that point.

Now I would make the number of judges of this supreme court odd, and I would do that by adding a chief justice as such. Let a man be elected as chief justice and let him hold that office. I have never sat on that bench and I have never had any conversation with judges about the conduct of the business of that court, but it is common talk of the bar that in the supreme court of the United States the manner in which business is dispatched depends very much on who is chief justice, and that one chief justice will accomplish much more than another, and one man who has been conspicuous as chief justice and one man who has been frequently mentioned is Chief Justice Waite, who went from a constitutional convention of Ohio to assume his duties on the supreme bench. If there is anything in that point.

Change in Judicial System.

to have one head, it is manifestly better to have a chief justice chosen as such, and occupying the position as such than to have it rotate from year to year with different members of the court filling the position of chief justice. It seems to me this is a desirable amendment, and it is no little thing that it would add dignity to the position. I may be mistaken in this, but I believe the state of Ohio is the only state that has not a chief justice as a matter of right. I mean a man chosen to fill that particular position. If that is so, it seems to me it would be a good chance for Ohio to fall in line. So to carry that out I would insert "a chief justice and" in line 8, following the words "shall consist of".

Let me now come to the next point, which is quite technical, but which I think would be an improvement, and that is giving to the supreme court the power to issue the writ of prohibition. There will be some lawyers here who have not looked at their Blackstone for some years, and who may have very hazy notions in their own mind as to what a writ of prohibition is. It is a writ that is used by the higher court in ordinary parlance to keep an inferior court within the limits of the jurisdiction that the law prescribes for it. It is a short cut to tell the inferior court to mind its own business and not attempt to do something that the law does not authorize it to do. It was a writ that was exercised by the court of King's Bench in England, and that was brought over to all the courts of last resort in this country. I believe it was possible to have been exercised by the supreme court under the constitution of 1802 in Ohio, but it was made impossible in the constitution of 1851. Why the change was made I do not know. I do know that if the court had been granted that power we would have been saved in Hamilton county a scandalous exhibition some little time ago. I refer to a case where a judge undertook to act as supervisory judge under the statutes which called him such. We never had a supervisory judge in Hamilton county. The judges met and elected a presiding judge under a statute local to Hamilton county. This was a question arising upon a question of bias in another judge. The statute requires that that affidavit shall be presented to the supervisory judge, and then there being no writ of prohibition under which it could be determined, whether this judge could act in that manner, the lawyers tortured — I can use no other words — the writ of mandamus with the writ of injunction into a writ of prohibition, and we had that sort of thing going on in the courts of Hamilton county which accomplished exactly the same result of what they thought was a mandamus to compel the judge not to do what he was going to do, and they coupled that with a prayer for injunction. To a lawyer who was brought up in the old school such a thing would have caused I don't know how much mental trouble. I was not brought up under the old school, but I was near enough to it to remember how those who were the leaders when I was young at the bar would have looked at a matter of that kind. I can not conceive any possible harm that the granting of the power to issue that writ to the supreme court would give and I can see that it might prevent a great deal of trouble.

Mr. PECK: There is no objection to that amendment.

Mr. WORTHINGTON: Then I will pass on. The next question is in line 14, involving appellate jurisdiction of the supreme court, and I am coming here to a matter to which I am advised the committee is opposed. I would insert at the beginning of line 14 the words "the construction of a statute." I can conceive of no case, barring constitutional questions, that should go to a court of last resort for final determination more certainly than one which involves the meaning of a law which provides for the whole state, and it is a matter that should be decided as quickly and as definitely as possible. So it seems to me it would be a very grave mistake for this Convention to leave these words out of the grant as a matter of right for appellate jurisdiction and let it come up only in the case where two appellate courts had differed as to what the particular statute meant.

Mr. BROWN, of Highland: What words do you propose?

Mr. WORTHINGTON: I propose to insert at the beginning of line 14 the words "The construction of a statute", so that it would read

It [the supreme court] shall have original jurisdiction in quo warranto, mandamus, habeas corpus, procedendo and appellate jurisdiction in all cases involving the construction of a statute, questions arising under the constitution of the United States, etc.

Mr. ANDERSON: That would permit all questions of right growing out of any statute to go to the supreme court of Ohio?

Mr. WORTHINGTON: That is the object of it. If the cases involve the construction of a statute they ought to go there.

Mr. ANDERSON: All questions of right predicated upon a statute would go there under your proposed amendment?

Mr. WORTHINGTON: I don't think so. To illustrate what I mean I will give an example: The supreme court of the United States has held under another provision, which is not in this language but under a grant of that kind, that any action to which a national bank is a party may be brought in the federal court. I would not want this to go as far as that. It may be my language is not as happy as it might be, but I do say wherever there is a controverted question as to the meaning of any particular statute, that that question ought to go to the supreme court for decision as speedily as possible and it ought not be left for the court of appeals to fight it out and then have one of those cases brought up to the supreme court by certiorari to find out the meaning of the statute later.

Mr. ANDERSON: Let me suggest several actual cases. For instance, the miners of the state of Ohio succeeded in having a law by which miners were protected in the way of furnishing them props and furnishing them safety lamps and in the way of furnishing an examination. The foreman or some one had to make an examination of the mine every morning for gases, and the same law provided that if the mine owner failed to obey that law, and by reason of his disobedience of the law — if that were the proximate cause of the injury — that then the mine owner would have to respond

Change in Judicial System.

in damages for an injury growing out of his negligence in this regard. Our supreme court, in the Morgan case, interpreted that statute in such a way that the miner could not recover on account of assumption of risk. Again, some years ago a law was passed prohibiting the employment of children under sixteen years of age by corporations where the children would have to work around dangerous machinery. Yet, in a case in 63 O. S., where the master had disobeyed the law, our supreme court held that by reason of the child—I think the child was fourteen years old—remaining in the employ of the master after the defective condition was known, the child assumed the risk and was also guilty of contributory negligence, and they interpreted that so as to render the law nugatory. I can cite many instances like that, so that if your amendment would go through it would leave us where we are in that regard.

Mr. WORTHINGTON: I think it is desirable that the cases you mentioned should go the supreme court so that the legislature should find out exactly the situation and apply a remedy if one is needed.

Mr. ANDERSON: You couldn't amend that.

Mr. WORTHINGTON: Yes, you could. You could amend by saying that the miner in the first place could not be held to assume the risk.

Mr. ANDERSON: Even that has been held by the supreme court as not to prevent the defense of assumption of risk by the lawbreaking corporation.

Mr. WORTHINGTON: Of course, I can not undertake at this time to go over all the cases of the supreme court on that question. There may be particular cases in which the supreme court has done what you or I would regard that they ought not to have done. It may be that in some cases they have construed statutes in a way that we don't think is right, but whether the statute does or does not contain a specific clause of prohibition, especially or by inference, is a matter of construction, and that should reach a final decision.

Mr. ANDERSON: Let me suggest a case which is called the Narrimore case. That is a case where a man was employed in Cincinnati in a railroad yard. There was a law passed in 1884 about the blocking of frogs and guard rails. By reason of disobedience of that law by the railroad company Narrimore was injured. The lower court and the circuit court held that he could not recover because he had assumed the risk, he had worked in the yard knowing the master had disobeyed the law. That case was taken to the United States court of appeals, and Judge Taft decided that notwithstanding the lower court had held that Narrimore had assumed the risk, yet because of the statute in Ohio, which had been disobeyed by the railroad, the corporation could not set up as a defense the assumption of risk.

Another case of the same kind occurred where a man named Johns was killed in Cuyahoga county under exactly similar circumstances, but by reason of absence of diverse citizenship the case could not be taken to the federal court and it was brought up to the supreme court of Ohio and that court held, notwithstanding the railroad was a lawbreaker and notwithstanding that a law had been passed for the protection of a railroad man who could not protect himself, the railroad company could set up as defense assumption of risk in a suit by the widow of Johns.

Mr. WORTHINGTON: Don't your attacks upon the supreme court react upon you? Who put the supreme court there?

Mr. ANDERSON: You don't want me to answer that?

Mr. WORTHINGTON: I have no objection to it.

Mr. ANDERSON: I don't intend so.

Mr. WORTHINGTON: If the judges are not fit, the remedy is to elect other judges, but do not, on that account, cripple the administration of the law. What the gentleman alludes to as to the difference of opinion between the federal and the state courts is a matter that happens not every day, but very often. There are many cases in which that arises. The United States court, when a state statute comes before it which has not received the interpretation of the supreme court of that state, gives its own interpretation, but if the supreme court of the state has given an interpretation of that statute the United States courts follow the interpretation of that state supreme court. But if the supreme court of the United States construes the statute, it follows that construction, and so do all other federal courts. That is a misfortune under our dual system.

Mr. BROWN, of Highland: Admitting that the shortening of litigation as covered by this proposal is a good thing, and that the insertion of those words you propose would defeat the purpose of this proposal, will it not be a sufficient safety that the decisions on such questions of statutory law should be allowed to be taken up by certiorari when it becomes very important?

Mr. WORTHINGTON: I would have no objection to that. That would cover the objection. What I am after is that the supreme court should have an opportunity to determine the meaning of a disputed statute, and whether the right of recourse to that court be given to the litigant as a matter of right or as a matter of grace from the supreme court I do not care. I don't think that necessarily arises under the power of certiorari.

Mr. BROWN, of Highland: It might be made so?

Mr. WORTHINGTON: It might be made so.

Mr. BROWN, of Highland: Another question about the writ of prohibition: Would that do away with obiter dictum?

Mr. WORTHINGTON: No; it won't prevent the court from talking nonsense. We may prevent them from doing nonsense.

Mr. JONES: The purpose of your proposal in regard to amending line 14 was to give the supreme court original jurisdiction in cases involving the construction of a statute?

Mr. WORTHINGTON: No; appellate jurisdiction.

Mr. JONES: I misunderstood you.

Mr. PECK: Does not allowing the bringing up of cases of great general interest by certiorari give the court sufficient latitude to bring up any statute really of importance? I don't want every statutory question going up, because there are statutory questions that are of no moment. But when a real statutory question arises the court could allow it to be brought up.

Mr. WORTHINGTON: I would be more satisfied if that were amended to read "matters of public or general interest or involving the construction of a statute", so as to make it specific. There are many statutes that

Change in Judicial System.

are not of public interest or great general interest, and yet it is of interest to the public at large that the meaning should be established. I am coming to that later.

Mr. ANDERSON: Is it not true that eighty per cent of the cases that now go to the supreme court are those where the individual interests are on one side and the corporate interests on the other, and is it not also true that nearly all of them are based upon the construction of some statute passed in favor of the interests?

Mr. WORTHINGTON: I should think not. I can not speak from personal interest because I do not recall that I ever represented a corporation in the supreme court in my life, but judging from observation from the reading of reports I should say not. I said I never represented a corporation in the supreme court. I did represent the Cincinnati Tin Company which was ousted from the canal at Cincinnati. There is no other case that occurs to me just now.

As I said a while ago, the supreme court, it seems to me, will have time to burn with the small amount of business that is going to come under this proposal as it now stands. Look and see what it is limited to; original jurisdiction, by which there may be two or three cases in the course of a year, very seldom more than that; then appellate jurisdiction as a matter of right in constitutional matters, and in matters adjudging the graver penalties of the law. Those cases will not be sufficiently numerous to keep the court busy. It will probably be a long time that that condition of affairs will exist, and they will have greater freedom and power to issue writs of certiorari so as to give them apparent reason for existing. I would like to add other powers there, other species of jurisdiction which are now prohibited from usage. I understood the chairman of the Judiciary committee to say that the circuit court of Franklin county is now overburdened with actions brought under its original jurisdiction to review proceedings of officials of the state within this county. I may have misunderstood him.

Mr. PECK: I do not know that I said to review proceedings of officials, but in connection with state matters.

Mr. WORTHINGTON: The original jurisdiction of the circuit court of Franklin county under the present constitution is just exactly the same as that of the supreme court, and that original jurisdiction I will read to you. It is in section 6, which provides: "The circuit court shall have like original jurisdiction with the supreme court, and such appellate jurisdiction as may be provided by law." So that if the circuit court of Franklin county is exercising original jurisdiction in anything but mandamus and quo warranto — and cases of habeas corpus and procedendo could not come under that — and if the legislature attempts to give jurisdiction in any other matter, the legislature is transcending the limitations of the constitution. It was held by the supreme court in the case of Logan Branch Bank, 1 O. S. — and I believe I have a reference to the page here, but the members of the bar are more or less familiar with the case — that the supreme court could not be given an appeal from the auditor of state — the power to review the decisions of the auditor of the state — because that would not be either original jurisdiction or appellate jurisdiction. If it were original jurisdiction it would not

be within the constitutional grant, and if it were appellate jurisdiction it was an appeal from somebody that was not a court and the supreme court could only have appellate jurisdiction from courts as the supreme court decided in that case. With the increased functions constantly being given to the state administrative officers, with the growth of power of the railroad commission, the tax commission, and the public utilities commission, there will be questions constantly arising which will have to be determined by some court. As matters now stand those cases as they come up are brought into the court of common pleas of some county, generally Franklin county, and they drag their weary length along through the court of the common pleas and the circuit court until they get to the supreme court, or else there is an agreement between the parties by which a pro forma judgment is entered in the lower courts and the case is rushed along to the supreme court.

Mr. PECK: It may be that sort of cases that I had in mind, cases that have come to the common pleas court, because I was told they involved cases of original jurisdiction. The conversation was brief and we didn't go into the subject deeply, but it was said they related to public affairs.

Mr. WORTHINGTON: I know there are many of those, just as the supreme court of the United States has had many interstate commerce cases.

Mr. PECK: They are peculiar to this circuit?

Mr. WORTHINGTON: Naturally, because the seat of government is here.

Mr. DWYER: About two hundred cases are docketed in the circuit court and about thirty per cent go to the supreme court. Manifestly the circuit court in this county is very much hampered in its business by having this class of cases come to it.

Mr. WORTHINGTON: And I would depart from the constitution of 1851 and would grant the supreme court original jurisdiction to review those cases, that they may be brought directly in that court, and I would grant that court the right to determine whether the officer did right or not, subject, however, to such grants as the legislature might make with reference to it. In other words, I would not undertake to settle a question of that magnitude here, but would authorize the general assembly to give that power to the supreme court if the general assembly saw fit.

Mr. PECK: I am inclined to agree with you about that.

Mr. WORTHINGTON: And I would accomplish that in line 17, right before the word "It," by inserting "and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law." That would leave the whole thing to the legislature and would remove a stumbling block.

Mr. PECK: I will accept that amendment so far as I am concerned. Would not that include county officers?

Mr. WORTHINGTON: It is left to the legislature. I doubt if they would go as broad as the grant of power.

I have already said if the court is made to consist of an odd number of judges there would be no occasion for the words in line 22 down to the word "below" in

Change in Judicial System.

line 26. That would be wiped out automatically and could be eliminated.

Now, in the next clause: "and no statute adopted by the general assembly shall be held unconstitutional and void except by the concurrence of all the judges of the supreme court."

Mr. PECK: The words "general assembly" have been stricken out.

Mr. WORTHINGTON: I am reading it as it was originally, but reading it as you say it is now with the amendment, "and no statute shall be held unconstitutional and void except by the concurrence of all the judges of the supreme court sitting in the case"—that is, it will require the unanimous judgment of the supreme court to declare void and unconstitutional an act passed. I want to call the attention of the Convention very seriously, not to that matter, but to the position in which they are placing the supreme court of Ohio, if they adopt this provision as it stands as the fundamental law of the state. There are provisions in the Ohio constitution also found in the federal constitution. There is one about the obligation of contracts. There are others forbidding the state to pass any laws impairing that obligation. There are others contained in the first section of the fourteenth amendment of the constitution about personal rights. Cases may come to the supreme court of Ohio which involve the constitutionality of acts, federal and state. In view of those provisions of the United States constitution as well as the parallel provisions of the constitution of Ohio, every judge of the supreme court is obliged when he takes his seat to take an oath of office that he will obey the constitution of the United States as well as the constitution of the state of Ohio. The constitution of the United States says that laws and treaties made in pursuance thereof shall be the law of the land, and now what is going to happen to the unfortunate judge who finds himself constrained by the constitution of Ohio to declare a law valid under the Ohio constitution which he believes in his conscience to be void, and what is he to do with reference to the constitution of the United States when the same question comes up in the same case with reference to that? Is he to stultify himself and send that case up to the supreme court of the United States at Washington to be reversed, because they won't pay any attention to the restrictions you put in here? I submit that is a position in which he should not be placed.

Mr. PECK: I don't see why any judge should get in that position. A judge does not decide against his convictions.

Mr. WORTHINGTON: Doesn't he enter the decision?

Mr. PECK: No, sir; the court enters the decision.

Mr. WORTHINGTON: Is he not a part of the court?

Mr. PECK: A majority of the court enters the judgment.

Mr. WORTHINGTON: One man enters it. Is that right? I have heard, not in the course of the debate, but in the talk outside of the debate, as an excuse for this provision, that it is usually provided in deliberative bodies as to matters of great importance that more than a bare majority should be necessary to decide the question. And, therefore, it is provided in our own constitu-

tion that constitutional amendments shall be passed by a certain vote more than a majority, and that other measures shall be passed by more than a vote of a majority in the general assembly; and it is argued that the constitutional question to come before the court is one of the same nature as those, and therefore should follow that same rule, but there never was a greater fallacy. There is absolutely no parallel between a court and a deliberative body that makes the laws, and the reason is this: The general assembly when it has a matter before it, does something or nothing. If it acts, it changes the existing laws; if it does not act, it leaves the existing laws alone. But a court is never in that position. Whenever a court makes a decision it changes rights of some kind. If it affirms a decision below, it sustains the right of the plaintiff as against the defendant. If it reverses the decision, it does the contrary. Even if the court dismisses a case as not having jurisdiction it acts. Take the case alluded to from the floor of this Convention the other day, where the supreme court of the United States recently dismissed a case from Oregon, in which the constitutionality of the initiative and referendum was involved. It was said that the court affirmed the constitutionality of the initiative and referendum. It did not. All the court did was to say it had no jurisdiction to decide that question and the parties had to go for relief to congress. It did not pass upon the constitutionality of the initiative and referendum law in Oregon one way or the other. It said the relief was to be sought in another tribunal. And so I say you can not find a case in which the court when it takes action does not change existing rights of some kind. It is not like the general assembly. It is not like any other deliberative body, and there is no reason in the nature of things for applying to a court the reasoning which requires a deliberative body to have more preponderance than a majority. A court is a unit. It is one thing. The judges who sit there make up a court to be sure, but from the time of the beginning of judicial history the judgments of courts are the judgments of a majority of the courts, and you are reversing the whole principle of jurisprudence when you introduce any such provision as that.

Now passing to the next question:

In cases of public or great general interest, the supreme court may direct the court of appeals to certify its record to the supreme court and may review and affirm, modify or reverse the judgment of such court of appeals.

I agree with my colleague, the chairman of the Judiciary committee, in saying it is wise to disregard the advice given by the bar association of Hamilton county that this clause be modified and let any case go up to the supreme court by writs of certiorari on the application of parties interested. He and I are old enough to remember the troubles that we had from motions for relief and applications for writs of error. Those who are not so old do not remember those evils as well as he and I do. Of course, I would not have a return to those days, but I do think this clause could be modified a little bit, and if I had my way about it I would embody with this clause the part found in the sixth section as to the revisory jurisdiction of the supreme court

Change in Judicial System.

over the court of appeals, and thereby bring all of the matters relating to the jurisdiction of the supreme court in one section and one place, so that we would not have to look for it in two places.

Now, carrying out the idea I have expressed as to eliminating in the first place the clause arising from there being an even number of judges, and eliminating the clause requiring a unanimous decision to declare a statute unconstitutional—I care not whether that is unanimous or a majority of one or more is required—I stand upon the plain flat principle that a court is a unit, and must act as a unit. Its judgments are the judgments of a court which much speak by the majority.

Mr. BROWN, of Highland: It appears to my mind that you regard the change of the time-honored jurisprudence as a serious matter. Is it a serious matter to change time-honored jurisprudence or any other institution if it works good for the institution or if it is to the advantage of the institution? Is the fact of its age in itself a serious matter?

Mr. WORTHINGTON: I object to this change because it is illogical. It is not merely a question of change in the time-honored system of jurisprudence, but it is at war with the very theory of jurisprudence. I have not myself examined—it did not occur to me to do so—I have not myself examined to find out the number of cases in the supreme court of Ohio where statutes have been held to be unconstitutional. I fancy if a careful statistician went over the reports he would find that the number is much less than it is supposed to be now; in other words, that the evil which the gentlemen say exists in the present system is much less serious than they now think it to be. When some particular act that is affirmative of the public welfare is declared unconstitutional, as the one which excited Mr. Roosevelt so much, we can well see how the people may get indignant and want the whole system changed, but I think it is well in the first place, before you institute a change of this kind, to find out, not from imagination, not from discussion on the street or elsewhere, but from actual ascertainment, the results—how many statutes have been declared unconstitutional and how many of those decisions you know are wrong, because if you agree the decision is right there is no argument against it. So in place of the two things I have mentioned and this last one about certiorari, I would insert at this place after the word "law" in line 22—I would strike out the paragraph following line 22 and insert what I shall read. But if I cannot persuade the Convention to follow my view about what part of the court shall have power to declare a law unconstitutional, then what I have to say would follow the words "supreme court" in line 28. It might be inserted at either place:

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, reverse the same, and

render final judgment or remand the cause for further proceedings.

There are some things in there that are not in the committee's report which seem to me necessary for the complete expression of thought which the committee undoubtedly had in mind. There are other things which vary a little from the report and I will call attention to this first.

Mr. ANDERSON: If your amendment were adopted would that permit the supreme court to enter upon final judgment in certain cases, and if so, what cases?

Mr. WORTHINGTON: In the cases that might be prescribed by law—the power it has now.

Mr. ANDERSON: That would be the rule of Pennsylvania, that the supreme court can reverse a case and render a judgment in favor of the defendant in error.

Mr. WORTHINGTON: They do that now.

Mr. ANDERSON: That is the rule in the supreme court of Pennsylvania.

Mr. WORTHINGTON: Our supreme court does that.

Mr. ANDERSON: Can you name me one case in which that has been done?

Mr. WORTHINGTON: I have not the cases at my fingers' ends, but there have been many cases decided by the supreme court in which they have reversed the judgment of the court below. The statute says the supreme court in reversing the judgment shall render such judgment as the court below should have rendered, and if the supreme court is of the opinion that the court below should have rendered judgment in favor of one party or the other and the court below did not do that, the supreme court does that.

Mr. ANDERSON: Is not your amendment stronger than that? Does it not permit the supreme court to finally dispose of cases in favor of a defendant in error if the court sees fit to do so?

Mr. WORTHINGTON: If it does mean what you say it does I have been careless in the use of language. I had no intention to vary from the existing law. It may be that the language should be qualified, but I did not intend to give the supreme court power to render any judgments other than the court below should have rendered on that record, and I don't think I have, but I may have done so. Now you will note that I have left out of line 28 the adjective "great" before the word "general." I have done that in the interest of brevity, and I don't think it amounts to anything except an admonition of the supreme court which they will do with as they see fit when the case arises. In other words, if the supreme court has a short docket it will be very apt to say that a case that comes before it on application for certiorari is one of very great general interest and must be brought in there to give them something to do; whereas, if they have a long docket, they will say the particular case may be important to the litigant, but there is no great general interest, although there may be general interest. In other words, the matter is left to the supreme court, and why multiply adjectives that way?

I have introduced another change where I am afraid there might be trouble. Remember this is a constitu-

Change in Judicial System.

tional grant of power to the supreme court: "In cases of public or great general interest the supreme court may direct the court of appeals to certify its record to the main court," etc. When may the supreme court do that? The supreme court is the only one that can pass on that. The supreme court would fix its own statute of limitations. I do not think that should be left to the court. I think that is a matter of legislative discretion, and the legislature should fix that statute of limitations. Therefore, I put in at the beginning of my amendment, "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 court," etc., so as to give the legislature power to say how long a time shall be open for a litigant to apply for a writ of certiorari.

Mr. HOSKINS: That is in line 31 of the proposal of the committee?

Mr. WORTHINGTON: Yes. I have stricken out of my own copy all of line 22, following the period, and running down to the end of the paragraph. I strike out the first part of that down to the word "below" in line 26 because that clause is unnecessary if the court consists of an uneven number of judges.

Mr. HOSKINS: What is the language you use with reference to the class of cases the supreme court may review?

Mr. WORTHINGTON: By certiorari you mean?

Mr. HOSKINS: Yes.

Mr. WORTHINGTON: "The supreme court may, within such limitations of time as may be prescribed by law, cause a record or records of any judgment or judgments rendered by the appellate court in cases of public or general interest." That, you will see, is the same as line 28 with the exception of leaving out the word "great." Then I go on, "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." That language as to the conflicting judgment is a substitute for lines 65 to 69 so as to bring all the revisions of certiorari together, and I have varied from lines 65 to 69 in this: I have provided that when the supreme court finds out that two courts of appeals have rendered conflicting judgments, then the supreme court can issue certiorari for either or both records, and it may determine what should be the law in those cases. That is done to obviate the hardships that have been spoken of here as to where the first litigant has had his case considered in the circuit court or the appellate court, and the judges of that court, being sworn to administer the law, he supposes that they have administered the law correctly, and that therefore he should abide by the result; later some other man rules upon that case and there is a difference in the court of appeals and then that case goes up and the supreme court decides that the second court decided rightly and the first did not and the first man is left out in the cold. There should be a limitation of time in which writs of certiorari apply in those cases.

Mr. PECK: I have no objection to the line you

suggest "within such limitation of time as fixed by the general assembly", but I do object to the other part.

Mr. WORTHINGTON: Now I call your attention to a difference between the committee and myself. I read line 65:

* * * whenever the judges of a court of appeals find that a judgment which they have agreed upon is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall reserve and certify the record of such case to the supreme court for review and final determination.

That leaves it to the court of appeals which decided the case to decide whether it conflicts.

Mr. BROWN, of Highland: Under certiorari could not application be made to the supreme court?

Mr. WORTHINGTON: Not under the proposal as it stands.

Mr. BROWN, of Highland: I thought under the other provision you would have a right to get a writ of certiorari from the supreme court.

Mr. WORTHINGTON: Only in cases of public or great general interest.

Mr. BROWN, of Highland: That would be a matter of general interest if two cases were decided adversely to each other.

Mr. WORTHINGTON: It might be, and the interest might be peculiar to the litigant and not interest others.

Mr. BROWN, of Highland: You said the supreme court would be likely to act according to how busy it was?

Mr. WORTHINGTON: There should not be two grants of power covering the same subject. It is not natural that there should be, and the supreme court would naturally say that this case which came up because of division of opinion in the courts of appeals is to be covered altogether by what the constitution says with reference to the power of the court of appeals that decided the case.

Mr. BROWN, of Highland: Judge Peck's proposal makes it the duty of the appellate court to do it and also the right of the supreme court to do it, which I think would cover it.

Mr. WORTHINGTON: It may be that Judge Peck's proposal grants the latter. I doubt it. I would rather have it in the supreme court. I do not think there is any occasion for the appellate court to pass upon that matter at all. There is no practical reason. If the appellate court passes upon it in the first place it has to find it out before it enters the judgment, because after it enters the judgment the matter is at an end. It can only do that before entering the judgment, and that is a limited time, and there may not be opportunity to find out whether there was this difference of opinion. We have often argued cases in our county not knowing of parallel decisions made in neighboring circuits. That happens frequently and it seems to me you are imposing peril upon litigants that might as well be obviated and that there can be no objection within reason to granting power to the supreme court instead of the court of appeals to require those cases, and both of those cases, which the proposal does not cover to be sent up.

Change in Judicial System.

Mr. BROWN, of Highland: I have no object in opposing anything you suggest. My prime object is to simplify courts for litigants.

Mr. WORTHINGTON: I understand you are not making captious criticisms, but just want to arrive at the merits of the matter, and I am trying myself not to make captious criticisms, but to present to the Convention things I consider of substance except as to the mere matter of the name of the court.

I add an amendment after lines 38 to 45 as to the filling of vacancies that might arise by expiration of terms of judges of the present circuit court. Judge Peck has, in the amendment offered by him, by substituting the word "before" instead of "after," and by inserting "by expiration of term," removed part of the criticism that I would have made upon that clause. What I am going to say with reference to it is not said by way of any desire to be hypercritical at all, but simply to show the course of reasoning in my mind which led me to suggest the amendment I am going to offer. As the clause stood originally, it seemed to me manifestly to relate only to vacancies occurring accidentally, by death or resignation, and not to those that occurred by expiration of term, and that led me to think about covering the point of vacancies that accidentally occur, and also vacancies that occur by expiration of terms. We all know our judges of circuit courts are elected for terms of six years and that their terms are so arranged that one vacancy occurs every two years. Until some such vacancy occurs we want to keep that up. The idea of my amendment will suggest itself to you immediately. I find in the proposal at lines 43 and 44 these words: "Their number may be likewise increased." That, as I take the context, relates to the number of judges and not to the number of the appellate districts. I don't

think there can be any question about that when the context is read:

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.

As long as you are to have three judges in every district, if you can increase the number of the districts, I can not see any occasion for a grant of power to increase the number of judges in a district. I can not see any reason why three judges in a district are not sufficient. If they are not sufficient, the remedy should not be by increasing the number of judges, but by cutting off part of the district or by readjusting the districts.

Mr. PECK: It was thought that in time the court should be strengthened by adding one judge.

Mr. WORTHINGTON: I thought that might be in the minds of the committee, but I could not conclude that it was in view of the provision of lines 63 and 64, which require the concurrence of all the judges of the appellate court to reverse a judgment below, and if you had an appellate court of four or five judges it would certainly seem too preposterous to say that one judge of the common pleas court and one judge of the court of appeals should decide that case against all the others, so I abandon that idea.

Mr. PECK: That was simply to provide for a possibility.

Mr. Worthington here yielded to Mr. Doty, who moved to recess until tomorrow morning at ten o'clock.

The motion was carried and the Convention recessed.