SIXTY-EIGHTH DAY

MORNING SESSION.

FRIDAY, May 3, 1912.

The Convention met pursuant to adjournment, was called to order by the president and opened with prayer by the member from Knox county, the Rev. Mr. McClelland.

The journal of yesterday (legislative day of Wednesday) was read and approved.

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

The PRESIDENT: A call of the Convention has been demanded, the doors will be closed, and the roll will be called.

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

Anderson,	Harter, Huron,	Price,
Beatty, Wood,	Hoskins,	Riley,
Brattain,	Hursh,	Rorick,
Brown, Highland,	Johnson, Madison,	Shaw,
Brown, Lucas,	Jones,	Smith, Hamilton,
Cody,	Kehoe,	Solether,
Crites,	Kerr,	Stalter,
Cunningham,	King,	Stamm,
Dunn,	Leslie,	Tallman,
Eby,	Malin,	Tetlow,
Elson,	Marriott,	Weybrecht,
Evans,	McClelland,	Wise,
Farnsworth,	Norris,	Worthington.
Fox,	Peck,	

The PRESIDENT: There are seventy-eight members who have answered to their names.

Mr. MILLER, of Crawford: I move that further proceedings under the call be dispensed with.

The motion was carried.

Mr. DOTY: I want to call attention to the fact that eighty-six members promised to be here this morning.

SECOND READING OF PROPOSALS.

The PRESIDENT: The second reading of proposals, and the first thing in order is Proposal No. 134.

Mr. HALENKAMP: If there be no objection we would like to have this informally passed, and I make that motion.

The PRESIDENT: If there be no objection the proposal will be informally passed and the next business in order is Proposal No. 227.

Mr. HARRIS, of Ashtabula: I move that that be informally passed and retain its place on the calendar.

The motion was carried.

The PRESIDENT: The next business is Proposal No. 16—Mr. Elson.

Mr. DOTY: The member from Athens, the author of the proposal, is not present, and I think this matter ought to be informally passed on the calendar.

The PRESIDENT: If there is no objection the proposal will be informally passed. The next will be Proposal No. 15—Mr. Riley.

The proposal was read the second time.

Mr. RILEY: Mr. President and Gentlemen: I am somewhat taken by surprise that this matter should come up this morning and I have been almost persuaded by my friends not to go into the matter now, but it is something of such self-evident merit that I think it is safe to submit it to a majority of the Convention at any time.

If there is any one thing that there is universal complaint about it is the law's delays and especially the delays and failures to prosecute indictments for crime. Our governor was present some time ago and called attention to some of the features of this proposal, but the proposal had been before the committee for quite a time before he spoke.

There was a time when those charged with crime had no sort of a show for a fair trial. That time happily passed long ago and we went to the other extreme of regarding criminals with great tenderness, entirely too much so to accomplish the ends of justice.

Every presumption has always been, and we do not object to that rule continuing, in favor of one charged with crime. The presumption of innocence attaches until the person is clearly proved guilty. I would not have that otherwise. But we have in this country utterly failed in the prosecution of criminals as compared with other countries. Statistics have been furnished on this floor since the Convention met showing these facts, but I am not disposed to call attention to them. A very small per cent of those charged with crime, and who are undoubtedly guilty, are punished. This is because of the laxity of our laws and the extreme liberality shown to those accused of crime. Right here in this proposal is one thing which illustrates what I had in mind. For a long time it has been possible for a person charged with crime in any degree to take depositions, but there has been no provision in Ohio for depositions to be taken on behalf of the state under any circumstances. We do not propose to change the rule that the defendant shall be brought face to face with his accusers, but we do think where it is possible the state should be allowed to take depositions in this state, and if possible, with safety, beyond the state, though this does not refer to that matter. It will be possible to secure such testimony by arrangement with sister states and it may be possible to take the defendant across the state line, but this provision ought to be enacted whether that arrangement can be made or not, because it often happens that there are witnesses whose testimony could be taken if the defendant could be taken to the place, from the court house, and be confronted with the witnesses, where the testimony could not be secured, if they cannot be brought to court on account of the physical condition of the witness.

I remember a few years ago, when a witness who had been shot by the defendant was taken into the court room and testified when the witness could not have gone any distance and the defendant would have been acquitted if the witness could not have testified. So the first provision in this proposal is to provide for the taking of depositions on behalf of the state when the defendant's presence can be procured so as to comply with the old

rule of bringing the defendant face to face with his accusers.

Another provision of this proposal that was not in my original proposal was taken from a proposal submitted by the gentleman from Hamilton [Mr. BOWDLE], and it is this: "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and the same may be made the subject of comment by counsel."

The rule has been in this state for a long while — I do not know how many years—that the defendant in a felony case could testify for himself. I know that in some of the neighboring states it is a comparatively new proposition, passed within twenty or twenty-five years. It was formerly the rule that a defendant was not permitted to testify, but since he has been permitted to testify it has been a matter of choice with the defendant whether he would testify. If he does not testify, the rule has been inflexible that no comment shall be made by the prosecution on his failure to testify. Now there is no good reason for that rule in my judgment. If he fails to testify I have never been able to see any reason why the fact might not be commented upon. It may be truly said in many cases where there was a doubt the defendant had it in his power to make clear what his counsel said was doubtful, and if the defendant will not do it on the stand it seems to me that is a fact that should be held against him in such a case and the comment on that fact would be proper.

My proposal as originally drawn modifies the last clause of this proposal, because this re-enacts a section of the bill of rights, and copies, in line 27, the words "no person shall be twice put in jeopardy for the same offense." I propose to ask the Convention to amend this clause by making an exception there in the case of a failure to convict by error of law. If a defendant is found guilty he may have a new trial. He may make a motion in arrest of judgment. He may take his case through the courts, to the supreme court of the state, once or twice, or as often as convicted, but where a verdict of "not guilty" is rendered in favor of the defendant the rule is he shall not be again put in jeopardy, no matter what the nature of the trial at which he was acquitted. My original proposal provided that, if the acquittal was procured by fraud, perjury or bribery or misinstruction of the court, he should not be considered as having been in jeopardy, but might be retried. That was the matter the governor referred to when he addressed us and suggested that there might well be a provision for a new trial, and why not? Why should there not be even-handed justice? Why should not the interest of the public be considered as well as the interest of the criminal? If the courts err—and every judge knows, and every lawyer and almost every layman knows, that judges are liable to make mistakes, and do make mistakes—and if they do make a mistake in favor of the defendant why should not the defendant be detained and the prosecutor have an opportunity to take the case to the supreme court, if need be, and have that error corrected and the man put on trial and have justice done? So in proper time I propose to offer to so amend that for error of law there may be a new trial. I read this morning from Colorado—and that is the only state that has taken that step—that in Colorado they have made that provision, not only for taking depositions, but also that for error of law a new trial can be granted to the state, and that the defendant in such cases should not be considered as having been in jeopardy. Now I do not deem it necessary to detain you further at this time.

Mr. ROEHM: You say the amendment you propose to make to this proposal has been adopted in Colorado?

Mr. RILEY: Yes.

Mr. ROEHM: Has the United States supreme court construed that provision?

Mr. RILEY: I am not certain whether the United States supreme court has contrued the provision or not, but the United States courts have construed many such provisions. The provision of the constitution of the United States that no person shall be put twice in jeopardy refers to the practice of the United States courts and the trials under United States laws, and has no reference to our state trials. This has been many times so decided.

Mr. KRAMER: I want to ask a question with reference to the matter of taking depositions. Do you think it would work any hardship on the accused, remembering that two-thirds of the criminals or those charged with crime have no means, if they were compelled to go into different parts, even, of their own state?

Mr. RILEY: They are authorized to take depositions now.

Mr. KRAMER: But if the state were to compel them to go into different parts of the state?

Mr. RILEY: The state would see to it that the defendant is taken. He would be if charged with murder.

Mr. KRAMER: But take this case, where he has no right to be furnished an attorney. Would it work any hardship?

Mr. RILEY: I have not known a murder case or a felony case tried without an attorney for the defendant.

Mr. KRAMER: But below that the state does not furnish an attorney. Now wouldn't it be likely to work a hardship on the accused in those cases in which the state can not furnish him with an attorney?

Mr. RILEY: You assume that the state can not do something that it always does.

Mr. KRAMER: Not below felonies?

Mr. RILEY: This does not apply to anything below felonies.

Mr. KRAMER: I guess that is right.

Mr. STILWELL: What was the amendment you suggested?

Mr. RILEY: In line 27, that when a defendant is acquitted on error of law there may be a retrial and he shall not be considered as being in jeopardy.

Mr. CUNNINGHAM: What has the proposal now about jeopardy?

Mr. RILEY: We simply copy the provision in the present constitution because we are amending the entire section, section 10 of article I, and we are copying all except the new matter and that is in italics in this proposal I believe.

Mr. PECK: Why not prepare and present your amendment about twice in jeopardy?

Mr. RILEY: I will do that. Mr. Pettit has one substantially in the form I desire.

Mr. NYE: I see you provide in the taking of deposi-

tions the accused shall meet the witnesses face to face. Suppose the man charged with crime and under indictment is unable to give bail, and you want to take depositions out of the state; how would you manage to have the defendant meet the witnesses face to face?

Mr. RILEY: We could not take the depositions out of the state without taking the defendant out of the state, and that could not be done with safety unless some arrangements were made between the authorities of the different states and this state, but this proposal ought to be passed without reference to that, because it often happens within the state, in the same county perhaps, that there is an absent witness whose testimony is needed.

A DELEGATE: What is the object of putting in line 25 there, "but his failure to testify may be considered by the court and jury and the same may be made the subject of comment by counsel?" Is there anything in the present constitution that prevents that?

Mr. FITZSIMONS: Yes.

Mr. RILEY: If there is not it is in the statute. There is such a rule in force now.

Mr. MAUCK: Has not the clause, "no person shall be compelled, in any criminal case, to be a witness against himself" been construed so as not to permit any comment on the fact that he fails to testify?

Mr. RILEY: That is where it comes in.

Mr. WOODS: Is it not a fact that where the defendant does not take the stand, if the prosecutor refers to it in any way in his argument to the jury, it is error and the case is reversed?

Mr. RILEY: Most assuredly, and this ought to be written in here. That is the very reason.

Mr. BOWDLE: I offered a proposal here which is the last part of the Riley proposal referred to, but the Judiciary committee thought it wise to incorporate my proposal in the Riley proposal, and, of course, I assented. This is a subject in which I have been rather deeply interested for some years. I suppose no matter how we are labeled in this Convention, whether whig or tory, radical, progressive or reactionary, we are all identified in this one thing, that we desire to get ahead. I should like to aid a little in this, making the common sense of the street the common sense of the court room. Of course we know that the common sense of the street is today not the common sense of the court room, that when a man goes from the street into a court room an opaque curtain is rung down between the personality of the street and the personality of the court room and when he gets into the court room he loses his street personality and common sense. If judges and jurors, spectators and counsel really preserved in the court room the personality they have on the street, no trial could be conducted, because we should all break down with laughter.

It is not conceivable that the common sense of the street can become the common sense of the court room unless constitutional conventions of various states will aid a little in this respect, and this proposal of mine was introduced in a spirit to help us all move on and up.

In the olden times, when there were hundreds of crimes punishable with death, they had the jack and the thumb screws in order to extort all sorts of confessions, some of which were true and some false, and when we set up shop on this side of the Atlantic, in our effort to stand straight we fell over backwards, and we went to the extreme, and said that not only should a man not be compelled to testify against himself, but the slightest reference to the fact that he had not testified should be reversible error in the court above. It is just as though I should go home and somebody should accuse my secretary of having stolen from the cash box—which usually contains very little—and I ask the secretary about it, and the secretary would say, "Now under the law of which you are an apostle, I am presumed to be innocent until I am proved guilty. Therefore I am innocent because I have not been proven guilty under the constitution. I can not be compelled to testify against myself, and therefore, being presumed to be innocent and not being compelled to testify against myself, and not being required to answer your question, I stand before you as a blameless person."

Of course, if we were not too high up I should fire the secretary through the window for a speech like that, and yet that is precisely what goes on in our legal affairs. A great pork-packer, with a triple chin, accused of an infraction of law, can cross his legs in the court room and say not a word, and deny to the court and the jury the right to draw any conclusion from that silence, although he may not be laboring under any mental or physical disqualification. That is what we want to get away from. We can not compel the accused to take the witness stand, but we can at least smoke him out, by a process of allowing the court and counsel to do that which the court and counsel can not now do—by allowing them to draw conclusions from his failure to testify and comment upon those conclusions.

The bar has not been so backward in this matter. All over this country from time to time lawyers and judges have spoken as to the obsoleteness of the present system of things. Here is a pamphlet on "The Duty to Obey the Law," an address by Justice Rousseau A. Burch, of the Kansas supreme court. The address was delivered at a state conference of county attorneys of Kansas. He says:

> Attention has been called to the fact that laws and institutions suffer in the estimation of the people because, having been established for conditions now outgrown, they resist their own improvement too long and are inadequate to meet the needs which social progress has evolved. A single illustration from the criminal law may be considered. Many a guilty man escapes punishment, to the confusion and humiliation of the law and order forces, because he can not be required to testify, and because, as a corollary, his failure to testify cannot be considered to his prejudice. The prosecution must disclose everything to him. The names of all known material witnesses for the state must be indorsed on the indictment or information at the time it is filed. The accused then sits by until the last item of evidence against him has been introduced at the trial, when he springs a defense carefully prepared to suit the exigencies of the case, or, if he chooses, remains silent while the court in solemn phrase instructs the jury that he is presumed to be innocent of every element of the offense charged against him and that no inference can be drawn from his failure to testify. The existing rules had their

> origin in humane efforts to protect unhappy prisoners who had no counsel, who could not testify at the trial and who could not appeal, from star-chamber practices and from the barbarities of a penal system which is now regarded with feelings of horror. At the present time there is no valid reason why a person charged with crime should not be required by law to testify at any stage of the proceeding precisely the same as any other witness with knowledge of the facts. Should a defendant decline to testify at the preliminary examination he should be denied the privilege of doing so at the trial, and a refusal to be examined at any time should raise the presumption that the evidence withheld would be incriminating.

Justice Burch is not alone in this view.

It is very interesting to observe how all the republics on this side of the Atlantic, when they set up shop, followed the declaration of Massachusetts and New York. Take up the constitutions of South America, and every one of them was so impressed with the language that each one, with the single exception of Brazil, copied what New York had used, but they went ahead and amplified a little. In the republics of Ecuador and Peru they provide that not only shall a witness not be required to testify against himself for any criminal offense, but this privilege extends to substantially every member of his family. They carried it really further than members of the family. The constitution of Ecuador provides:

> No husband or wife shall be compelled to testify against each other in a criminal case. No person shall be forced to testify against his relations, whether in the ascending, descending or collateral line within the fourth civil degree of blood relationship or the second degree of affinity.

So nobody in the entire family can be asked to take the stand. In Peru it is precisely the same, and likewise in Bolivia. Argentina broke away from that and confines the privilege to the accused himself, but it was all done pursuant to that parrot-like element in human nature that influenced them to believe, when we of the North set up our government successfully, and had this in our constitution, that they had to do the same thing.

I have a number of pamphlets by distinguished lawyers throughout the country on this subject and all to the same purpose.

Mr. STEVENS: Is that privilege extended in South America as a privilege of the witness or a right of the accused? That is, can the accused ask that the witness be not called?

Mr. BOWDLE: I really do not know. I simply know that they can not be required to testify.

Brazil, taking her jurisprudence from Portugal, has not the provision. The republic of Mexico, getting her jurisprudence from the Code Napoleon, left out anything of that sort.

In Mexico we have this situation: Instead of making the right of silence a constitutional guaranty, they seem to assume that a man has the right to talk, and they give him the privilege of having his preparatory statement made in seventy-two hours.

Mr. ROEHM: Does not that privilege or right look as though those republics down there had intended to encourage murder to prevent revolution?

Mr. BOWDLE: Yes, and the murder mill has been running as rapidly down there as here. It operates day and night ceaselessly.

Mr. KILPATRICK: Do you say the failure of the defendant to testify can be considered by the court? In your opinion how would you have the court to consider that? It is charged to the jury, and if he does not consider it in his charge to the jury where would he consider it?

Mr. BOWDLE: I take it it would simply mean that the court may consider it as a fact and may speak of that fact to the jury. To what extent the court might be allowed to interpret the fact beyond saying that the man has failed to take the stand and appears to be laboring under no disability, I can not say, but conclusions might be drawn from the silence and those conclusions might be stated by counsel to the jury. Of course if the witness is laboring under any disability, it would not be proper to refer to his silence, and his disability might be explained.

Mr. HALFHILL: What would we do with a case like this, where the evidence is purely circumstantial evidence? Would not the court charge that one circumstance taken with another circumstance must so co-ordinate toward the guilt of the accused that the jury could not reach any conclusion based on other than a hypothesis of guilt? Would that be proper?

Mr. BOWDLE: I think so.

Mr. HALFHILL: In other words, if those circumstances were consistent with any theory of innocence the judge would charge that the defendant would have to be acquitted?

Mr. BOWDLE: Precisely.

Mr. HALFHILL: Now, in a case like that, where it was purely circumstantial evidence, and the man was innocent, but could not explain it, would not he be in a desperate situation if the prosecuting attorney would mercilessly flay him because he kept silent?

Mr. BOWDLE: He might avoid that merciless flaying by frankly and honestly getting on the witness stand and submitting himself, as an honest man should, to the ordinary processes of examination and cross-examination, and I can not see why he would suffer thereby.

Mr. HALFHILL: But circumstantial evidence forms a piece of chain as it were, one, two or three links, and a man might be wholly unable to explain one and two, but still could explain three, but in explaining the third he would put himself beyond the rule.

Mr. BOWDLE: He could enjoy the privilege of saying he could not possibly explain those circumstances if he is in such a curious predicament as that.

Mr. HALFHILL: Have you considered the other part of the proposal about taking depositions?

Mr. BOWDLE: I have really given little attention to that, save only as one of the members of the Judiciary committee, listening to elaborate discussions that went on there.

Mr. HALFHILL: Did the constitutions of South America have anything on that point?

Mr. BOWDLE: No, sir; and for the ordinary and usual reason that in South American countries people are not given to rapid travel as in this country and can not

easily remove from jurisdiction to jurisdiction. That is probably the way that is accounted for.

Mr. HALFHILL: Would you not think one charged with a felony, if he were transported beyond the state to meet his witnesses, ought to have his expenses paid by the state?

Mr. BOWDLE: I would think the legislature in elaborating a scheme pursuant to the powers given by this proposal might fairly and justly arrange for some sort of method by which the accused and his counsel could go to the point where the evidence is to be taken. We have today a practical and thoroughly barbarous way of evading, by the notorious third degree, the present constitutional privilege given to the accused person. The police get hold of a man accused of some first-class crime and, knowing he can take refuge in utter silence, they endeavor by all sorts of devious sweating processes to get him to say something, which amounts to a confession, which can be used against him, so that having uttered some word that looks like a confession, the police can take the stand themselves and thus challenge him to come out by producing on the witness stand what looks on the face of things like a confession. That has happened every day in the big cities, and it has become a subject of congressional investigation. All of that will be avoided if you create a condition of things in the constitution that will require the defendant to come into the light of day and take his place on the witness stand and state his version of what has occurred or what is alleged to have occurred.

Mr. OKEY: In the proposal you offered to the Judiciary committee the wording was a little different from what it is now?

Mr. BOWDLE: Yes.

Mr. OKEY: You had it, "may be regarded by the court and jury as a fact"?

Mr. BOWDLE: And the words "as a fact" in that proposal are cut out.

Mr. DWYER: Only the right of comment was allowed.

Mr. BOWDLE: I did not agree with the committee then and I do not agree with it now, but I do not know that the matter is worth talking about. Of course it is a legal fact.

Mr. DWYER: Would it not have to be considered in some way and how would it be considered?

Mr. BOWDLE: It would be considered as a fact, as a negative fact. It is not competent, of course, for court or counsel to consider anything but facts. Facts may be of two kinds, positive and negative. His failure to testify is a negative fact. I had worded my proposal to include what Judge Okey indicates, that the failure of the accused to testify may be considered as a fact in evidence, and it was thought wise to strike out "as a fact in evidence" and it was left out and made to read "considered by the court and counsel."

Mr. REDINGTON: In regard to depositions, do you not think we could provide some way by which the officers can take the accused from the state to take depositions?

Mr. BOWDLE: That is one of the things that is, so to speak, up to the legislature. The legislature must get to work if its sees fit to exercise the powers conferred on it and devise some scheme by which, if the depositions are to be taken in a criminal case, they may be taken fairly and justly.

Mr. REDINGTON: If we put into the organic law the right to take depositions how can the legislature abridge the defendant's right in this regard?

Mr. PECK: The right of the defendant to take depositions below now exists.

Mr. BOWDLE: There is an excellent pamphlet by Edward S. Wilson, of the Ohio bar, and I want to read from it at page 5:

> This protection of the criminal is furnished by the bill of rights of our Ohio constitution, the amendment, improvement, or reconstruction of which should be a part of our most serious purpose. President Taft said in a recent address: "The administration of the criminal law is a disgrace to our civilization." Shall we not do something to remove that disgrace, and make our country as free from crime as Spain, Russia or Italy, not to speak of England, France and Germany?
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> The sanctity of this bill of rights is built upon its antiquity—a weak and fragile basis upon which to construct human progress. All the exactions of the bill of rights, so far as the treatment of crime is concerned, is contrived to meet a condition that no longer exists. Two hundred years ago, there were one hundred and seventy capital crimes; then we needed to protect the individual against society; now, we need to protect society against the individual. We are not doing it. The statistics of crime prove that beyond doubt.
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> So fixed and arrogant had become these old dogmas, that men have reverenced them almost as divine decrees. But lately there is a tide against the ancient fetish and able men are denouncing it with eloquence and power. The old doctrine of the presumption of innocence is losing much of its force as a result of its misuse and prostitution, but upon this controversial feature of the problem I do not dwell here, preferring to speak of things about which there should be but little, if any, controversy.

Mr. HALFHILL: The difficulty I have always observed those encounter who approach the bill of rights with the idea that it guarantees too many rights, and who are of the belief that it should be abolished altogether, because it is a relic of ancient days, is the fact that there are at least three classes of criminals that come before the court. Now, if we could abolish all of the bill of rights as against one class of criminals it would be a good thing.

One of these classes of criminals embraces those who are surely enemies of society. They are criminal by nature or by instinct, or as the result of environment and training. At least they belong to the criminal class. They are the kind of human beings who in the event of a great catastrophe, like a fire, flood or earthquake, go out and plunder the dead. They ought to be shot on sight. There is a great number of that kind of people in the world, and the constant fight between the police, representing organized society, and the confirmed criminal is a thing that every good citizen tries to help by taking the side

of organized society as against the criminal class. It is well enough at all times to keep that class in mind.

But there is another class that are criminals by accident or environment, and many of them are young. They are the class of criminals which the great philanthropists try to help and which men like Judge Lindsey spend their lives in trying to start on the right path and in trying to reform, so that they may be brought back and made good citizens.

There is yet another class that is not criminal at all, but they are charged with crime, and no man of experience at the bar or any place else who has lived to about the half century mark, has failed to observe where good citizens have been charged with crime and sometimes heinous crime. It is a condition like that that the bill of rights intends to reach to and protect, but unfortunately, in reaching to and protecting the good man who is unfortunately placed, it gives too much latitude to the bad man who belongs to the criminal class. One of the most heartrending things I have ever encountered in the world was to stand by a man that I believed to be innocent and who was proved to be innocent in the end, though it took years to do it; and yet public opinion at the time, especially if the bill of rights had unshackled and let loose all the force of the law, would have confined this man to durance vile. Those are the situations that confront anybody that observes these things. If you could amend the bill of rights so as to reach the criminal and yet protect the rights of those unfortunates charged with being criminals, but who are innocent, I would be in favor of it.

Mr. BOWDLE: Has it not been your uniform observation that innocent men charged with crime uniformly do not fail to take the stand and uniformly do not seek the protection of the bill of rights?

Mr. HALFHILL: I have observed cases and tried cases and have defended cases where it was impossible for an innocent man to take the stand by virtue of circumstantial evidence in the case, and although they are not numerous, I have cases of that kind in mind, and they have caused me to have possibly too great a regard for the bill of rights. It may be that I prize it too much, but I want to be sure of protecting the rights of innocent men that are wrongfully charged.

But now I think this idea suggested here of the right of the state to take depositions ought to be further modified so that if the state does take depositions there will be no question that it would transport the one who is charged to the place where the deposition is taken, because I have seen innocent men from other states put in prison in this state, even where counsel had to be appointed for them and where juries have eventually acquitted them, that could not possibly have been able to confront the witnesses unless the state furnished the means.

Mr. OKEY: Do you think it is possible for us to provide in our constitution anything that would enable us to take depositions out of the state?

Mr. HALFHILL: I think we could. We could pass a constitutional provision broad enough to allow depositions in criminal cases before a notary public or justice of the peace in any other state on notice, just the same as a civil case.

Mr. OKEY: What would you do with the criminal after he is out of the state?

Mr. HALFHILL: You mean, is it feasible to take the criminal out of the state?

Mr. STILWELL: In order to meet the witnesses.

Mr. HALFHILL: You mean that he might be released after taken out of our jurisdiction?

Mr. OKEY: Yes; under habeas corpus proceedings.

Mr. HALFHILL: That might be permissible under our system of government. It might be that there is insuperable objection to the provision. I do not know.

Mr. CAMPBELL: Might I ask the gentleman from Allen [Mr. HALFHILL], how are you going to compel the attendance of witnesses in a foreign state to take testimony provided you once get there?

Mr. HALFHILL: Of course that is a very pertinent inquiry. It would be impossible to compel the witness in a foreign state unless by treaty the courts of that state would issue some order directing the attendance of the witnesses before the officer.

Mr. CAMPBELL: Then our constitutional provision would be perfectly worthless unless the other forty-seven states would recognize it to the extent of compelling the attendance of witnesses when we desired them?

Mr. HALFHILL: Yes; I think so. There would perhaps have to be something like treaty relations with the other states. I think that is what it would lead to.

Mr. MAUCK: Has any treaty been necessary to take depositions in civil cases or for the defense in criminal cases heretofore?

Mr. HALFHILL: No.

Mr. MAUCK: If not, why would any treaty be necessary to take depositions in behalf of the state?

Mr. HALFHILL: I can not say it would be necessary, but in taking depositions as you take them now you are compelled to secure a commission from the court here to somebody in the other state, appointing him as commissioner to take those depositions, or you are compelled to go to the executive or to the courts of another state and get authority issued to some official in that state to subpoena the witnesses and secure their testimony. You have to do that now.

Mr. MAUCK: Do you mean to suggest that there is a state in the Union that does not provide for the taking of depositions before some proper officer?

Mr. HALFHILL: I have not heard of such a total failure as that existing in any state as to civil cases, but the methods for securing such testimony are cumbersome.

Mr. MAUCK: Why would you suggest the treaty as necessary because we extend the mere rule of evidence in Ohio?

Mr. HALFHILL: I used the word "treaty" thinking everybody would understand it related to an agreement made between sovereign powers, and it does so relate, and the fact of it is that the states of the Union are sovereign powers in relation to surrendering fugitives, and many executives refuse to honor requisitions from other states.

Mr. MAUCK: Still it might be true that it would be inexpedient to take a man from jail and send him over in custody of an officer lest he might be taken under writ of habeas corpus, but would that at all exist where you

are taking depositions for the state and the accused is out on bond?

Mr. HALFHILL: I did not catch that question.

Mr. MAUCK: You have said that you feared if a man were taken to another state to take depositions against him that he might be taken by habeas corpus proceedings from the custody of the sheriff or whatever officer had charge of him. But suppose the accused person is out on bond. Why not take the depositions against him then? He is at liberty to go to any state if he so desires.

Mr. HALFHILL: I did not say I feared it as a practical thing, but I say it might be done and undoubtedly is done. There are habeas corpus proceedings brought to liberate witnesses in other states frequently, and the conflict has arisen between the United States and different states on numerous occasions.

Mr. MAUCK: That theory could not operate against the public in the case of an accused person out on bond, because he would be at perfect liberty?

Mr. DWYER: The ability to give bond is very rare in those cases. Those people are seldom able to give bond.

Mr. HALFHILL: There is many a man who can not give bond who is an innocent man. Now, if you can modify the bill of rights, reach the criminal class and also protect the man accidentally charged with crime, I am for it; but I am not for this proposal.

Mr. CUNNINGHAM: In lines 25 and 26 we have the language, "but his failure to testify may be considered by the court and jury and the same may be made the subject of comment by counsel." How far would that justify a court in charging the jury that the criminal's refusal to testify would create a presumption of his guilt? Would that justify a court in so charging?

Mr. HALFHILL: The court might not go so far as to say it was a presumption of his guilt, but the court might say to the jury, "You may consider all the circumstances in the case, including the circumstances surrounding the prisoner and his appearance and the fact that he did not testify in this case when he had the opportunity to do so." That would amount virtually to an overthrowing of the presumption of innocence.

Mr. CUNNINGHAM: Might not the legislature provide how far that should extend as a matter of law?

Mr. HALFHILL: As a matter of court procedure it is pretty hard to draft a statute which would control the charge of the court to a jury, if there were such a broad constitutional provision as this authorizing the passage of the statutes. If the provision here were not so broad and more specific of course you could pass the statute which would preserve the right of the defendant as suggested, but this gives all latitude and sweeps away all barriers, according to my way of thinking.

Mr. DWYER: The present law provides that neither court nor counsel can comment on the failure of the defendant to testify.

Mr. HALFHILL: Yes.

Mr. DWYER: All we want to put into this proposal is that the court and counsel may comment on that failure.

Mr. HALFHILL: Yes.

Mr. DWYER: And it appears to me that is going far enough. Suppose a man is charged with crime and his counsel sees if he puts him on the witness stand the jury will not believe him anyhow because he has a bad record. That record is open to the prosecuting attorney who may go into it and convince the jury that he is guilty. I have known cases where the counsel says, "The defendant has a bad record and has been in the penitentiary; if I put him on the stand, the jury won't believe him, it will expose his record to the prosecuting attorney and it will make a bad impression." There is that dangerous result from it, if you go too far.

Mr. HALFHILL: That is very true, and it is a known fact in the history of English criminal procedure that within the last very few years they have originated the right of review of criminal proceedings. There was a long time that the harsh rule of the common law obtained in the criminal procedure in England, and there was no right of review. Even the charge to the jury could not be reviewed. That practice was done away with only a few years ago in England, and while we are talking about the great number of criminals that escape here under a lax bill of rights do not forget that in England they have changed the law and have given rights of review in criminal cases; and it is said that the first case reviewed was where a man was charged with offering a counterfeit shilling to a barmaid, and having a workhouse record and fearing he was again going to be taken in custody, he fled and left the shilling on the bar. He was captured, indicted and convicted, and the reviewing court found the barmaid was not even able to identify the shilling left on the bar, and it was further found the defendant was excluded from showing where he got the shilling he had left on the bar. In other words, he was an innocent man, and under the recently created right of review in criminal cases he was acquitted, and that happened in England within the last decade.

Mr. RILEY: Something like that happens frequently in this country.

Mr. HALFHILL: I am saying the right of review of the first case under the new law in England resulted in the reviewing courts freeing an innocent man, who by the old procedure would have been convicted.

Mr. RILEY: They have adopted the idea of giving the government a chance as well as the defendant.

Mr. HALFHILL: No, sir; they have adopted our idea of giving a review in a criminal case—that is to say, permitting the prisoner to have his case reviewed, and that did not exist in England until within the last decade.

Mr. PECK: Do they not apply it both ways there, to the crown and to the criminal?

Mr. HALFHILL: I am unable to answer that, but I do know the prisoner never had any right of review until by act of parliament this procedure was humanely changed within the last decade.

Mr. RILEY: Questions have been asked relative to taking the prisoner out of the state, and what might happen if you took a prisoner out of the state to take depositions. Do you see anything in the provision about taking depositions out of the state? There is nothing whatever. I stated a while ago that there is a necessity for this sort of a provision for witnesses in the state and even in the county where the court is sitting. It often happens that you can not get the witness in court. Now why not go out in the county or any place in the state,

and why would it not be wise to take prisoners beyond the state to take depositions?

Mr. HALFHILL: Do you intend to have this broad enough so that the state can be permitted to take depositions beyond the state line?

Mr. RILEY: That is my idea, but that is left to the legislature, if you want to "safeguard" it as we have gotten in the habit of doing every thing, it could be done. It certainly could be done anywhere within the limits of the state, and I do not think it is necessary to consider the other matter, as the legislature is not likely to pass a law by which the prisoner can be taken out of the state.

Mr. HALFHILL: I suggest that you prepare that amendment and put it in its proper place. I will be glad to withdraw my objection on that point then.

Mr. PETTIT: I have that amendment prepared and will offer it.

The amendment was read as follows:

> Amend Proposal No. 15 as follows:
>
> By changing the period to a comma, in line 27, and adding the following: "but if the judgment be reversed for error of law, or if judgment be arrested after verdict he shall not be deemed to have been in jeopardy."

Mr. PETTIT: I am heartily in accord with the idea incorporated in the proposal of my friend Mr. Bowdle to start with. It is a notorious fact that crime is becoming too rampant, in the state of Ohio especially. We have had a good deal of talk in this Convention about the fact that there were very few men charged with crime that are convicted and it is a good deal on account of conditions existing in connection with the trial. Talking about progress, if we take up isolated cases referred to by my friend from Allen [Mr. HALFHILL] we would not have any reform at all. There is a possibility, of course, at some time, of an innocent man's being convicted. I have been connected with a good many criminal cases in my county, murder cases and those of a minor degree, and when I was representing the defense we would stand up and say to the jury, "This man stands here clothed with a mantle of innocence from head to foot and until you prove every single element of crime you can not remove that presumption." Now, under the present system, it makes no difference whether an acquittal is produced by bribery or perjury; if there is a verdict and judgment for the defendant that is the end of it, so far as the state is concerned and so far as the defendant is concerned. But a defendant can take any conviction to the higher court and on the slightest technicality, and sometimes without any reason he gets a new trial. It is all one-sided as the matter stands, and it seems to me if the prisoner has the right to take depositions beyond the state or in the state the state should have the same right and have the defendant there meet the witnesses face to face. I am in accord with that, but I think we ought to go even further than that amendment, because it does not embrace the two matters I spoke of. An acquittal is brought about by bribery or fraud and the state's hands are tied. We may know absolutely when the verdict is brought in that it was produced by bribery or perjury and yet the state has no relief. I submit that is not right. As Mr. Bowdle said, it is time to begin thinking about protecting society from the criminal class.

Mr. FACKLER: Do you not think your language is a little ill chosen? You say, "he shall not be deemed to have been in jeopardy." Don't you think it should be "he shall be deemed not to have been in jeopardy?"

Mr. PETTIT: That is grammatical and I accept it as best.

Mr. FESS: Would not the question whether the verdict was secured by perjury or bribery necessitate another trial to establish that? How would that be determined?

Mr. PETTIT: By witnesses. I have a case in my mind that occurred in my county. I am just as well satisfied as I am that I am here that the verdict was secured by bribery. It was one of the worst murder cases ever tried in my county. Judge Sloan was defending the criminal and on the first trial the jury was not out longer than fifteen minutes and came in with the verdict of murder in the first degree. On the second trial there were eleven for conviction on the first ballot, but one man hung the jury. He would stand and look out of the window and everybody knew he was bought to hang that jury and the man was not convicted of murder in the first degree. There should be some remedy.

Now, Judge Dwyer suggested that a man's character may be very bad and he may not want to have the prosecuting attorney bring it in. If the defendant does not put it in issue the state cannot attack it.

Mr. RILEY: Have you accepted the amendment offered by the delegate from Cuyahoga [Mr. FACKLER]?

Mr. PETTIT: Yes.

The PRESIDENT PRO TEM [Mr. DOTY]: That correction has been made by consent of all parties.

Mr. FESS: To this amendment, it seems to me, there is a really serious objection. I believe in the purpose of this amendment fully. I give my hearty indorsement to it with this exception, that it seems to necessitate a second trial or a trial anew to determine whether the verdict was secured by bribery or perjury.

Mr. STILWELL: "De novo?"

Mr. FESS: No; I didn't say that.

Mr. RILEY: That is not in the amendment.

Mr. MAUCK: This amendment by the gentleman from Adams would be entirely wise if it were not entirely unnecessary. The supreme court has decided that when a judgment of conviction has been reversed and a new trial is granted the accused has not been in jeopardy, and where a motion has been made in arrest of the verdict and the motion is sustained, it is virtually held there has been no trial and the accused has never been in jeopardy. The amendment, therefore, is not needed.

Mr. FACKLER: That is true if the verdict below has been a verdict of conviction, but in case there is a verdict of acquittal the state has no right under the law to take it up and get a new trial. The amendment would make it so that the state could go to the higher court and have the judgment set aside and then the state could try it again.

Mr. MAUCK: I did not understand that that was the purport of the amendment. If it is I am against it for another reason, because I think one opportunity is enough for the state against the accused.

Mr. WOODS: I hope this amendment will be adopted and that this proposal will be adopted.

As to the first proposition, that the defendant can sit in court and be represented there by the attorney and never take the witness stand nor say a word to throw any light upon the matter being tried, and then that the prosecutor can not say anything to the jury about it, is ridiculous. I think we all admit it is ridiculous. The prosecutor ought to be allowed to say anything to the jury about the fact that the defendant is sitting there and knows more about the facts than anybody else, and yet can sit there and not say a word and the prosecutor can not refer to it. I have tried many cases and I have had to dodge around and shy around that and get as close as possible.

Mr. PRICE: If a defendant took the stand, would he not open up all the conduct of his life? Suppose he has been a bad man and has been guilty of several crimes and has been sent to the penitentiary, would not that come out? And suppose he is innocent of the present charge, would he not be justified in remaining in his seat? Now to what extent are you going to allow the prosecuting attorney to comment on the fact that he remains in his seat?

Mr. WOODS: That may be taken care of by statute. A statute might be drawn and this might be abused, but I say it is ridiculous that the prosecutor should not have a right to call the attention of the jury to the fact that the man who knows more about the affair than anybody else will not take the stand to say anything.

Mr. PRICE: Why should he be compelled to take it?

Mr. WOODS: He knows more than anybody else, and why not compel him?

Mr. STILWELL: Suppose he is innocent and doesn't know anything?

Mr. WOODS: Yes, but just the same you can not imagine a case where you or I would be charged with crime, and where, if we were innocent, we would not be glad to stand and tell the jury that we were innocent. Of course, if we were guilty we might not want to take the stand.

Mr. HALFHILL: You don't have to imagine those cases. They actually occur in everybody's experience and can be cited.

Mr. BOWDLE: In your long experience, how many innocent men accused of any crime have taken refuge behind this silence?

Mr. HALFHILL: A whole lot. [Laughter]. What was that question?

Mr. BOWDLE: In your experience how many innocent men accused of crime have taken refuge behind silence?

Mr. HALFHILL: Oh, I didn't understand your question.

Mr. PETTIT: The member from Perry [Mr. PRICE] said that a man might have a bad record and for that reason he might be slow about going into the witness box. If he has a good character he can prove that.

Mr. HALFHILL: Yes.

Mr. PETTIT: There is one thing in our criminal trial that is absolutely wrong, and this proposal does not take care of it. If the man has a good reputation he is going to refer to it. He may be the worst man in the state and the prosecutor can not show anything against him unless he opens up the door himself.

Mr. PRICE: Is it not a prejudice to open the door?

Mr. PETTIT: No, sir; it is not a prejudice that will injure an innocent man.

Mr. PECK: In this matter of a person taking the stand he is the same as any other witness?

Mr. PETTIT: Yes.

Mr. PECK: And is it not true that the court in this matter of cross-examining witnesses as to collateral matters, as to previous conduct, etc., has entire discretion in the matter and the judge can regulate that and cut it off whenever it is being abused?

Mr. PETTIT: Absolutely.

Mr. PECK: And the prosecutor has no right to ask such questions except by permission of the judge?

Mr. PETTIT: And the judge on the bench will protect the defendant every time. The defendant has the right to go into the character of all the witnesses against him.

Mr. HARRIS, of Hamilton: Do I understand the purport of the amendment offered by the member from Adams is to give the state a chance to attempt the second trial of a man once found innocent by a jury?

Mr. PETTIT: Yes; if that judgment is reversed.

Mr. HARRIS, of Hamilton: I do not know what you lawyers are going to do, but we laymen will not vote for any such proposition.

Mr. WOODS: I can cite you a case that I have here in the supreme court. I helped the prosecutor in my county try a case this winter and the judge ordered that jury to acquit the defendant. We came to the court with a prosecutor's exceptions to have that statute determined. If the supreme court holds we were right, and that that man was guilty, he has gone scot free, and we cannot try him again unless we get another case like that. If the court holds we were right, why should not the state have a right to put the man on trial again? The defendant has the right, and why should the state not have it? I believe in giving every man a fair trial, and giving him every presumption he now has, and I believe in making the state prove beyond a reasonable doubt every element of the crime, but when you have done that you have given him a fair show. If a man is found innocent by a jury and it turns out afterwards that the jury was bribed, or something like that, and the verdict of acquittal was brought about by that means, you cannot try him again, and that certainly is a miscarriage of justice. Why not correct it?

Mr. WINN: If, for a moment, I believed that this amendment offered by the member from Adams [Mr. PETTIT] would result in allowing the prosecution to go to a reviewing court by error proceedings, reverse a verdict of acquittal and then have a retrial, I could not find language sufficiently strong to express my opinion against it. To say such a proposition is monstrous is putting it too mildly.

In the trial of criminal cases there are many things. The court says to the jury that when this man was accused and presented by indictment the law put around him a presumption of innocence. The law never clothed any man with a presumption of innocence, but upon the contrary, when a grand jury of twelve men have con-

vened behind closed doors, and after an inquisition or examination into his guilt or innocence have brought into the court an indictment, in ninety-nine cases out of a hundred a presumption of guilt is immediately established in the minds of the average man. Take the cases pending against these men recently. How many on the floor of this Convention didn't immediately think they were guilty?

Mr. WOODS: Is it not a fact that when you impanel a jury the trial judge and the attorney for the defendant have a right to ask every one of those men whether they have any presumption that the man is guilty?

Mr. WINN: Yes, and our humane statute says that no difference what may be the opinion of the juror, if in answer to the trial court he says, "Nothwithstanding my opinon I will render an impartial verdict," he is a qualified juror. No one need tell me about those things. Since this Convention met the state board of pardons filed with the governor a recommendation for the pardon of a prisoner who has been confined in the penitentiary for eleven years. This recommendation by the board is based upon the ground that the prisoner in question was convicted upon perjured testimony and the board of pardons reached that conclusion after a careful and thorough consideration of the case extending over a period of eighteen months. The record and files of the case with the recommendation of the board of pardons are now in the hands of the governor awaiting his examination and action thereon.

Mr. WOODS: You are opposed in the case of an acquittal to the state having another trial?

Mr. WINN: Certainly.

Mr. WOODS: Suppose a man is acquitted and it turns out that that verdict was based upon perjured testimony. Has there been a trial of that proposition?

Mr. WINN: It does not take a lawyer to see the fallacy of that suggestion. How are you going to determine whether or not he was acquitted upon perjured testimony? That means a trial of the question of whether the witness has testified truthfully or falsely, and then after that you would go into another court.

Mr. PETTIT: A point of order. That has nothing to do with the amendment and is not before the Convention.

The PRESIDENT: The point of order is not well taken.

Mr. WINN: After having determined that question, the question might be brought up whether that determination was arrived at by perjured testimony. I see it is not in this proposal, but it was originally in the proposal, and I am astounded that a lawyer who has given any attention to criminal practice would think of such a thing as putting that in this proposal.

But now on this other matter; suppose the court says finally to the jury, "The fact that this man has not taken the witness stand shall not be considered by you." That is a fiction. Do you believe there ever sat twelve men in a jury box, where a man did not take the stand in his own behalf, that the jury did not consider that fact? If it were possible for the law to say, "Wherever a guilty man has failed to take the witness stand, there shall not be any objection to referring to that," it would be all right, but think of the hundreds of cases where some weak man or weak woman or child, by advice of a lawyer, refrains from taking the witness stand because counsel knows how dangerous it will be for that frail man or weak woman or child to commit himself or herself to cross-examination by skilled counsel on the other side!

Mr. KRAMER: I want to ask the gentleman from Defiance [Mr. WINN] a question.

The PRESIDENT: The time of the member from Defiance [Mr. WINN] has expired.

Mr. KRAMER: I just intended to ask, does he think when a judgment of acquittal is reversed and a case retried, that that is monstrous? That is all it can mean. It cannot mean anything else. It simply means that the strong arm of the state is on one side and a weak man on the other, and he can be dragged to the supreme court and back again, just as any other case can be taken there. I should say it is monstrous to say that a weak man or a weak criminal, or a man charged with crime, can be dragged from one court to another and a judgment of acquittal reversed, and be dragged back again to the court of common pleas and retried upon some technical error in the law.

Mr. WOODS: You don't think he could be dragged into the supreme court?

Mr. KRAMER: Certainly; if the prosecutor takes the case there, he takes it on a prosecutor's bill, and the court, at the instance of the county, appoints a lawyer.

Mr. PETTIT: I think the matter is all one-sided. If the defendant is convicted the state furnishes him a transcript and a lawyer.

Mr. KRAMER: But if he is declared to be innocent by the jury the state has no right to say that that man who has been declared innocent shall lie under that charge for four or five years by taking him up to the supreme court and then back to the common pleas court again. I say it is monstrous, and in order to test the feeling of the Convention, I move to lay the amendment of the gentleman from Adams [Mr. PETTIT]on the table.

The yeas and nays were regularly demanded, taken, and resulted—yeas 54, nays 15, as follows:

Those who voted in the affirmative are:

Beatty, Morrow,	Harbarger,	Moore,
Brown, Pike,	Harris, Hamilton,	Nye,
Campbell,	Harter, Stark,	Peck,
Cody,	Henderson,	Peters,
Collett,	Hoffman,	Pierce,
Colton,	Holtz,	Price,
Cordes,	Johnson, Williams,	Read,
Crosser,	Keller,	Redington,
Cunningham,	Kramer,	Roehm,
Davio,	Kunkel,	Shaffer,
Doty,	Lambert,	Smith, Geauga,
Dunlap,	Lampson,	Stalter,
Dwyer,	Leete,	Stewart,
Earnhart,	Longstreth,	Stilwell,
Fackler,	Ludey,	Thomas,
Farrell,	Matthews,	Ulmer,
Halenkamp,	Mauck,	Watson,
Halfhill,	McClelland,	Winn.

Those who voted in the negative are:

Baum,	Hahn,	Rockel,
Bowdle,	Miller, Crawford,	Stevens,
Cassidy,	Okey,	Taggart,
Donahey,	Pettit,	Walker,
Fess,	Riley,	Wise.

So the amendment was tabled.

The PRESIDENT: The gentleman from Hamilton.

Mr. STEWART: I move the previous question.

The PRESIDENT: The gentleman from Hamilton was recognized.

Mr. PECK: Is there any other amendment pending?

The PRESIDENT: No.

Mr. PECK: Then we are on the proposal as recommended by the committee.

The PRESIDENT: Yes.

Mr. PECK: Gentlemen of the Convention: This proposal was for a long time under consideration by the Judiciary committee. The number of the proposal is 15, and it was one of the first that came to us, and we had it under consideration for two months. At last, after long consideration, we reported it in its present form. Personally I think it is a good proposal as it now stands, and that it ought to be adopted. We had a great deal of difficulty with this very amendment that has just been voted down. We finally, among ourselves, by a bare majority, rejected the amendment that has just been voted down, and the proposal was sent to you in the way it appears in the books. As I said to you the number of the proposal is 15, and the amended proposal is just ahead of the other one.

There are two or three propositions in it that are important. The first is about taking depositions. I do not see any objection to that at all as it stands. I doubt if it is feasible to take depositions out of the state, or whether the general assembly can make any arrangement to do so, but if it is not, it is feasible within the state, and to that extent the relief should be given. This thing of having criminals escape by reason of testimony not being produced in court happens too frequently. Sometimes the testimony is in the state and could be procured by this procedure and ought to be had. Now there is no doubt in the world that the criminal procedure of this country needs speeding up. There is no greater reproach to American jurisprudence than the present condition of criminal misuse and administration. The whole machinery is to acquit. Everybody's sympathy is worked up for the poor prisoner. We hear it now from those who are in the habit of appearing on that side of the case. That is one of the difficulties here. We have too many men whose minds are prejudiced from the fact that they have been in the habit of defending criminals. They have cases now pending, and we are told about them. Obviously the mind of that delegate is prejudiced by that and other similar cases. He never sees the other side of the matter. Now here is our friend from Medina who sees the prosecutor's side, and he is inclined perhaps to see too much of that side, and to go too far on that side.

Mr. HALFHILL: Agreed.

Mr. PECK: Yes, you are agreeing there, but not when I refer to the other side. That is the trouble with the arrangement. In every bar there will be fifty lawyers who are in the habit of defending and only one prosecutor. There are fifty who see it from the side of the defense and only one from the side of the state, and for that reason it is almost impossible to get anything done for the state. The fifty are opposed to anything because their precious clients may not get out and they cannot get fresh fees.

Mr. HALFHILL: Is not that so in every lawsuit, civil as well as criminal, that the counsel are prejudiced on their side of the case?

Mr. PECK: Yes, but they are on different sides of the case civilly. They vary. One time they are for the plaintiff, and the next time for the defendant, but in criminal cases you are on one side all the time. You are always for the defendant.

Mr. HALFHILL: No, sir; I have been appointed to help the prosecuting attorney.

Mr. PECK: Maybe you were when you first got admitted, and were kind of practicing, and they threw you a case to give you a fee or two. Then you may have been advocating the pleas of the state, but you haven't been many times since.

Mr. HALFHILL: I have been appointed several times to assist the prosecutor in important cases.

Mr. PECK: That is unusual. All the prosecutors are regularly elected, and are regularly paid prosecutors, and all the rest of the bar is against the prosecution, and so get more or less prejudice in favor of the defendant. That is true of a majority of the bar in this state. In England the prosecutors are selected from term to term from the bar. One time a man may be a prosecutor, and the next time he may be for the defense, and the prejudice is not always one way there, and they get a better system than we do. They see it from both sides. Here our attorneys see it from only one side, generally the side of the prisoner, and they are afflicted with the same conservatism that afflicts the bar in everything that pertains to their precious practice. In the matter of depositions there is no reason why depositions should not be taken by the state when the defendant's presence can be had.

Mr. STILWELL: Do you not think, Judge, that it would be wise to add at the end of line 26 "as may be provided by law"? That refers to the right of the prosecutor to comment upon the fact that the defendant does not take the witness stand.

Mr. PECK: That would simply permit the legislature to nullify the law, and under the leadership of the gentleman from Defiance [Mr. WINN] and others they would probably proceed to do it, and I am opposed to that.

I do not think anybody can find any reasonable objection to this matter of taking depositions. Now I want to say, in order to save this proposition, if there is any part that can be carried, I shall ask that it be divided, and shall ask a separate vote on each of the propositions contained in it.

The PRESIDENT: Does the member ask for a division of the question at this time?

Mr. PECK: No; not now.

The PRESIDENT: The chair will take note of the fact that the gentleman from Hamilton [Mr. PECK] has demanded a division of the question.

Mr. PECK: Now about the last three lines, "No person shall be compelled in any criminal case, to be a witness against himself?" That is a repetition of the present constitutional provision, but it has outworn its usefulness, yet, in deference to the opinions of many other people, I have agreed it should remain. But just a word on that. Whenever anybody in your household is charged with doing anything wrong, who is the first person you interrogate? It is the person charged. So in business transactions, if a man is charged, who is the first person to be put on the witness stand? The man charged. That

is the natural mode of procedure, and there is no other system of jurisprudence on earth in any civilized country which prevents it except ours. We have it, and it has come down to us with the wisdom of the fathers, although the wisdom of the fathers may not have a confounded bit of sense in it. Yet it was their wisdom, and we bow to it. But we added to it this: "But his failure to testify may be considered by the court and jury and the same may be made the subject of comment by counsel." The defendant is already authorized to testify. The law permits him to do so, and that law was passed in the interest of the prisoners. I know the case out of which it grew, a famous case in the annals of criminal jurisprudence in Hamilton county, where the party accused was the only person present when the crime was committed. He desired to testify, and between the time the act was committed and the trial, the law was passed, and it was passed at the instance of his counsel. That is the way the criminal law in this state has been moulded, by those in favor of the criminal. Now I do not see any objection to the last part of that. The defendant is not bound to take the witness stand. He can stay off of it if he wants to. This does not affect anything as to his obligations on that subject, except that it may be alluded to or considered by the jury. In nearly every case the jury does consider it. There is generally somebody on the jury smart enough to see that that defendant has not testified on his own behalf, and they ask the question in the jury room, "Why didn't that fellow get up and testify?" If the man who knows most about it does not tell what he knows it raises a strong presumption against him in the minds of the persons trying any case. The jury does consider it, and this only authorizes them to do what they do do as a matter of fact. The prosecutor ought to have the right to allude to it. If it results in a great many of them taking the stand and testifying, what harm is done? Someone says, "Oh, they may be cross-examined and something may be gotten out of them about their former life; it might bring to light some of their former evil deeds." Dreadful calamity. It would be perfectly dreadful to prove that a man had had several terms in the penitentiary! But, as has been said, the court always has it in its power to protect the witness against that sort of cross-examination; cross-examination on collateral matters is always at the discretion of the court, and the court can always stop it when it thinks proper, and the judges will furnish all the protection needed in that line.

Look at the thousands of crimes that are committed here. The statistics are dreadfully against this country on crime. Why, we have more in proportion to our population than any country in the world! And why have we so many lynchings? What brings greater disrepute than a lynching? I want to tell you, if you go across the water and read the newspapers, you will find that there is nothing they gloat over over there as much as the details of an American lynching. Every one of them is published in full, with all the details, in the London papers.

Mr. HALFHILL: Are you not in error in stating that there are more homicides in this country to the population than any other country on earth?

Mr. PECK: No, sir; this country very greatly exceeds any civilized country. There might be some in Africa that would exceed it.

Mr. HALFHILL: Italy is civilized.

Mr. PECK: Yes; and they are not equal to us in homicides.

Mr. HALFHILL: I call your attention to the fact that the latest statistics show that there are 105 homicides per million inhabitants in Italy, and that is more than in the United States.

Mr. PECK: I have seen a comparison of statistics and the percentages figured out and the actual numbers given, and they have been very much against this country, and I thought everybody knew it. If I had thought everybody did not know it I could have brought them here.

Mr. HALFHILL: I do not want to dispute your authority without giving mine. I am referring to an article on "Crimes and Criminal Procedure" in the Encyclopedia Brittanica, tenth edition. These statistics are gathered together and given.

Mr. PECK: I do not know anything about that article. The article I was referring to was a magazine article. Perhaps it was in Collier's. I saw it, and there is no doubt as to its substantial correctness. But suppose there are more in Italy than here. Do we want to lag at the tail-end of the procession in a matter like this? Do we want to be at the bottom, below a country notorious for crimes, like Italy? Are we to be put on a par with the country that has the Blackhand, the Mafia and the Camorra, or are we trying to be civilized and are we trying to stop crimes and criminals? Are we trying to suppress homicides?

I tell you, this is an important proposition. There has not been a more important one before this body. We must do our duty, and we must not let our professional notions keep us from passing this proposal. The trouble with the lawyers is that they have heard all these old legal maxims and legal saws until they have come to look upon them as a sort of ten commandments. We are likely to think that they are entitled to as much sanctity as the ten commandments. We represent a state, the people of the state, a law-abiding people and a law-abiding state, and we are not here to represent lawbreakers, or to facilitate the escape of lawbreakers,or to make specious pleas for the poor, weak, miserable criminal. Pleas may be made to a jury for them, but not here. What we want is to convict that poor, weak criminal, and not let him do it again. It is to the interest of society that punishment should be prompt. I am opposed to extreme punishment. I think the length of terms in this state are all greater than they need be. In England imprisonment for a long term is not much given, but the certainty and promptness of the punishment are the two elements for the prevention of crime. The criminal elements there understand that just as sure as they commit a crime they will be brought to book and the law applied to them, and as a result you see a diminution in the commission of crime.

Mr. RILEY: In view of the fact that there are comparatively few present, I move that further consideration of this proposal be postponed until tomorrow, and that it retain its place on the calendar.

The motion was carried.

The PRESIDENT: If there are any reports from any committees now is a good time to offer them.

REPORTS OF STANDING COMMITTEES.

Mr. Peck submitted the following report:

The standing committee on Judiciary and Bill of Rights, to which was referred Proposal No. 330—Mr. Dwyer, having had the same under consideration, reports it back with the following amendment, and recommends its passage when so amended:

Strike out all of said proposal after line 3 and in lieu thereof insert the following:

Until further provided by law the state is hereby divided into ten appellate court districts as follows:

The present first, third, fifth, sixth and eighth judicial circuits shall each constitute with the same numbering, counties and boundaries, the first, third, fifth, sixth and eighth appellate court judicial districts.

The counties of Preble, Darke, Shelby, Champaign, Miami, Montgomery and Greene shall constitute the second appellate court judicial district.

The counties of Brown, Adams, Highland, Pickaway, Ross, Pike, Scioto, Lawrence, Gallia, Jackson, Meigs, Vinton, Hocking and Athens shall constitute the fourth appellate court judicial district.

The counties of Lake, Ashtabula, Geauga, Trumbull, Portage and Mahoning shall constitute the seventh appellate court judicial district.

The counties of Columbiana, Jefferson, Belmont, Harrison, Carroll, Monroe, Noble, Guernsey and Washington shall constitute the ninth appellate court judicial district.

The counties of Franklin, Madison, Clark and Fayette shall constitute the tenth appellate court judicial district.

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

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

REFERENCE TO COMMITTEES OF PROPOSALS.

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

Proposal No. 335—Mr. Dunn. To the committee on Taxation.

Proposal No. 336—Mr. Read. To the committee on Education.

Proposal No. 337—Mr. Watson. To the committee on Initiative and Referendum.

Proposal No. 338—Mr. Dunn. To the committee on Judiciary and Bill of Rights.

Proposal No. 339—Mr. Dunn. To the committee on Judiciary and Bill of Rights.

By unanimous consent the Convention took up resolutions laid over under Rule 96.

Resolution No. 109—Mr. Stilwell, was taken up.

Mr. Lampson moved that the resolution be indefinitely postponed.

The motion was carried.

Mr. Thomas moved that Resolution No. 110—Mr. Thomas, be informally passed.

The motion was carried.

PETITIONS AND MEMORIALS.

Mr. Halfhill presented the petition of W. B. Bradshaw and twenty-one other citizens of northwestern Ohio protesting against the initiative and referendum proposition adopted by the Convention, protesting against any compromise with the interests and praying the Convention to submit to popular vote a proposition that will provide for genuine and unrestrained government of the people, by the people, and for the people; which was referred to the committee of the Whole.

Mr. Halenkamp presented the petitions of Sullivan Walter and eighteen other citizens of Cincinnati; of F. Steffen and nineteen other citizens of Cincinnati, asking for the abolition of the legislature; which were referred to the committee of the Whole.

Mr. Ulmer presented the petition of E. P. Gauder and thirty-eight other citizens of Lucas county, asking for the abolition of the legislature; which was referred to the committee of the Whole.

Mr. Miller, of Fairfield, presented the petition of W. H. Palmer and fifty-two qualified electors of Fairfield county, disapproving of the majority report of the taxation committee and urging favorable consideration of the minority report of the committee; which was referred to the committee on Taxation.

Mr. Nye presented the petition of James B. Morrow and twenty-four other citizens of Lorain county, requesting that an amendment shall be proposed to the constitution providing for the abolition of the legislature and for the passage of laws through initiative of the people by direct vote; which was referred to the committee on Legislative and Executive Departments.

Mr. Farnsworth presented the petition of George Prendergast and forty-seven other citizens of Lucas county, asking for the pasage of the initiative and referendum; which was referred to the committee on Initiative and Referendum.

On motion of Mr. Harris, of Hamilton, the Convention adjourned.