

# SEVENTY-THIRD DAY

## AFTERNOON SESSION.

WEDNESDAY, May 22, 1912.

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

The journal of Thursday, May 9, was read and approved.

Mr. TAGGART: Mr. President: Just a brief word of explanation. In order to expedite business, it is the desire of the committee on Schedule that a certain proposal be introduced in order that it may be engrossed and printed and be referred back to the committee. While it is not in form, we desire to have it printed to get the matter in shape.

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

Proposal No. 340—Mr. Taggart. To submit an amendment to schedule No. 4.

Mr. Colton submitted the following report:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 174—Mr. Mauck, having had the same under consideration, reports it back, and recommends its indefinite postponement for the reason that the substance thereof has been incorporated in Proposal No. 72.

Mr. COLTON: By unanimous consent I want to make a brief statement explaining. The committee on Phraseology was at work steadily here during last week the entire time until Thursday night, reviewing the proposals, and a subcommittee was at work from that time until now reviewing the proof from the printer. The result of the work is embodied in the books on your tables. If you will turn to the first page you will find a list of the proposals on which we have reported. There are eleven reports found in this book. We were not ready to report all this afternoon, but will promise the others later. This report consists of three parts. You will find the subject of Proposal No. 24, the first one passed, on white paper. It is the engrossed proposal as it passed this Convention. Following this, on pink paper, you will find the report of the committee, referring to the engrossed proposal by lines and suggesting certain changes. Following this, on buff paper is the proposal as it will appear if the amendments suggested by the committee are incorporated in it. So it will be fairly easy for the members to make comparison and determine whether the amendments are proper or not. We have done the work with a great deal of care and we have read and reread the proof again and again, but we can hardly hope to have detected every possible inaccuracy or error. We have done our work as carefully and as well as the time permitted.

Mr. MAUCK: I think it is apparent that the provisions of Proposal No. 72 and Proposal No. 174 should be incorporated in one proposal and I consent that Proposal No. 174 be indefinitely postponed, calling attention to the fact that Proposal No. 72 as reported by the

committee needs further amendment than that submitted by the committee on Arrangement and Phraseology. I merely call the attention of the committee to it because the last sentence in the amended Proposal No. 72, being that part of Proposal No. 174 that has been drawn from Proposal No. 72, "laws may be passed regulating the sale and conveyance of other personal property," is in effect an article wholly devoted to corporations, and if the ordinary rule of construction of a constitutional or statutory provision should prevail that would be construed in pari materia—if the member from Highland [Mr. BROWN] will excuse the latin expression—and it would probably be held that this provision only applies to the sale and conveyance of personal property belonging to corporations. If that sentence is amended that laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, partnership or individual, the purpose of both proposals I think will be effectually expressed.

The PRESIDENT: The question is on agreeing to the report of the committee.

The report of the committee was agreed to and Proposal No. 174 indefinitely postponed.

Mr. COLTON: I offer a report.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 72—Mr. Stokes, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

In the title change "8" to "2".

Strike out all after the dash in the title and insert: "Regulation of corporations and sale of personal property."

In line 4 change comma to period and strike out "Section 2".

In line 5 before "Corporation" insert "Sec. 2."

In lines 6 and 7 eliminate paragraph.

In line 9 change "stock" to "stocks".

In line 10 change "stock" to "stocks".

After "law," in line 11 add: "Laws may be passed regulating the sale and conveyance of other personal property".

The PRESIDENT: The question is on agreeing to the report of the committee.

The report of the committee was agreed to.

Mr. DOTY: I move that the proposal be engrossed with the line numbers in accordance with the buff printed form and that it be read the third time tomorrow.

Mr. HARRIS, of Ashtabula: This refers to Proposal No. 72?

Mr. DOTY: That is all.

The motion was carried.

Mr. NYE: I offer a report.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 209—Mr. Tetlow, having had the same under

## Reports of Standing Committees.

consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out title and insert:

"To submit an amendment by adding section 37 to article II, of the constitution.—Eight hour day on public work."

Strike out lines 4 to 9 and insert:

## ARTICLE II.

"Sec. 37. Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for laborers engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

Mr. THOMAS: I think the language in line 7 should be changed to "laborers and mechanics," adding the words "and mechanics". "Laborers" might be construed to mean only those who do common labor.

Mr. DOTY: If this proposal is agreed to at this time it will go upon the calendar for tomorrow, which will give the member a chance to prepare any amendment he desires.

The report was agreed to.

Mr. DOTY: I move that the proposal be placed on the calendar and be read the third time tomorrow.

The motion was carried.

Mr. FESS: I offer a report.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 24—Mr. Cordes, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out the title and insert: "To submit an amendment by adding section 35 to article II, of the constitution.—Workmen's compensation."

In line 5 change "Section 33" to "Sec. 35."

In lines 5 and 6 strike out "from a state fund."

In line 8 strike out "and administered by the state and"

In line 8 insert "state" between "a" and "fund".

In line 9 after "employers" strike out the semi-colon and insert: "and administered by the state."

In line 10 insert a comma after "therefrom".

In line 11 strike out the third "e" in "employees".

In line 12 strike out "es" in "employees".

In line 14 strike out the third "e" in "employees".

In line 11 insert a semi-colon after "employers".

In line 16 change semi-colon to comma and insert "to".

In line 17 strike out "the general rule of" and insert "such".

In line 17 insert a comma after "classification".

In line 18 insert a comma after "fund".

The PRESIDENT: The question is on agreeing to the report of the committee.

The report of the committee was agreed to.

Mr. LAMPSON: I move that the proposal be engrossed and placed upon the calendar for third reading tomorrow.

The motion was carried.

Mr. Halfhill submitted the following report:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 236—Mr. Worthington, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out, in the title, all after dash and insert: "Investigations by each house of general assembly."

In line 2 strike out "Section 8 of Article II of".

In line 5 change "Section" to "Sec."

In line 9 strike out "other" and strike out the comma after "safety".

In line 11 insert a comma after "contemplation".

In line 11b insert a comma after "members".

The PRESIDENT: The question is on agreeing to the report of the committee.

The report of the committee was agreed to.

Mr. COLTON: I move that that proposal be engrossed and placed upon the calendar for a third reading tomorrow.

The motion was carried.

Mr. ANTRIM: I offer a report.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 100—Mr. Fackler, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

In the title strike out all after the dash and insert: "Abolition of justices of the peace in certain cities."

In line 5 change "Section" to "Sec."

In line 7 change the period to colon and change capital "P" to lower case "p".

In line 8 strike out "there shall be" and change "justices" to "justice" and after "peace" insert "shall be elected."

In line 8 change "where" to "in which."

In line 9 insert commas after "is" and after "be."

In line 10 strike out "are given" and insert "have."

In line 10 change the second "justices" to "justice."

In line 11 insert commas after "have" and after "exercise".

The PRESIDENT: The question is on agreeing to the report.

The report was agreed to.

Mr. ANTRIM: I move that the proposal be engrossed and placed on the calendar for third reading tomorrow.

The motion was carried.

Mr. LAMPSON: I offer a report from the committee on Arrangement and Phraseology.

## Reports of Standing Committees.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 241—Mr. Dwyer, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out the title and insert:

To submit an amendment by adding section 38 to article II, of the constitution.—Removal of officials.

Between lines 3 and 4 insert sub-head ARTICLE II.

In line 4 change "Section 24a" to "Sec. 38."

In line 6 change capitals "G" and "A" to lower case "g" and "a".

In line 8 strike out "provided" and insert before the period, "authorized by the constitution."

The PRESIDENT: The question is on agreeing to the report.

The report was agreed to.

Mr. LAMPSON: I move that this proposal be engrossed and placed upon the calendar for third reading tomorrow.

The motion was carried.

Mr. LAMPSON: I offer a report.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 118—Mr. Lampson, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

In the title strike out all after dash and insert: "State bond limit for good roads."

In line 5 change "Section" to "Sec." and strike out "(Public Debt)."

In lines 8 and 13 change "G" and "A" to lower case "g" and "a".

In line 12 change period to colon.

In lines 12 and 13 eliminate paragraph.

In line 13 change capital "P" to lower case "p".

In line 15 strike out "of" and change "millions" to "million."

In line 16 insert "rebuilding" after "constructing."

In line 16 insert "repairing and" after "improving" and strike out the comma after "maintaining."

Strike out "repairing and" at the end of line 16.

In line 17 strike out "rebuilding."

In line 18 change semi-colon to a period and change "not" to "Not".

In line 18 change "millions" to "million" and strike out "of".

In line 18 change "in" to "of".

In line 20 strike out comma.

In line 21 strike out comma and insert "to" before "provide".

In line 21 strike out "final".

In lines 22 and 23 eliminate paragraph.

Strike out comma at the end of line 23.

Strike out all of line 24 after "cost" and insert: "of constructing, rebuilding, improving, repairing and maintaining the same shall be paid by the state."

In lines 24 and 25 eliminate paragraph.

The PRESIDENT: The question is on agreeing to the report.

The report was agreed to.

Mr. LAMPSON: I move that the proposal be engrossed and placed on the calendar for third reading tomorrow.

The motion was carried.

Mr. ELSON: I offer a report from the committee on Arrangement and Phraseology.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 122—Mr. Farrell, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended.

Strike out the title and insert: "To submit an amendment by adding section 34 to article II of the constitution.—Welfare of employes."

Between lines 3 and 4 insert ARTICLE II.

In line 4 before "Laws" insert "Sec. 4."

In line 5 insert a comma after "wage".

The PRESIDENT: The question is on agreeing to the report.

The report was agreed to.

Mr. KNIGHT: I move that the proposal be engrossed and placed upon the calendar for tomorrow for its third reading.

The motion was carried.

Mr. ANTRIM: I offer a report.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 166—Mr. Stilwell, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out the title and insert: "To submit an amendment by adding section 33 to article II of the constitution.—Mechanics' and builders' liens."

Between lines 3 and 4 insert sub-head ARTICLE II.

In line 4 change "Section" to "Sec."

In line 4 insert a comma after "laborers".

In line 6 after "or" insert "for which they have".

The PRESIDENT: The question is on agreeing to the report.

The report was agreed to.

Mr. ANTRIM: I move that the proposal be engrossed and placed on the calendar for its third reading tomorrow.

The motion was carried.

## Reports of Standing Committees—Invitation to Convention to meet at Cincinnati.

Mr. FESS: I offer a report relative to Proposal No. 54.

The report was read as follows:

The standing committee on Arrangement and Phraseology, to which was referred Proposal No. 54—Mr. Elson, having had the same under consideration, reports it back with the following amendments, and recommends its passage when so amended:

Strike out all after dash in title and insert: "Reform of civil jury system."

In line 5 change "Section" to "Sec."

Strike out the semi-colon in line 5 and all of the remainder of line 5 and all of lines 6 and 7, and insert:

" , except that, in civil cases, the general assembly may authorize the rendering of a verdict by not less than three-fourths of the jury."

Mr. LAMPSON: I want to call the attention of the committee on Phraseology to the fact that the committee voted to change that word "reform" in the title to "change", not to use the word "reform," that being a word rather indefinite in meaning.

Mr. DOTY: That is all right.

Mr. LAMPSON: We changed that.

Mr. KNIGHT: I move that that be withdrawn from the Convention and referred to the committee to permit the committee to correct it.

Mr. DOTY: It is easy to correct it on third reading.

Mr. NORRIS: When are these reports open for discussion? As they are called up?

The PRESIDENT: Yes. The question is on agreeing to the report.

The report was agreed to.

The proposal was ordered to be engrossed and read the third time tomorrow.

Mr. DOTY: If there are no further reports, I move that the rules be suspended and that Proposal No. 340 be referred to the committee on Schedule. This is the proposal introduced this afternoon, and the plan is to refer it back to the committee so that the committee may make its report and save time.

Mr. PECK: What is it about?

Mr. DOTY: Schedule.

Mr. PECK: That doesn't tell us anything.

Mr. ANDERSON: I received a telephone call from Mr. Campbell stating that by reason of illness in his family he cannot be here today or tomorrow and requesting leave of absence.

Leave of absence was granted.

Mr. DOTY: The proposal introduced by Mr. Taggart is a proposal affecting the schedule. This has been introduced and read the first time, and under the rules it could not be referred until tomorrow. To expedite business I desire to have this proposal submitted to the committee on Schedule at this time.

The motion to submit was carried.

Mr. KILPATRICK: I offer a resolution.

The resolution was read as follows:

Resolution No. 127:

*Resolved*, That the services of the sergeant-at-arms, J. C. Sherlock, be and are hereby continued

for the period of ten days after the adjournment of this Convention for the purpose, and he is hereby instructed to procure boxes and all necessary material for packing and shipping the personal effects of the members; that he be and is hereby authorized to retain from the present force, the necessary help required not to exceed five persons; that said sergeant-at-arms and the persons so retained by him shall receive for such service the same per diem as is now being paid them by this Convention; that the president of the Convention is hereby authorized and instructed to sign vouchers therefor and for necessary material and express charges.

Mr. KILPATRICK: You have accumulated while here quite a good deal of property by way of proposal books and other things of that kind and it has been the custom in sessions of the legislature to have all these things boxed up and sent to our respective homes. It is necessary to have a resolution of this kind to have that done, and for that reason I would ask that the rules be suspended and the resolution be put on its passage.

Mr. DOTY: I agree with the general substance, but there is one word that may have to be changed. There is no hurry and I prefer to have it go over.

The PRESIDENT: Then the resolution goes over under the rule.

Mr. DOTY: I would like to state that the committee on Arrangement and Phraseology has made all the reports it is ready to make, and we expect to have all the rest or nearly all the rest reported tomorrow morning, which we think, with the proposal to be put upon the calendar tomorrow, will make a full day for tomorrow. There will be perhaps a few that we will have to report on Friday, but we can report every proposal by Friday morning, and perhaps by tomorrow afternoon they will be put in this book in numerical order, not in the order in which the proposals were passed, and thereby we can turn to them more readily. I therefore move that we adjourn until 9:30 tomorrow morning—no, I will withhold the motion to adjourn as Judge Peck has something to be offered at this time.

Mr. PECK: I take pleasure in presenting the following communication:

The Business Men's Club Co.

May 20, 1912. ♪

HON. HERBERT S. BIGELOW,

President of Ohio Constitutional Convention—  
Columbus, Ohio.

Dear Mr. Bigelow:

The board of directors of the Business Men's Club of Cincinnati extend a most cordial invitation to all of the members of the Constitutional Convention now in session at Columbus to meet at a dinner to be given in the club house of our organization some evening in the near future convenient to your body. We shall be delighted to receive an early acceptance of this invitation and hope as many members as possible of your distinguished body will find it convenient and agreeable to accept this invitation.

Very sincerely yours,  
The Business Men's Club Co.

## Invitation to Convention to Meet in Cincinnati.

Mr. PECK: This is just what it purports to be, an invitation to dine with the Business Men's Club if you choose to do so, and to hold a meeting there. My idea is that it would be a graceful thing to hold our last meeting there. They are in earnest. They want to see you. They have nothing to ask, no axe to grind. It is simply a social matter. They want you to come to Cincinnati to enable them to show you how nicely you can be entertained there and how glad they will be to see you all. I hope the committee will be appointed and fix a date. They asked me to fix it when I was there and I said, "If you extend an invitation you had better leave it to the Convention to fix the day as no one knows when they can come." You observe the tone of the letter on that subject. My idea would be to consult with them and have the last meeting of the Convention there.

Mr. PRICE: I move that the invitation be received and that we take it up for consideration now.

The motion was carried.

Mr. DOTY: In order that we may have something to discuss I move that the invitation be accepted, but I want to call your attention to this situation: The chairman of the committee on Arrangement and Phraseology has said the committee on Arrangement and Phraseology has been very busy working while the rest of the Convention has been away, for the sole purpose of making it possible to have an early adjournment; not with any idea of undue haste, but to make it possible to adjourn next Tuesday. Now if this Convention make up their minds to work until next week and stay here and begin early Monday morning, it is possible for us to do our work, as I think, and the members on the committee on Arrangement and Phraseology think, it will be possible for us to adjourn the Convention by Tuesday night, or at the very latest by Wednesday. The reason I have stated this is because of this invitation. If that program were carried out, it makes it possible, if we desire to conclude our work by Tuesday night, to then accept the invitation of the member from Hamilton [Mr. PECK] and to hold our last session in Cincinnati on Wednesday. That is the only way that I can see where we can get through at this time and be reasonably sure in accepting the invitation.

Mr. HARRIS, of Ashtabula: Be through here Tuesday?

Mr. DOTY: It is my guess. I have not fixed it positively.

Mr. HARRIS, of Ashtabula: Why suggest that?

Mr. DOTY: It is possible to get through Tuesday if we work all of the time until Tuesday, but if we recess Thursday we will not get through until June.

Mr. HARRIS, of Ashtabula: Following the reasoning of the gentleman from Cuyahoga [Mr. DOTY], if we accept that invitation we must necessarily compress the work into the time between now and then.

Mr. DOTY: Yes; perhaps between now and Monday we can come to a definite conclusion. I do not contend that we can get through on Tuesday, but if we are not going to work on Saturday and Monday the chances are very much against our getting through on Wednesday.

Mr. HARRIS, of Ashtabula: I want to call the attention of the member to the fact that we have found

it exceedingly difficult to hold a quorum here on Friday and to hold this whole Convention over Sunday seems to be a large undertaking, even if they agree to stay.

Mr. DOTY: That is the reason I am telling them. If they don't desire to stay they can govern themselves accordingly.

Mr. HARRIS, of Ashtabula: I dislike to get this thing in shape to be compressed. The invitation is fine, but I dislike to make that the closing day and fix the date.

Mr. DOTY: I just made the motion so as to have something discussed; not what is absolute but what is possible, and at any rate to continue up to Wednesday night.

Mr. PECK: The invitation is not conditioned upon anything. It is not conditioned upon the fact that you hold the last meeting there or that you fix the time to go. They will be glad to see you any time.

Mr. LAMPSON: Apropos of what the gentleman from Cuyahoga [Mr. DOTY] has been saying, I would call attention to the fact that next Thursday is Decoration day. A great many delegates have engagements for that. If we could get through before that we would have opportunity to fill engagements. The following week the state conventions of both parties are held, so that if we don't get through by Wednesday of next week it looks as though we might be here two or three weeks without accomplishing very much. I think every delegate in this Convention ought to make a sacrifice, to give attention to the business of this Convention now so that we can close it up in an orderly manner by Wednesday of next week.

Mr. HARRIS, of Ashtabula: I conclude that the argument of my colleague, if it means anything, means a Saturday session. My attention has been called to the fact that there are seventy county conventions held next Saturday. In the face of that what is the use of this talk?

Mr. DOTY: Those are partisan conventions.

Mr. HARRIS, of Ashtabula: They are political conventions.

Mr. DOTY: Yes, and this is not a political body.

Mr. HARRIS, of Ashtabula: No. And there are no candidates here and nobody cares anything about their political future either!

Mr. PRICE: I move to receive and discuss this matter now because this is about as good a time as any other time. So far as working Saturday is concerned, I don't think that cuts any figure. I do not think any man can say how long we are going to be here since accepting these reports, and I think the regular thing to do is to adjourn Friday and come back here regularly next week and then fix the time and go to Cincinnati. I have been down to that town and my experience was such that I would like to go back.

Mr. KING: All that is before us is to accept or decline the invitation. We are now approaching the first of June, and I am certainly in favor of working not only days but nights and Sundays if necessary.

DELEGATES: No. No.

Mr. KING: It is nonsense to stand here and talk about the county conventions of political parties. We have forty-two proposals. Let us go to work and dispose of them. It should not take the Convention beyond

## Invitation to Convention to Meet in Cincinnati—Reform of Jury System.

the date suggested by the member from Cuyahoga [Mr. Dory], if we work at it. I want to work at it and I want to get to the last of this Convention just as soon as we can do it. I do not want to hurry, but I am in favor of working until we finish.

Mr. HARRIS, of Ashtabula: I expect to be here Saturday myself. I am entirely willing to work Saturday. I have heard the same line of argument as advanced by the gentleman from Erie a half dozen times and I have been here Friday and Saturday and I have seen how it works out. I will be as glad to get through this as any one, but I want to look at the case as it is, in the light of our experience.

Mr. WINN: I am in favor of the adoption of the resolution by this Convention providing that from this time until the conclusion of the sessions there shall be no leaves of absence granted except by unanimous consent, and if anybody shall absent himself from the Convention without its consent he shall forfeit twenty dollars a day. I started to prepare such a resolution and I shall prepare it and offer it at the earliest possible moment. I am opposed to the acceptance of that invitation to visit Cincinnati. I am opposed to it because it has no place in a constitutional convention. I do not say that for this Convention to adjourn and hold a session in Cincinnati will discredit it. I mean it would not be a discredit to the Convention because the visit is to Cincinnati, but I say it will discredit this Convention to adjourn to meet any place except the place where it holds its sessions under the law. We are going to have enough when we get before the people in September—or whenever we appeal to them for approval or disapproval of our work—we are going to have enough to do if we succeed in obtaining the approval by the electors of the state of what we are doing, and every time we indulge in any frivolities we just simply drive off a certain number of votes. That is certain. There is no person here who would not be pleased to accept the invitation of Judge Peck to visit Cincinnati, not only because it comes from that great city, but because it comes from one of our most distinguished and honored members; but we cannot afford, gentlemen, to do anything else here except attend to our business, if we expect to avoid criticism of the people of Ohio. I should like to make a trip to Cincinnati some day myself. I am going down there at the first real good opportunity. I would like to have all the members there and I would like to have a big dinner.

Mr. PECK: What is the objection to doing it now?

Mr. WINN: My objection is this: We were elected and sent here to perform a certain duty.

Mr. PECK: Suppose we go after our work is done?

Mr. WINN: If you will accept the invitation to be dined by that club some day in June, July, August, or September, after we conclude our work and have gone back home, where we belong, I shall vote to accept the invitation, but let it be after we have concluded our work, so that we shall not go as a Convention.

Mr. FESS: As a citizen living very near to Cincinnati, I should like to see this invitation accepted if we could do it. It seems that it will take a little time after we do accept it for them to prepare. We can not accept it today and go tomorrow. That would not be fair, and since we have so very much work—I have been thinking how long it will take to read the forty-two proposals.

It will take a day to do that and a good deal of the time in calling the rolls, and there are some questions that are bound to be discussed that are of great importance to the committee on Submission. We are bound to consume some time. I agree with everybody that has spoken that we should stay here and get through with this work as soon as possible. If we could do that and have a session at Cincinnati I would be delighted to vote for it, and I therefore move that this matter be referred to the committee on Rules so they can arrange the time and conditions and report later on. I think in that way we do not jeopardize any of the work of the Convention.

The motion was carried.

Mr. LAMPSON: I move that the rules be suspended and that we take up now for consideration Proposal No. 54, by Mr. Elson:

The motion was carried.

The proposal was read the third time.

The delegate from Marion was here recognized.

Mr. DOTY: Before the member starts in debate, I would like to have settled the question as to how much time debate shall occupy?

Mr. WINN: I rise to a point of order. The member from Marion [Mr. NORRIS] has the floor.

Mr. DOTY: The member from Marion might be allowed to take care of himself.

The PRESIDENT: The gentleman from Marion has the floor.

Mr. NORRIS: I want to be fully heard. I have not occupied ten minutes of the time of this Convention in speaking so far, and I want to be heard fully now.

Mr. DOTY: I have no desire or power to interfere with your rights now in any way, but I think it is time to bring up the general question before we get into anything like a general debate, as to what time shall be allowed.

Mr. LAMPSON: I suggest to the members that the member from Marion [Mr. NORRIS] has occupied very little time, and I suggest that the motion be withheld until he gets through.

Mr. Norris moved to amend Proposal No. 54 as follows:

Strike out all after the word "inviolable" in line 5 insert a period and strike out the remainder of line 5 and all of lines 6 and 7.

Mr. NORRIS: With all due respect I deny that this Convention has the authority to invite the people of Ohio to surrender, or to authorize the legislature to surrender, the right of a citizen to submit his controversy, triable to a jury in a court of record, to other than a common law jury, or to accept in determination of his rights a verdict other than the united conclusion of the twelve jurors.

And I assert that the proposed amendment now before this Convention is inimical to the compact of the ordinance of 1787 relating to trial by jury and judicial proceedings according to the course of the common law, as adopted by our present state constitution and the constitution of 1802, and that it is not within the legal power of this Convention to submit it, and not within the province of the people of Ohio to adopt it and accept it as a part of the organic law of this state.

On page 78 of the journal of this Convention, under date of January 24, appears Resolution No. 42. By that resolution a committee is appointed by this body to ex-

## Reform of Jury System.

amine and report as to the binding effect of the ordinance of 1787 upon us, and the relations of that ordinance and its compacts to the constitution that may be proposed by this Convention.

In obedience to that authority the standing committee on Judiciary and Bill of Rights submitted its report, declaring that the ordinance of 1787 has been suppressed by the assent of the states to the federal constitution and by the action of the supreme court of the United States, and that it only remains to complete the destruction of that great charter that the people of Ohio ratify the action of this Convention in declaring it abrogated and so cast it into oblivion. The report may be found under date of February 15 on pages 197-200 of the journal of this Convention.

This report has been received by this Convention, printed by its authority, awaits the further action of this body and finds lodgement with this proposal as a brief in its support; wherefore, with all deference to the learning and research and integrity of my colleagues of the Judiciary committee, I may take issue with them and express incidentally my unfaith in their conclusion, of which this report is the evidence.

Of all the dangers which this Convention could invite there can be nothing so fatal as the menace that slumbers in this report. It is a gratuitous and unnecessary and uncalled for, and I trust, unintentional, attempt to surrender that which belongs to posterity; an attempt to surrender that which, unless abrogated by the authority that created it, in manner provided by its terms, will endure as long as the people of Ohio, and of the states that were the Northwest Territory, shall love their country and have the spirit and courage to defend it. But once that compact is abrogated, nothing can recall that abrogation; once suppressed, as that report declares it, nothing can rehabilitate or resurrect it.

It matters not that we may now be unsuccessful in our assault upon it and that for all of this report and its attack that great charter will still live on, yet, if this report be the view of this Convention, as expressive of its willingness and wish, we then leave in the record here of the acts of men gathered by the people to make organic law that from which courts in the far future, disposed to be not jealous of the people's rights, can quote and draw conclusions, and that with which men seeking to subvert the institutions of their country can slap posterity in the face.

And all this, without demand, without requirement, without necessity and without reason.

I expect to show by the authorities cited in that report that the compacts of the ordinance of 1787 are not suppressed and not stamped out and not ended. But at farthest, when adopted by the constitution of a state of the Northwest Territory, as its compacts are and ever have been adopted by the constitution of Ohio, these compacts, thus adopted, then as a part of the ordinance, stand in abeyance and in temporary inactivity only, and do await the violation of them by the state which has thus adopted them to become reintegrate and to spring into quick life.

There is not a clause in the compacts of that ordinance that is not, either in letter or in spirit, written into the present constitution of Ohio, as they were in our consti-

tion of 1802, and there is nothing in either of those instruments repugnant to those articles of compact.

So that except where held in abeyance by substantive articles of the federal constitution for federal purposes and to assist federal government and to guard the rights of states, which affect not the proposal here, that compact and all of it is through our state constitution in full force now. And if every state except Ohio would consent to sweep the federal constitution and its beneficent provisions out of existence, and would enact a thousand pages of tyranny in its stead, Ohio, not consenting, because of this compact, would not be bound, and could seek refuge behind and in this mighty charter.

Let us see what this ordinance is that this Convention is advised to view with cold, oblique regard as one of the many mistakes our fathers made and which I plead here in bar to this proposed amendment to the constitution of this state.

The ordinance of 1787, and the wisdom of it and in it, is admired by the statesmen of the world as the greatest charter of liberty that ever was produced. Aided perhaps by the great men of that time, it was written by either Thomas Jefferson or Nathan Dane, both of whom are even now thought by many to have been men of at least fair intellect and to a degree somewhat patriotic. That ordinance dissipated the jealousies that had arisen between the colonies immediately following the Revolutionary War, which threatened the direst calamity, and smoothed the road and made it possible for those independent nations to form of themselves the Great Republic.

Jealousy and bitterness had arisen between the colonies. The act of confederation, sometimes called the first constitution of the United States, went into effect on the 9th of July, 1778, in the midst of the revolutionary struggle. While the citizens of the respective colonies possessed certain privileges and immunities under it, yet the act of confederation was not operative proximately upon the inhabitants, either individually or collectively, but, for the purposes therein named, only upon the states. So that citizenship as we know citizenship under the federal constitution, to which every inhabitant is a party, did not then exist. (Cooley's General Principles of Constitutional Law, 26-28; 1 Wharton, 304-324. 6 Wharton, 264-413.)

And while the continental congress had jurisdiction to settle differences between the colonies and power to make provision for carrying on the war, yet, as a government, the colonies thus confederated together, were a government without citizens; it had no executive head, no courts, and no method of enforcing the ordinances of its congress other than by argument and persuasion and appeal.

This confederacy was not a nation as this report declares it. It was a league of friendship, each with the other, says the third article of the act, for their common defense, the security of their liberties and their mutual general welfare. They were bound to assist each other against all attack from any source, on any pretense whatsoever, and to effect this the union was perpetual. Each state retained its independence and its every power and jurisdiction and right which were not expressly delegated by that confederation, to effect the purposes of that union.

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It was an alliance offensive and defensive between independent nations, and the delegates in the continental congress bore to each other more the relation of ambassadors from independent powers than otherwise. Such was the confederacy and its character, which up to the end of the Revolutionary War had been held together by common danger and by the cohesive power of common defense. The war had ended. No longer facing a common enemy and having time to contemplate it, they were astounded by the enormous debt which their victorious war had created.

This vast indebtedness was to be defrayed out of a common treasury, which was to be supplied by the respective states. All the colonies were poor. Their resources were exhausted by nearly eight years of continuous war. The vast debt to the payment of which they stood bound, and the manner of its apportionment among them and the manner of its exaction, gave promise to most of them of years of taxation and poverty and toil and final bankruptcy.

Let us see the method of taxation by which these people were being destroyed; for there is nothing new under the sun. I quote from the articles of confederation:

All charges of war and all other expenses that shall be incurred for the common defense and general welfare, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all lands within each state, granted to or surveyed to any person, as such land, and the improvements thereon shall be estimated, and the taxes for the paying of that portion, shall be laid and levied by the legislature of the several states.

Do you recognize this method of sapping and destroying the energy and strength of a people? It savors of the single tax which has admirers here. Why, the act of confederation even provided the recall. Men wiser than we, under the old union, before the adoption of the federal constitution, which is a radical departure from it, had tested out to the verge of ruin the dangerous fads and fancies which in this twentieth century and here so strangely challenge our approval.

Let us see the condition of the old union and the colonies after they had tried these heresies and weighed them in the balance and found them wanting. I read from a letter of Alexander Hamilton of date of December 1, 1787, fifteen months before the federal constitution went into effect, and thirteen months before the ordinance of 1787 and its compacts were read into and made a part of Virginia's corrected deed of cession of the Northwest Territory. This was the situation:

We may indeed, with propriety, be said to have reached almost the last stage of national humiliation. There is scarcely anything that can wound the pride, or degrade the character of an independent people, which we do not experience. Are there engagements, to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners, and to our own citizens, contracted in a time of imminent peril, for the preservation of our political existence? These remain without any proper

or satisfactory provision for their discharge.\* \* \* We have neither troops, nor treasury, nor government.\* \* \* Is public credit an indispensable resource in time of public danger? We seem to have abandoned its cause as desperate and irretrievable. Is commerce of importance to national wealth? Ours is at the lowest point of declension. Is respectability in the eyes of foreign powers a safeguard against foreign encroachments? The imbecility of our government even forbids them to treat with us: Our ambassadors abroad are mere pageants of mimic sovereignty. Is a violent and unnatural decrease in the value of land a symptom of national distress? The price of improved land in most parts of the country is much lower than can be accounted for by the quantity of waste land at market, and can only be fully explained by that want of public and private confidence, which are so alarmingly prevalent among all ranks, and which have a direct tendency to depreciate property of every kind. Is private credit a friend and patron of industry? The most useful kind which relates to borrowing and lending, is reduced within the narrowest limit, and this still more from an opinion of insecurity than from a scarcity of money. To shorten an enumeration of particulars which can afford neither pleasure nor instruction, it may in general be demanded, what indication is there of national disorder, poverty, and insignificance, that could befall a community so peculiarly blessed with natural advantages as we are, which does not form a part of the dark catalogue of our public misfortunes? \* \* \*

In our case, the concurrence of thirteen distinct sovereign wills is requisite under the confederation, to complete execution of every important measure that proceeds from the Union. It has happened, as was to have been foreseen. The measures of the Union have not been executed; the delinquencies of the states have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of government, and brought them to an awful stand. Congress at this time scarcely possesses the means of keeping up the forms of administration, till the states can have time to agree upon a more substantial substitute for the present shadow of a federal government. Things did not come to this desperate extremity at once. The causes which have been specified, produced at first only unequal and disproportionate degrees of compliance with the requisitions of the Union. The greater deficiencies of some states furnish the pretext of example, and the temptation of interest to the complying or at least delinquent states. Why should we do more in proportion than those who are embarked with us in the same political voyage; why should we consent to bear more than our proper share of the common burthen? These were suggestions which human selfishness could not withstand, and which even speculative men who look forward to remote consequences could not, without hesitation, combat.

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Each state, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruin. (Federalist, pages 139, 140, 186.)

The wealth and resources of the colonies lay in the unoccupied lands. The colonies, except Virginia, North Carolina, South Carolina and Georgia, possessed little, if any, ungranted territory. Virginia owned an empire. The Northwest Territory concededly belonged to her. She had in it, title and possession. She owned it, water, air, earth and sky. All that vast territory, now the states of Ohio, Indiana, Illinois, Michigan, Wisconsin and Minnesota east of the Mississippi River and north of the Lake of the Woods. This territory Virginia had conquered at her own expense and with her own troops.

And this was the voice of Virginia to her sister republics: Our confederacy is going to pieces, shattered by the hardships and poverty of vast indebtedness. Let us form of ourselves the Great Republic. I will open the road; I will smooth the way; I own an empire; I will so cede it by treaty and concession that its boundless wealth may be devoted to lifting from us the burden that is crushing us, and to no other purpose whatsoever.

Then followed Virginia's deed of cession. And then the ordinance and compacts of July 13, 1787. Then the submission of the ordinance and its compacts to the Virginia legislature in 1788. Then its acceptance by the people of Virginia on the 30th of December, 1788. And then the corrected deed of cession into which by its terms the ordinance is read. (60 U. S. 503.)

And so born into the world to bless mankind was that great charter of human liberty, the ordinance of 1787.

Let me read the six articles of compact by which I claim we are bound, and which bar the submission of this proposed amendment to the people of this state. If ever writing was divinely inspired, that writing was divinely inspired:

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of states and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with general interest:

It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to-wit:

Article 1. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiment in said territory.

Article 2. The inhabitants of the said territory shall always be entitled to the benefits of the writs

of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law; all persons shall be bailable unless for capital offenses where the proof shall be evident or the presumption great; all fines shall be moderate, and no cruel or unusual punishment shall be inflicted; no man shall be deprived of liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed.

Article 3. Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. \* \* \*

Article 4. The said territory, and the states which may be formed therein shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. \* \* \* The navigable waters leading into the Mississippi and St. Lawrence and carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy without any tax, impost or duty therefor.

Article 5. There shall be formed in the said territory not less than three nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to-wit: \* \* \*

And whenever any of the said states shall have 60,000 free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government; provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles. \* \* \*

Article 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted. \* \* \*

The words, "the inhabitants shall always be entitled to the benefits of trial by jury and of judicial proceedings according to the course of the common law," do not find place in that compact as mere verbiage and interpolation, but they are classed with the greatest principles of civil

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and political liberty. Let us see in what light the federal courts view them. I read from *Spooner vs. McConnell*, 1 McLean, 364. In speaking of the ordinance, the court says:

Then followed the articles of compact, six in number, guaranteeing, in the most solemn and impressive forms of expression, the great principles of civil and political liberty, namely, the toleration of freedom of opinion in matters of religion; the benefits of the writ of habeas corpus; of trial by jury; and of judicial proceedings according to the course of the common law; the encouragement of schools, and the means of instruction, etc,

Then follows with the other compacts. So that these words speak of the most sacred of human rights, held under the substantive guarantees of that compact to be yielded up only in accordance with its terms.

But this report declares that the assent of the states to the federal constitution is the assent to the suppression of the ordinance by that constitution, and that the states generally in ordaining the federal constitution, says the report, have consented to the abrogation of the ordinance; and then the report, in glib and graceful cadence, labels its conclusion as "dry logic too reasonable for the purposes of productive litigation." Let us see about how much logic of any kind there is in this opinion.

The federal constitution went into effect on the 4th of March, 1789, three months after Virginia had accepted the ordinance and changed her deed of cession. The federal constitution was reported by the convention on the 17th of September, 1787, two months after these independent states had met in the congress of the Confederation and created the ordinance. Many members of the convention which framed the federal constitution had been members of the continental congress. Many members of the continental congress were members of the first congress under the federal constitution. Eighteen members of the first congress under the federal constitution had been members of the convention which framed the federal constitution, and that convention was in session when the ordinance was created. So it would not be violent presumption to conclude that the men who were building the great republic, holding fresh within their view these two great charters, the ordinance and the federal constitution, understood, or thought they understood, their relations one to the other.

The United States, under the articles of confederation, was for the purposes named in that act, a perpetual union. In no less than six instances in the articles is it so declared. It was a government whose constitution had been ordained by the states and not by the people. Its powers were vested in a congress consisting of delegates from independent states. It was a government of but a single department, having neither an executive, a judiciary nor a citizen. For the government of an alliance of states at peace with the world and with each other, or as a foundation upon which to rest a suitable government, it had failed.

From the act of confederation to the federal constitution was not merely a new dynasty, succeeding another in an established government. It was a new government, radically different from the old. It was a new

union, inheriting only the perpetuity of the union which preceded it. They had the perpetual union, which had been formed by the states under the Confederation. But it was necessary, in order to establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessing of liberty to themselves and their posterity, to form a more perfect perpetual union. Not by a constitution ordained by the states, as this logical report declares it; if ordained by the states, it would still remain a mere confederacy. But in order to form a more perfect union, we—not the states—but we, the people of the United States, do ordain and establish this constitution for the United States of America. And it was adopted by the people through delegates elected for the express purpose of considering and deciding upon it; and the people of the states, as well as the states themselves, became parties to it. And it became operative upon all the people, individually and collectively, within the sphere of its power, as well as upon all the states. (Cooley's Principles of Constitutional Law, 26-27-28; 1 Wheaton, 304-324; 6 Wheaton, 264-413.) And so, when the iron tongue of midnight tolled off the last second of March 3, 1789, there appeared on earth for the first time an American citizen, and the Great Republic then first took its place among the nations of the earth.

But what became of the ordinance of 1787 which this report declares was suppressed by the birth of the Great Republic? Let us see. Such of the compacts of the ordinance as are necessary to guarantee the rights of states, and such as are necessary to protect the federal government and secure the rights of citizens of the United States—for under the federal constitution, all the citizens of all the states became citizens of the United States—such of the compacts as were thus necessary are adopted by the federal constitution for federal purposes. On September 25, 1789, the ten amendments constituting the federal bill of rights were submitted to the states by the first congress; nine were borrowed from the ordinance. Also the right to benefits of the writ of habeas corpus, trial by jury, inviolability of contracts, sacredness of private property, and so on, down to the first of February, 1865, when the thirteenth amendment to the constitution of the United States, prohibiting slavery, exactly as therein written, were borrowed from the ordinance, all borrowed from the ordinance of 1787, the clauses of which so adopted are not postponed in their application to the states and the inhabitants of the states in the Northwest Territory, except in so far as their exercise thus would conflict with the federal government and its jurisdiction and its authority and its prerogative.

It is a well settled principle that it is not the mere existence of federal power which precludes a state from exercising the same power. But it is the exercise of that power by the federal government which so precludes the state from exercising it; and that without this, subject to federal exercise of the same power in the same sphere, any state may at any time exercise such power. (Cooley's Principles of Constitutional Law, 35; *Golden vs. Price*, 3 Wash. C. C. 313; 3 Dallas, 386; 21 Howard, 506; 13 Wallace, 397-406; *Sturges vs. Crowninshield*; 4 Wheat, 122-196.)

Not suppressed, not abrogated, mark you, but held in

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abeyance, with the federal constitution, the proximate instrument to which we must look for immediate effect as to rights that call for exercise of federal power.

Suppressed by the assent of the states to the federal constitution! The assent of the states to the federal constitution was by the states' formal acknowledgement of the validity of the ordinance, and formal and solemn acceptance and adoption of its compacts, and its terms under the new government. Sections 1 and 2 of article VI of the federal constitution recognizes its validity, as a part of the supreme law of the land. I read from article VI of the federal constitution:

Section 1. All debts, contracts and engagements, entered into before the adoption of this constitution shall be as valid against the United States under this constitution, as under the confederation.

Section 2. This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made [all treaties then made had been made under the confederation], or which shall be made under authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The ordinance of 1787 with its compacts is not mere congressional legislation. But it is a treaty, with all the solemnity and force of a treaty, a treaty made under the Confederation, and adopted by the federal constitution; and adopted and adapted by the first congress on the 7th of August, 1789, within five months after the federal constitution went into effect. And I am not without authority upon this proposition. I quote from *Scott vs. Sanford*, 60 U. S. 503, 522, 523:

North of the Ohio, Virginia conveyed the lands, and vested the jurisdiction in the thirteen original states before the constitution was formed. She had the sole title and sole sovereignty, and the same power to cede, on any terms she saw proper, that the king of England had to grant the Virginia colonial charter of 1609, or to grant the charter of Pennsylvania to William Penn. The thirteen states, through their representatives and deputed ministers in the old congress, had the same right to govern that Virginia had before the cession. (Baldwin's *Constitutional Views*, 90.) And the sixth article of the constitution adopted all engagements entered into, by the congress of the Confederation, as valid against the United States; and that the laws made in pursuance of the new constitution, to carry out this engagement, should be the supreme law of the land, and the judges bound thereby. To give the compact, and the ordinance, which was a part of it, full effect under the new government, the act of August 7, 1789, was passed, which declares: "Whereas, in order that the ordinance of the United States in congress assembled, for the government of the territory northwest of the river Ohio, may have full effect, it is requisite that certain provisions should be made, so as to adapt

the same to the present constitution of the United States."

It is then provided that the governor and other officers should be appointed by the president, with the consent of the senate; and be subject to removal, and so forth, in like manner as they were by the old congress, whose functions had ceased.

By the powers to govern, given by the constitution, those amendments to the ordinance could be made, but congress guardedly abstained from touching the compact of Virginia, further than to adapt it to the new constitution. \* \* \*

As to the Northwest Territory, Virginia had the right to abolish slavery there; and she did so agree in 1787, with the other states in the congress of the Confederation, by assenting to and adopting the ordinance of 1787 for the government of the Northwest Territory. She did this also by an act of her legislature, passed afterwards, which was a treaty in fact [her second deed of cession].

Before the new constitution was adopted, she had as much right to treat and agree as any European government had. And, having excluded slavery, the new government was bound by that engagement by article VI of the new constitution.

This ordinance was addressed to the inhabitants as a fundamental compact, and six of its articles define the conditions to be observed in their constitution and laws. These conditions were designed to fulfill the trust in the agreements of cession, that the states to be formed of the ceded territories should be "distinct republican states." This ordinance was submitted to Virginia in 1788, and the fifth article embodying as it does a summary of the entire act was specifically ratified and confirmed by that state. This was an incorporation of the ordinance into her act of cession.

This report argues from the false premise that there was but one party to the compact originally, and that party was the general government, the nation, and quotes from Judge Grimke to that effect in *Hutchins vs. Thompson*, 9 Ohio, 62.

That ill-considered remark of Judge Grimke he takes back in the next twenty lines of that decision. I read from the case:

I have called this part a compact, because it is so termed in the instrument; but if it were not for some things which have since taken place, there might be great difficulty in regarding it in that light. There was in reality but one party to it originally, and that was the general government. But when application for admission into the Union was made by the people, inhabiting the eastern part of the territory, modifications in several parts of the ordinance were asked for, and were granted by the United States as one party, and Ohio, so far, treated the articles of compact as of perpetual obligation. The alterations proposed were with a view to the immediate

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formation of a state constitution, and were of no importance, if the state should have a right to annul the ordinance the moment it assumed that condition. The state may thus, by its own act, have converted that into a compact which was before only a fundamental act of congress.

The ordinance provides that so far as it can be consistent with the general interest of the Confederacy such admission shall be allowed at an earlier period and when there may be a less number of free inhabitants in the state than sixty thousand. (Ordinance, article 5.)

And it was in relation to modifications under this clause of the ordinance, which were requested and assented to, and not as to any of the compacts.

The nation originally the only party to the ordinance and its compacts! Why, under the Confederation, when the ordinance was adopted by the state, there was no nation. The government was an offensive and defensive alliance between independent nations, and as such each state spoke for itself in the continental congress. I quote:

The declaration of independence was not, says Justice Chase, a declaration that the united colonies jointly in a collective capacity were independent states; but that each of them was a sovereign and independent state; that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any power on earth. (3 Dallas, 199; 4 Cranch, 212; 60 U. S. 502.)

As to how Virginia looked upon the Confederation, as well as that she fixed and dictated the terms of cession and the purposes for which cession was made, as one of the high contracting parties, I quote from her deed of cession, 1 U. S. L. 417:

That all lands within the territory so ceded shall be used as a common fund for the use and benefit of such of the United States as have become or shall become members of the confederation, or federal alliance, of said states, Virginia inclusive; according to their usual respective proportions in the general charge and expenditure, and shall be faithfully, and bona fide disposed of for that purpose, and for no other purpose or purposes whatsoever.

And I again repeat that the ordinance was submitted to Virginia, and on the 30th of December, 1788, was specifically ratified and confirmed by Virginia, and that the ordinance was incorporated in her deed of cession. (1 U. S. L. 481; 60 U. S. 503; Ordinance, article 5.)

Before the federal constitution was adopted she had as much right to treat and agree, particularly with all of her sister states, each becoming a party to the agreement, as any European government had; and her acceptance of the ordinance and her deed of cession, of which the ordinance became a part, was a treaty in fact.

Each of the original states was and is a party to the ordinance and its compact, Virginia in the dual relation of grantor and a participant in the proceeds arising from the vast body of land. In fact, every state then and now in the federal union is a party to that compact;

but be that as it may, each of the states formed from the territory became a party to it, and each inhabitant thereof a party to the ordinance and its compacts. I quote from *Spooner vs. McConnell*, 1st McLean, 344, 373:

The compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory became parties to the compact. And this compact, so formed, could only be rescinded by the common consent of those who are parties to it.

And I quote from 60 U. S. 504. The court in speaking of the ordinance says:

The consent of all the states represented in congress, the consent of the legislature of Virginia (1 U. S. L. 481), the consent of the inhabitants of the territory, all concur to support the authority of this enactment. And it is apparent in the frame of the federal constitution, that the federal convention recognized its validity and adjusted part of their work with reference to it.

I also quote from 60 U. S. 512:

The ordinance of 1787, depended upon the action of the congress of the Confederation, the assent of the state of Virginia, and the acquiescence of the people; and the federal government accepted the ordinance as a recognized and valid engagement of the Confederation.

So that we have other parties to the ordinance than the nation, which then had no existence.

Of the vast wealth which Virginia so generously ceded, the states became and were the recipient. Of the compacts of the ordinance, which breathe every principle of human liberty, the inhabitants and states formed in the territory were and are the thrice blessed beneficiaries.

This report claims that the states and the nation, through the supreme court of the United States, assent to the suppression of the ordinance.

"Shall be considered as articles of compact between the original states, and the people and states in said territory, and forever remain unalterable unless by common consent," says the ordinance.

The consent of the original states or any state is not created either by the dicta or the decision of federal courts. The compact cannot be abrogated by implication.

The United States can only consent to the abrogation of the compact through the states in congress assembled. I quote *Spooner vs. McConnell*, 1 McLean, 344:

It is a well established principle that no political change in a government annuls a compact made with another sovereign power, or with individuals. The compact is protected by that sacred regard for plighted faith, which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization, and throw us back to an age of vandalism.

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In this same case which I have quoted, which was under the fourth article of the ordinance, in relation to the navigable waters in said territory and the power of the state concerning them, the court says:

All were interested in this provision, since all might have occasion to navigate the rivers referred to. Is it rational to conclude that congress intended to surrender a right so solemnly secured, so important in its character, and so extensive in its operation? And is such intention to be predicated on any action, short of an express declaration to that effect? If an ordinary act of legislation cannot be repealed without the observance of the forms and solemnities requisite in its enactments, a compact declared on its face to be "unalterable, unless by common consent," cannot be abrogated by mere implication.

The Congress of the United States as the representative of the people of the United States is a party to the compact, and as much bound by its stipulations as the states individually. (1 McLean, 370, 375, 379.)

In Hogg vs. Zanesville Canal and Manufacturing Co., 5 Ohio, 416, Judge Hitchcock says, as to article IV of the compact, relating to navigable waters leading into the Mississippi and the St. Lawrence:

This portion of the ordinance of 1787, is as much obligatory upon the state of Ohio as our own constitution. In truth it is more so; for the constitution may be altered by the people of the state, while this compact cannot be altered without the assent both of the people of this state and of the United States through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory.

And that court further says on page 423, 5 Ohio:

The right to navigate the rivers is a right secured to the citizen by the ordinance of 1787. It is a right of which he cannot be deprived unless by agreement between the people of the United States through their representatives in congress, and the people of Ohio, through their representatives in the general assembly.

I also cite Hutchins vs. Thompson, 9 Ohio, 52; Cochran's Heirs vs. Loring, 17 Ohio, 409, 424, 425; Ohio vs. Boone, 84 O. S. 357 (in which the court quotes from these opinions, and declares that the foregoing quotations remain as the unmodified expressions of this court upon this subject. This case was decided in 1911), and 84 O. S. 359.

Only the parties which establish the compact can annul or modify, and then only in accordance with its stipulations. (Georgetown vs. The Alexandria Canal Company, 12 Peters, 91, and authorities heretofore cited.)

The federal cases cited in this report go to the verge of federal assault upon the ordinance and its compacts. And at farthest it can only be gathered from the federal

cases so cited, nor can it be found anywhere otherwise than that the ordinance is held in abeyance by the federal constitution and the constitution of the state, in so far only as those constitutions respectively adopt the articles of compact. If that be true, they are then enforceable through those latter instruments, such of them as are so adopted, and not proximately so long as thus held in abeyance. If the cases cited in this report be binding authority even to that extent, that conclusion must be gathered from expressions of opinions by the court which are not applicable to the fact upon which the cases rest. Let us see what those cases include and conclude.

The first case cited is the Escanaba Company vs. Chicago, 107 U. S. R. 678. The fourth article of the ordinance provides—

That the navigable waters leading into the Mississippi and St. Lawrence and carrying places between the same shall be common highways and forever free as well to the inhabitants of said territory, as well to the citizens of the United States, as those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor.

This case was decided in 1881. The Escanaba Company was a corporation, chartered under the laws of Michigan, and engaged in water navigation. The state of Illinois had authorized the city of Chicago, within the city limits, to straighten and deepen and widen the Chicago river, whose waters reach the St. Lawrence through the Great Lakes. And had further authorized the city to erect bridges over the stream to facilitate commerce. To meet the necessities of traffic, the bridges were closed at certain times and for certain periods of time. This the plaintiff claimed interrupted the navigation of the river, was not consonant with federal authority over navigable waters and was forbidden by the compact of the ordinance which I have just quoted. This report states the dicta in these cases and not the decision.

It is conceded doctrine, though obiter in these cases, that the federal constitution, as well as the constitution of a state in the Northwest Territory where the constitution had adopted a clause of the ordinance of 1787, holds the clause in abeyance so long as the clause remains a part of the constitution which adopts it.

It is undisputed that a state being admitted into the Union upon equal footing in all respects with the original states, is entitled to exercise all the sovereignty of a member of the Union. This latter doctrine has meaning, however, which the mere declaration of it does not convey.

The court in the Escanaba case declares that, independent of any constitutional right or restriction, the state has the power to arrange that concessions be made for the harmonious pursuit of all occupations, so that one might not invade the rights of the other, and so that facilities be given to all kinds of commerce, with the least obstruction to either; that, to effect these ends, bridges might be rightfully built across a navigable stream, where the structure is made and used so as least to interfere with commerce on the stream; and that the city of Chicago, in exercising the authority over the

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Chicago river delegated to it by the state of Illinois had complied with all these requisites; that widening, deepening and straightening the Chicago river, was not obstructing a navigable stream or making the river less navigable; and that the facts showed that in all that had been done there had been no discrimination against citizens of other states, that it was done in the endeavor to meet the wants and necessities of commerce of the citizens of other states as well as of the citizens of Chicago and the state of Illinois.

And the court affirmatively finds that the facts show no violation of the clause of the ordinance, and a condition not repugnant to its inhibitions but in compliance with them. And so the court declares:

We do not see that the clause of the ordinance materially affects the question before us, because the navigation of the Chicago river is free, and its character is not affected by the fact that it is crossed by bridges and used as described. (107 U. S. 447; *Palmer vs. Commissioners of Cuyahoga county*, 3 McLean, 226; *Spooner vs. McConnell*, 1 McLean, 370, et seq., 379.)

The next case cited is *Huse vs. Glover*, 119 U. S. 543, decided in 1886. This case arose because of the building of locks and dams in the Illinois river and in streams tributary to it. And the same questions and the same state of facts were present as obtained in the *Escanaba* case, with the additional proposition that the company which had made these improvements by the authority of the state, charged tolls for passing through the lock and dam. Quoting with approval the *Escanaba* case, and after having concluded, as to the ordinance, the same clause of which was sought to be interposed in that case, and after having remarked upon the well settled rules as to the dominion and sovereignty of a state when admitted into the Union, etc., the court declares:

Independently of these considerations, the terms of the ordinance were not violated; because navigable streams are subject to that which might be required by public convenience under reasonable conditions, and so as not to unnecessarily obstruct them to a degree inconsistent with their free navigation.

Then the court goes on and quotes from *Palmer vs. Cuyahoga county*, 3 McLean, 226, 227, and approves and confirms the doctrine:

This provision of the ordinance does not prevent a state from improving the navigableness of its waters, by removing obstructions, or by dams and locks, so increasing the depth of the water and that what was done in that behalf could not be considered in the nature of obstruction, prohibited by the ordinance.

And the court then declares that tolls are to reimburse the expenditure for the improvement and are not a tax.

In *Sands vs. The Manistee River Improvement Company*, 123 U. S. 226, this case is cited in that report, and was decided in 1887. The *Manistee River Improvement Company* obtained authority from the state of Michigan to clean out and make more navigable the *Manistee* river.

*Sands* was a lumberman and rafted logs down this stream, for which, after it had been thus improved by the defendant, the company charged him toll. It was in a suit to collect the toll that the case reached the supreme court of the United States. In deciding the case the court quotes and approves the *Escanaba* case, and the case of *Huse vs. Glover*, and is careful to declare:

Independently of the consideration there is nothing in the language of the 4th article of the ordinance respecting the navigable waters of the territory emptying into the *St. Lawrence*, which, if binding upon the state would prevent it from authorizing the improvement made in the navigation of the *Manistee* river. And the court further says, as we said in *Huse vs. Glover*, 119 U. S. 543, decided at the last term, the provisions of the ordinance that navigable streams shall be highways, without any tax, impost or duty, has reference to their navigation at a natural state. It did not contemplate that such navigation should not be improved by removing obstructions and deepening and widening.

And the court declares that by "tax, impost, and duty, mentioned in the ordinance is meant a charge for use of the government, and not compensation for improvements."

The report cites the case of *Coyle vs. Oklahoma*, 221 U. S. 563, decided in 1911. In that case the court says:

The question reviewable under this writ of error, if any there be, arises under the claim that the act of the state of Oklahoma providing for the immediate location of the capitol at Oklahoma City was void, as repugnant to the enabling act of congress under which the state was admitted.

The enabling act provided that the state capitol should remain at Guthrie, and not be removed therefrom, after the state was admitted, for a period named in the enabling act. As soon as the state was admitted the authorities of the state took measures to remove the capitol to Oklahoma City. *Coyle* sought to enjoin the removal, pleading this clause of the enabling act as bar to the removal.

And the court declares that it was no part of an act of congress for the admission of a new state to locate the capitol of a new state. And held that part of the enabling act for the admission of Oklahoma ultra vires, and not within the power or capacity of congress to require it. But that it was distinctively the business of the state to locate and fix the location of its own seat of government, and that therefore that portion of the enabling act was void; that congress may embrace in its enabling act conditions relating to matters wholly within its control, but not matters wholly within state control. (221 U. S. 566.)

The court then reads into its decision the definition of a state:

The definition of a state is found in the power possessed by the original states which adopted the federal constitution.

And in the very language of the ordinance, which was the first open door to the Union, the court declares that

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the power given to congress by section 3 of article IV of the federal constitution is to admit new states into this Union "on an equal footing with the original states in all respects whatsoever." (221 U. S. 559). This doctrine is as old as the ordinance which declares it; for until written into the compacts of the ordinance of 1787, man had never written it before.

And that very case of *Coyle vs. Oklahoma* recognizes and distinguishes between compacts made between the states sanctioned by the federal constitution, or which are the legitimate subject of congressional action, and so binding on the states, and the act then sought to be enforced at the bar of that court, which found no sanction in the federal constitution, and was so repugnant and incongruous as to defeat the ends in view, the formation of new states and their admission into the Union on a footing of equality with the original states.

In the case of *The City of Cincinnati vs. The Louisville and Nashville Railroad Company* decided by the supreme court of the United States, October, 1911, the opinion cites the cases I have here cited and is no broader than are those cases and goes no farther. Across certain real estate which was dedicated to, and accepted by the town of Cincinnati in 1789, defendant in error sought to condemn a right of way. The plaintiff in error, with other defenses, claimed that the "public exigency" contemplated by the provisions of article 2 of the ordinance of 1787, that allowed the appropriation of property for a public use, was not present in this instance; that article 2 of the ordinance being read into the contract of dedication no condemnation could be made. Upon this feature of the case the court held that eminent domain and under it the right to appropriate private property to public use, is an incident of sovereignty; that every contract is subordinate to it, and that article 2 of the ordinance properly interpreted does not forbid an appropriation such as is here involved. So that the court in fact finds in this case and in its subject matter nothing repugnant to the terms of the ordinance.

The ordinance of 1787 has the sanction of the constitution of the United States, and is and has been the subject of congressional action binding the states. The ordinance itself was the solemn enactment of all the states in congress assembled. It is a treaty. (60 U. S. 522, 523, 503, 502, 504.)

It was adopted by the constitution of the United States, article VI, section 1 and 2.

August 7, 1789, the first congress adopted the ordinance and adapted it to government of the Northwest Territory under the federal constitution. On the 30th of April, 1802, congress recognized its validity, and directed the creation of the state of Ohio, and that its government and constitution be not repugnant to the ordinance of the 13th of July, 1787, between the original states and the people and states of the territory northwest of the river Ohio. And the same act recognizes the compact as binding even as to boundaries of the new state. (Also see article 5, Ordinance.)

On March 3, 1803, congress refers to its act of April 30, 1802, as valid and supplements it.

On the 9th of February, 1803, congress recognizes the state as a member of the Union, and declares that the constitution and government of Ohio are in conformity

with the enabling act and so are not repugnant to the compacts of the ordinance of 1787.

May 20, 1812, in marking the western boundary of Ohio, congress again refers to the ordinance for its authority.

On the 29th of November, 1802 "the people of the eastern division of the territory northwest of the river Ohio, having the right of admission into the general government, as a member of the Union," says the constitution of 1802, "consistent with the constitution of the United States, the ordinance of congress of 1787," and the law of Congress April 30, 1802, to enable the people of the eastern division of the territory of the United States, northwest of the river Ohio, to form a constitution and state government, and for admission of such state into the Union, on an equal footing with the original states, and for other purposes; in order to establish justice, promote the welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish the following constitution or form of government. "That the great and essential principles of liberty and free government may be recognized and forever unalterably established, we declare." Then follows the bill of rights of our constitution of 1802, all borrowed from the ordinance. I quote from McLean, 368, 369:

In April, 1802, upon the application of the people of that part of the territory northwest of the Ohio, now embraced within the limits of the state of Ohio, congress passed a law to enable them "to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes." This act provides, among other things, for holding a convention of the people of that part of the territory; and authorizes such convention to form a constitution and state government, provided, the same shall be republican and not repugnant to the ordinance of the 13th of July, 1787. This provision is adverted to as evidencing that the congress of 1802, most distinctly recognized the obligatory character of the ordinance, and as containing an unequivocal expression of the opinion that no state within the territory could be organized, and admitted into the Union, with a constitution "repugnant" to that instrument. That body did not consider itself as vested with the power to absolve the state of Ohio from the obligations created by the compact. \* \* \*

It is also clear that the people of Ohio in calling a convention and adopting a constitution under the act of congress of April 13, 1802, recognized the ordinance as affording a paramount rule for their guidance. This is deducible from the fact that in the preamble to their constitution, the right of the state to admission into the Union is based upon the ordinance, the constitution of the United States, and the act of congress just referred to.

And as late as 1851, "We, the people of the state of Ohio," were still grateful to Almighty God for our freedom; and we adopted the present constitution with no departure from the compacts of 1787.

Recognized as the great and valid charter of our liberty

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by congress and conventions and constitutions, state and federal, a treaty, the compacts of which could only be held in abeyance when adopted by an instrument equally solemn—with this within their view, it is not strange that the judges in the Coyle case distinguished between a compact and an act of congress which was *ultra vires*.

What is meant by admission of a state upon equal footing with the original states in all respects whatsoever? This report, this "dry logic too reasonable for productive litigation" as the makers of it declare, defines it as follows:

All the states of the Union are equal, but this equality would be destroyed if the inhabitants of one state had more privileges, guarantees and immunities than the inhabitants of another state, or were bound by more prohibitions than the inhabitants of another state. Hence the national government cannot admit of a document transcending the one which is the basis of its own existence.

I would rather depend upon the explanation and definition of Justice McLean of the supreme court of the United States, and Justice Leavitt, sitting in the circuit court of the United States, in the case of *Spooner vs. McConnell*, 1 McLean, 344-349 (the opinion of Justice McLean) and 370-1-2-3-4 (opinion of Justice Leavitt):

The terms "sovereign power of a state" are often used without any very definite idea of their meaning and they are often misapplied. Certain objects on which the sovereign power may act are by its own consent, withdrawn from its action. But this does not divest the state of any attribute of its sovereignty.

A state cannot divest itself of its essential attributes of sovereignty. It cannot enter into a compact not to exercise its legislative and judicial functions, or its elective rights, because this would be to change the form of government, which is guaranteed by the federal constitution. Does this provision mean that the new state will exercise the same power and in the same modes as are exercised by any other state?

Now this cannot be the true construction of the provision, for there cannot be found perhaps any two states in the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound that there is no equal footing short of exact equality in this respect, then the states are not equal. But if the meaning be that the people of the new state, exercising the sovereign power which belongs to the people of any other state, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned, within the restrictions of the federal constitution, then the states are equal, equal in rank, equal in their power of sovereignty; and only different in their restrictions which in the exercise of those powers they may have voluntarily imposed upon themselves.

The sixth article of the compact prohibits slavery. The constitution of the state also pro-

hibits it. Now, notwithstanding this inhibition in the constitution, the people of the state in convention, might so alter the constitution so as to admit slavery. But does not the compact prevent such an alteration without the consent of the original states? The provision of the compact in regard to slavery rests upon the same basis as that which regards the navigable waters within the state. They are both declared to be unalterable except by common consent.

I might here remark that the compact regarding navigable waters is not adopted in terms by our constitution, but is written into it because of the fact that there is nothing in the state constitution repugnant to that compact. This being true, how much more plainly do the compacts as to slavery and trial by jury and judicial proceeding according to the course of the common law stand forth as unalterable.

In the same case Judge Levitt says, 1 McLean, 327:

To entitle a state to the character of sovereignty, it is not regarded as essential that she should possess in equal degree the same powers over all subjects that may be possessed by other states. In any other aspect of this subject, no one of the federal states formed within the territory, northwest of the Ohio river, has been admitted into the Union, on a footing of equality with some of the original states. The institution of slavery existed in many of the original states at the period of adoption of the ordinance, and in several of them it continues to exist. [This case was decided in 1838.] Yet, the ordinance expressly inhibits the introduction of slavery in any of the states to be formed within the territory. And these states have made this provision of the ordinance a part of their constitution. In this case then, it is clear that some of the original states possessed rights and exercised jurisdiction which is prohibited to Ohio and other states. And yet, can it be maintained that the latter states are not equal in sovereignty with the former?

It may be well on this point to refer to the language of the ordinance to ascertain in what light this subject was viewed by those who framed and passed it. To suppose them ignorant of the political rights and relations of the state, or that they misconceived the powers with which they were clothed, would be doing them great injustice. Under a form of government in which the congress represented the state in their sovereign capacities, it may be safely inferred that the rights of the states were not only well understood, but scrupulously guarded.

The inference is, therefore, irresistible that the intelligence and sagacity of that body did not lead to the suspicion that the compact detracted in any degree from the sovereignty of the state that might be admitted into the confederacy in virtue of the ordinance and 84 O. S. 359.

So it may be seen that the provision that a new state shall be admitted into the Union on an equal footing with the original states carries with it a meaning which

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mere reading of the sentence does not fully convey, and which the "dry logic" of this report does not comprehend, and that the report is as far from the law in this respect as it is in the respects I have mentioned and will mention.

The report declares that the ordinance is only binding between the original states and the people and states in the Northwest Territory. It makes very little difference whether this be a fact or otherwise. If it be a fact, then Ohio is one of the states in said territory and is bound. But it is not a fact. When Ohio entered the Union and ranged herself with her sister states she as a state was doubly bound. Not only as a new state admitted from the Northwest Territory, and bound by the compact, by the compact itself and by her constitution, adopted by her in consonance with the terms of the compact, but bound as a state of the Union, having assumed upon her admission to the Union all of the obligations of the original states, equal to them in sovereignty and equal in obligation. And so were and are her people bound. And I am not without authority on this point. I quote from 1 McLean, 344, 373:

This compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact. And this compact so formed could only be rescinded by the common assent of those who were parties to it.

Again, by the terms of the ordinance, the states admitted into the Confederacy thereupon became parties to the compact. It has already been remarked, that the congress of 1802, in providing for the admission of Ohio, and the convention of that state in adopting the constitution, and submitting it to congress, distinctly recognized the obligatory character of the ordinance. The state became a voluntary party to the articles of compact which it contained. And having assented to it, and acknowledging its binding character, she is concluded from taking the ground that it imposes no obligation upon her.

So Ohio as a state of the Union assumed all the obligations imposed upon a state by the constitution of the United States and the laws of congress. (Authorities above and fourth article of ordinance.)

Each case cited in the report as to the ordinance of 1787 is dictum, and makes no pretense of meeting the question squarely, but sidesteps and avoids and goes obiter and by the way. I venture to say that not otherwise are any of the cases examined by gentlemen, except it be the Spooner and Palmer cases, and they both, going up from Ohio, with the ordinance and the constitution of this state in the eye of the court, cross swords with the opinion of Justice Roger Brook Taney, upon whose dicta the dicta of these modern opinions rest. You may find the shadow of all these opinions in the Dred Scott case. (Dred Scott against John F. A. Sanford.) Not only the shadow, but the substance of the opinions cited, can be found in the nine separate opinions in that case; seven with the majority, and two, Justices McLean and Curtis, dissenting. That case, the Scott case, coupled

with cases preceding it, decided by the same judges, is the case in point. It has often been referred to and quoted here. It was said here by Mr. Roosevelt that the Dred Scott decision was recalled, and he smiled as he referred to it, as if recollection of the episode of that recall amused him.

The ordinance of 1787, and later, with the Missouri Compromise passed in 1820, kept the states at peace with each other for seventy-four years.

It had been long in view that the institution of slavery was the rock upon which the American Union would split into fragments. The federal constitution recognized slavery and made provision for it and for the fostering of it in the states that existed when it was framed. In its very first article is this provision to be found.

The same instrument invites new states to enter the Union on an equal footing with the original states in all respects whatsoever. The ordinance of 1787 declares as one of its compacts, that shall forever remain unalterable and binding upon the states and the people of the Northwest Territory thus invited to enter the Union upon an equal footing of the original states in all respects whatsoever, that slavery shall never exist in said territory, nor in the states formed in said territory, nor involuntary servitude otherwise than in punishment of crime whereof the party shall have been duly convicted.

This clash between those great charters provoked the assault upon the ordinance in the cases which lead up to this great case, the Scott case, hoping to find some vulnerable point by which its destruction in the interests of slavery might be effected.

With the object in view to render less implacable the slave states it was sought to nullify and take from congress the power to prohibit slavery in the territories of the United States.

When the state of Missouri was admitted into the Union in 1820, as a slave state, congress, as a compromise measure and to appease the North, by the same act which authorized Missouri to enter the Union declared that north of latitude 36 degrees and 30 minutes and west of the Mississippi, excluding Missouri, the institution of slavery should not exist. This bill was passed by a vote of one hundred and thirty-four to forty-two. The compromise had existed up to 1854, when it was supplanted by the Kansas and Nebraska bill, by which the question of slavery in the states created in said territory was left to the states themselves. But mark you, these measures had been all congressional action. The power to allow or prohibit slavery in the territories had been assumed and exercised by congress, and until the decision of the Dred Scott case it had never been questioned that the states and the people of the United States in congress assembled might not control within the territories of the United States that institution which had made enemies of the two sections of the Great Republic. But the time was ripe, and so the supreme court of the United States, by the most arrant dictum that ever was uttered, so far as concerns the proposition decided, declared that congress had not the power to prohibit slavery in the territories of the United States, and (the very words of the court) that the Missouri compromise was unconstitutional, null and void. Before this decision, in 1854, the Missouri Com-

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promise had been practically repealed. The Scott case was heard in March, 1856, and decided in April, 1857.

Dred Scott was a negro slave. He claimed manumission because of the fact that he had lived with his master at Fort Snelling, in the territory west of the Mississippi river, to which the Missouri Compromise applied, and at Rock Island, Illinois, to which the ordinance of 1787 and the constitution of that state, both prohibiting slavery, applied. The period of his residence in free territory covered a number of years. He had a wife and two daughters in like condition of servitude. Dred Scott claimed by thus residing in a territory in which slavery was not tolerated by law he had (I use the language of one of the justices) acquired property in himself; that he owned his own body; and that his body was not the property of John F. A. Sanford. And he claimed the same for his wife and daughters. The case was brought in the circuit court of the United States for the district of Missouri and carried by writ of error to the supreme court of the United States. To give the circuit court jurisdiction Scott declared that he was a citizen of Missouri and that Sanford was a citizen of the state of New York. The judgment of the circuit court was against Scott and in favor of Sanford.

The supreme court of the United States declared that the record showed that Scott was a man without a country; that being a slave he was neither alien nor citizen; that he had no right in any forum. And the court said he possessed no right which a white man was bound to respect; and found that the circuit court had no jurisdiction to entertain the case; and that the supreme court of the United States had no jurisdiction of the subject matter; and its judgment was that the case be remanded for dismissal for want of jurisdiction.

But notwithstanding this, that court claimed the right to investigate the false grounds upon which the circuit court had entertained the case, and to substantively make findings and decisions upon them. And so the supreme court of the United States built up the Dred Scott decision, and by it those judges destroyed the power of congress to prohibit slavery in the territories so far as their decision reached it. That case might have been decided against Scott without attacking the power of congress upon the provisions in both the ordinance and federal constitution relating to fugitives from service, but the power of congress as to slavery in the territories was the object of attack.

But what did the court with the ordinance of 1787, that which, when the federal constitution, which provided for slavery and provided for the importation of slaves on payment of \$10 duty on each person imported, and which invited new states to range themselves in the Union beside their sister states, and partake of this blessing of sovereignty upon an equal footing in all respects whatsoever—what did they with this compact that arose above the federal constitution, and said to the states of the Northwest Territory, "Thou shalt not"; and forbade that they adopt the institution of slavery or suffer it within their border; and enjoined upon them that they shun it forever as the destroyer of their country's peace? There was still part of the Northwest Territory not erected into states. What did they with the ordinance? That ordinance was an act of congress which forbid slavery in the Northwest Territory, and the Missouri

Compromise was an act of congress which forbid slavery north of 36-30. How did they reconcile the destruction of the power of congress as to one and not the other? They viewed and measured that great charter, which has the strength of a fortress formed by nature's hand, and discovered that it possessed qualities other than mere congressional legislation; that it was a compact, a treaty; that its abrogation depended, not as do the destruction of most treaties, upon the will of but one of the high contracting parties, but that to destroy it required the common and concurrent assent of all the parties to it; that the federal constitution had adopted it, and declared of it in its sixth article that it should be taken and held, and the principles in it, wherever they may be found, and adopted as the supreme law of the land; and that the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. And seeing it thus beyond their power to destroy and invulnerable to their assault, they smote it and cast their javelins against it, and turned themselves to the destruction of the power of congress to make free states in the territory we had acquired of France and Mexico, west of the Mississippi. To perpetuate slavery they destroyed as far as they could destroy. And so ended the first lesson.

This case was blessed in the South, and in the North the air trembled with the curses of it. I have been told by authority that I would not gainsay that that opinion was thus strained and distorted and warped, and the case decided thus, hoping by it to put off the day all dark and drear that then and long had threatened. But the effect was exactly the opposite. It lighted into flame the smoldering embers of discord, and the recall of the Dred Scott decision of which Mr. Roosevelt here smilingly reminded us was at hand. Within forty-nine months after that decision the signs in the sky so long portending evil to our country, stood forth in the realities of grim-visaged war. The earth shook with the tramp of contending armies.

Virginia, the peacemaker, that had ceded an empire to allay the jealousies of her sister states and helped them in their need—the streets of her cities were swept with hissing bullets; on every hill the fires of ruin glowed. Her valleys were plowed and torn with shot and shell; her soil was steeped with the blood of her sons, and on every hand within her border stalked the hideous form of death.

For fourteen hundred miles spread the battle front, all given to tumultuous carnage. The nations of the earth were sickened with the horror of it. Civilized man shuddered as the sounds of that grapple to the death between brethren smote the palpitating air. And there was no ear upon the earth so savage or remote that was not bent in listening fear at the sullen muttering of that mighty conflict. Until finally, when the greatest war of the nineteenth century ended at Appomatox, there had been given to slaughter and to death mightier hosts than had pursued Dred Scott and haughtier names than that of John F. A. Sanford. And that case and its teachings as to slavery had been washed from the rolls with American blood—the blood of Mr. Roosevelt's countrymen. Yet he smiled, did that man, that inimitable smile, which cometh in such questionable shape that we do misdoubt us whether it be wicked or charitable, and

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laughed as he bethought him here of that recall and the reeking horror of it!

Is it true that we view those years of terror and despair as merely one of the useless lessons of the past? I hope not. I trust not. It was not the end of the story with us, thank God. Yet it was but history repeating itself. History that is strewn with the wrecks of dead republics; each ruin a monument to the period of that country's life, when its institutions became not sacred to its people and when its citizens, lured by the voices of its demagogues pitched to the music of patriotism, trampled their own liberties under their own feet.

In each of the federal cases cited in this report the courts repeat in almost exact words, "Independently of the consideration as to whether the clauses of the ordinance are valid or invalid, the facts show no violation of their provision. There is in the acts of the parties nothing repugnant to the terms of the ordinance, wherefore the clauses of the ordinance do not materially affect the question before us."

So that the cases cited are dicta, in so far as the ordinance and the compacts of it are concerned, and are not decision. What is the federal rule as to dictum?

The opinion of a court cannot be relied upon as binding authority unless the case (not the briefs, not argument of counsel), unless the case calls for its expression. (Re City Bank N. O., 3 Howard, 392; Carroll vs. Carroll, 16 Howard, 287; 123 Federal 502; 178 U. S. 524; 157 U. S. 429.)

The positive authority of a decision is co-extensive only with the facts upon which it is made. (4 Wheaton 122; 12 Wheaton 213.)

General expressions of an opinion, which are not essential to the disposition of the case, cannot control the judgment in subsequent suits. (Harriman vs. Northern Securities Co. 197 U. S. 244.)

An opinion in a particular case founded on special circumstances is not applicable to cases under circumstances essentially different. (Brooks vs. Marbury, 11 Wheaton, 98; 24 Howard 553; 6 Wheaton, 264; 10 U. S. 615; 110 U. S. 608; 16 Howard 287; 6 Wheaton, 399; 96 U. S. 211; 135 U. S. 135; 169 U. S. 679; 197 U. S. 291.)

But suppose the federal cases be not dicta, but decision? Every case concerns only the tangible and physical things which are within the power and dominion and sovereign control of a state—waterways, navigable streams, bridges, roads, commerce, property, navigation—and deal not with the inherited liberties of the citizen, and not with the inalienable rights of the people. You may say the Dred Scott case sounds of human liberty; not so. Dred Scott and his wife Harriet, and his two little daughters, Lizzie and Eliza, inherited no liberties. They had no inalienable rights. They were slaves; they were articles of commerce and of barter. They were chattels.

Human rights and commerce do not stand on the same footing under the compacts of the ordinance of 1787, and are not so to be viewed. And I am not without authority on this point. (Spooner vs. McConnell, 1 McLean 366, 367.) I quote:

In looking into the ordinance, it is obvious that all the provisions of the articles of compact, are

not to be viewed as standing precisely on the same footing. The guaranties for the security of the great principles of liberty, which lie at the foundation, and constitute essential elements, of all true republican governments, are obviously to be regarded in a different light from those which pertain merely to the right and possession of property, and its advantageous enjoyment. The distinction seems to have been recognized by the framers of the constitution of Ohio, and to have exerted an influence upon them, in framing that instrument. They evidently acted under a belief that the fundamental law of the state must conform, in all its leading features and principles, to those of the ordinance of '87. But, while they were careful to impress those features upon, and incorporate those principles into the constitution of Ohio, they did not deem it necessary or proper to treat all the provisions of the ordinance as entitled to the same high consideration. Hence no reference is made in the constitution to the provision of the ordinance relating to the navigability of water courses; and for the plain reason that this was not necessary, in order to give to the constitution a republican character, and make it conform to the great principles declared in the ordinance.

How does the supreme court of Ohio view the compacts of the ordinance of 1787? After having quoted from all the decisions of the courts of this state upon that subject, and declaring that they remain as the unmodified expression of this court upon this subject, the court says, in Ohio vs. Boone, 84 O. S. 359:

We have thus briefly indicated the reason for our belief that the great charter of the Northwest Territory is still under and above and before all laws or constitutions which have yet been made in the states which are part of that territory.

And in this opinion all of the judges concur, and such is the voice of your highest tribunal as late as 1911.

But suppose all that has been said falls to the ground, and that my argument so far is without foundation or weight. In obedience to the compact and to the act of congress which directs Ohio to become a state, and which provides that her constitution shall not be repugnant to the ordinance, Ohio adopts its compacts, both in letter and in spirit, both in its constitution of 1802 and the present constitution, so that in neither of these instruments is there anything repugnant to the ordinance. And having entered the Union with these earnest of her faith in those compacts she cannot now recede from them.

One of the chiefest and most binding and most valuable articles of that compact, which shall forever remain unalterable except it be changed in accordance with the terms of the compact itself is "that the inhabitants shall always be entitled to the benefits of trial by jury, and to the benefits of judicial proceedings under the course of the common law."

What is a trial by jury under the course of the common law? A jury, under the common law, consists of twelve men. A verdict, under the course of the common law, is the united conclusion of twelve jurors. A trial by jury is a proceeding which results in the verdict of

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the jury and later in a judgment on the verdict. The finding of nine men out of twelve is not a verdict. And without a verdict there is no jury trial.

Our constitution provides that the right of trial by jury shall be inviolate, following the compact of the ordinance and the constitution of 1802. I quote from "Words and Phrases Judicially Defined," and cite 48 A. D. 178; 4 O. S. 167, 177; 25 O. S. 91, 102; 174 U. S. 1, 43; 19 S. C. 580-585.

The provision of the constitution which says that the right of trial by jury shall remain inviolate, means that the right shall in all cases where it was enjoyed when the constitution became binding and obligatory, continue unchanged. The term "shall be inviolate" does not merely imply that the right of jury trial, shall not be abolished or wholly denied, but means that it shall not be impaired. The word "inviolate" is defined by approved lexicographers to mean, unhurt, uninjured, unpolluted, unbroken. Inviolate, says Webster, is derived from the Latin word "inviolatus" which is defined by Ainsworth to mean not corrupt, immaculate, unhurt, untouched.

"Remain inviolate" as used in article I, section 6 of the constitution of Tennessee, providing that the right of trial by jury shall remain inviolate, means that it shall be preserved as it existed at common law, at the time of the adoption of the constitution. (Gibbs vs. Wilson, 49 S. W. 736; 101 Tenn. 612.)

The right to trial by jury is not a trivial right. It is the most sacred right of an American freeman. See how it is valued in our great charters. In the Declaration of Independence, where our fathers avowed that a decent respect to the opinion of mankind required that they should declare the causes which impelled them to that separation, assigned as one of the causes, "For depriving us in many cases of the benefits of trial by jury."

And hear the compact: "And for extending the fundamental principles of civil and religious liberty, which forms the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in said territory;" and which forever shall "remain unalterable unless by common consent," solemnly declares as one of those principles that the inhabitants of said territory shall always be entitled to the benefits "of trial by jury," and "of judicial proceedings according to the course of the common law."

In our constitution of 1802, "the right of trial by jury shall be inviolate", which provision means as the trial by jury then existed, at that date, November 29, 1802, when that constitution adopted that compact. It shall be inviolate and not be changed.

In our present constitution is the same provision, in exact words, which retains and keeps unchanged, in obedience to the adopted compact, the common law jury.

And in the federal constitution, article VII of the amendments, which was submitted on the 25th of September, 1789, as a part of the federal bill of rights, we find a similar provision:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Such men were then on this earth, signing federal constitutions and making laws in the congress of the United States, as George Washington, Benjamin Franklin, Roger Sherman, Daniel Carroll, Alexander Hamilton, Robert Morris, Thomas Fitzsimons and others like them. Those men looked upon trial by jury and judicial proceedings, according to the course of the common law, as the most excellent and most complete machinery ever devised by the wisdom of man for the freedom of a people and for the safety of a state. And they were right, for with this weapon a common man may defend himself and his property and throttle arbitrary power.

And Ohio having adopted the compact cannot recede from its obligation by any act of Ohio not affirmatively assented to by all the states in congress assembled. (Spooner vs. McConnell, 1 McLean, 344, 353, 369, 370, 375, 379; 5 O. 416, 423; 84 O. S. 355, 356, 357, 358, 359; 7 O. 62.)

It will not answer this argument to say that the constitutions of other states of the Northwest territory, upon which those states were admitted into the Union, followed less jealously the compacts of 1787 than does our constitution of 1802, the contract upon which Ohio was admitted. The decisions of the courts of those states are not explanatory of our situation. This is Ohio; this Convention is acting for the people of Ohio. These Ohio decisions which I have here and elsewhere cited are the declarations of the supreme court of Ohio, referring primarily to Ohio, in solemn affirmation of those articles of compact and the obligations of them.

We should be thankful that we cannot recede and withdraw from the compacts and obligations of that ordinance other than in manner fixed by its terms; for that great charter has afforded us and pointed out to us the best form of government ever enjoyed by man.

I agree with the truth uttered here by Mr. Roosevelt when he declared "that justice and liberty have been more perfectly realized in this country and under this form of government than ever before." Of course, the sentiment was absolutely inconsistent with everything else he said, and he took it back twenty times during his speech, but in so declaring he spoke the truth nevertheless. And I do not understand why we should be so desirous of freeing ourselves from the binding effect and from the protection of our bill of rights, and our charters and liberty. I do not see why we should view them as threats and menaces. I do not see why we should look with such stony horror on our form of government. I do not understand why we should be so charmed and hypnotized by every pretender who takes for his text and preaches into our ears of the rights of man and of his mountebank discoveries in that well-explored field. Yet it seems that we deem as sacred as the truths of holy writ every utterance which spits on the past and slanders the present and paints fantastic and nondescript pictures of the future.

It has been said from this rostrum by those invited to

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teach us here, and oft repeated on the floor of this Convention, that representative government is a failure; that under it there is no safety for the rights of man; that representative government is not sufficiently progressive to keep pace with the rights of man. It has been even here suggested that that shibboleth of the rights of man, "as it was in the beginning, is now, and ever shall be, world without end," should be indefinitely postponed and relegated to innocuous desuetude.

There are no new discoveries to be made in the rights of man. The rights of man are the same now as when the morning stars sang together. There is no progression in the rights of man. They were the gift of God at the creation of the world. They have not grown; they have not diminished. They were implanted in the human breast by Him who is the Universe. And locked in men's hearts, they have followed down through every adversity and crash and cataclysm. The rights of man are not prompted by conditions. The rights of man have always existed, and men knew them at all times and in all ages. The fathers who builded this republic knew them and knew them well. And they builded well. They gathered from the centuries of war and strife, which we call history, the principles of liberty, that, as we have them now, are the realized hopes for which men had shed their blood through the ages past. And in instruments that will never die, they, the ablest men who ever inhabited the earth, not excepting the committee on Judiciary of this Convention, have handed down to us our inalienable rights as trustees in trust for future generations. From those rights there is no severance.

They knew full well that a government of the character of the one they were then constructing, while the crash of overthrow might suddenly come, was never destroyed by a sudden and successful revolution; but that its destruction was accomplished by changes so gradual as to escape detection and challenge; changes yielded by the people themselves, until finally, when the people awakened, the liberties they had inherited were gone and the things that had been were not.

With wisdom almost divine, they would save us from our very selves. They knew that no country was ever more in danger than when the talent that should be consecrated to peace and the good of the people has no occupation but political intrigue and personal advancement. And they knew full well, did the fathers, the dangers that would assail us—avarice, directed by political sagacity; ambition, coupled with ability and armed with popular support; all educated in craft; all versed in the black grammar of politics; all playing for high stakes; all ready to sacrifice anything not their own to forward their own interests. They could hear as we have heard, advisers, counterfeiting the dulcet voice of progression and reform, telling of untried better things that should supplant the things which had been tried and have never failed us; all aimed at the very structure itself, often from men of honest opinion, but most frequently from men whose motives rest neither upon ignorance nor upon integrity.

The fathers of this republic were not oblivious to the fact that the spirit of unrest at times takes possession of a nation, unrest akin to religious frenzy. They knew that then is greatest peril to a people's liberty and to a nation's life.

They knew the history of the world right well, did those men. They knew of upheavals, and of conquests, and convulsions, and revolutions. They knew of Roman and of Greek; they knew of Copt, and Tartar, and Saracen, and Turk, and Goth, and Vandal, and Hun. They knew that the story of the Anglo-Saxon race was not free from trouble. They had heard of the Johns, and the Henrys, and the Edwards, and the Richards; they knew of Lancaster and of York; they knew that the Charles whose last word was "Remember" had his Cromwell. They had just then, at that very time, but to look across the water and behold their recent ally, the flower of the Latin race, fast whirling into the vortex of the French Revolution, for all this was before that little second lieutenant of artillery, who answered to the name of Napoleon Bonaparte, had stepped into the streets of Paris with his whiff of grapeshot; of which Mr. Carlyle tells. They knew, above all things, did those men, the causes that had impelled them into the struggle in which they had but just triumphed. And they knew that Almighty God had placed in their hands the material with which they were to construct that which man had hoped for, but which man had not yet seen upon the earth.

And so directed by wisdom divine they builded, and they builded strong. And with such strength did they build that four score and seven years after, not long to be sure, in a nation's life—eighty-seven years—Lincoln, who has been so often misquoted in these degenerate days, Lincoln, haggard and sad and worn with care, his presence a prophesy, and his face a prayer that the cup might pass from him. Yet his voice was mightier than the thunder of that awful battle which had scarcely then ceased to reverberate down the valleys of Pennsylvania when Lincoln declared on the red field of Gettysburg to heroes living, and to the shades of heroes dead, and to all the earth, and to all the people that walk upon the earth, and to all posterity, and to us, that the fathers had builded a government of the people, by the people, and for the people, under which, if preserved, liberty could not perish from the earth, and that he dedicated himself, as millions of others had dedicated themselves, to the preservation of that government, under which, if preserved, liberty could not perish from the earth. And, thank God, he succeeded.

And such was the strength of the government the fathers had made for us that after over four years of assault, armies unsurpassed for bravery and discipline and generalship that did beat against it, rolled back from the onslaught baffled and destroyed.

My fellow citizens from over the sea, had that vast force, with its bravery and numbers and discipline, its commanders and resources and intelligence; had the Southern people, with their army and resources, been set down in the heart of Europe as they were situated here, they would have carved out an empire with the sword, and the world would have resounded with the crash of falling thrones. Yet this government lives to bless us, thank God. It withstood the tempest's breath, and the battle's rage, and the earthquake's shock. And such is the government and its character that we have invited you here to enjoy and help us preserve. Frowning battlements, yes! moated gates, yes! But remember that fortress was reared that within it may rest in safety, for

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the first time since the flight of years began, the ark of the covenant of liberty, there to be defended against all who may come to pollute or destroy it.

They not only builded strong, but they were tender and careful of human rights, were the fathers. Look at that compact of 1787. High and low, rich and poor alike; life, liberty, property, religion, morality, knowledge—each citizen secure, so that he and his may stand forth with safety in the glad light of day or in the darkness of night may watch with peace the glories of the sky.

The Man of Sorrow must have directed them. The Man of Sorrow who knows so well the needs of poor humanity, and who did solve for us the silent riddle of death; the beneficent spirit of the Christ must have possessed them, as those mighty men wrote the rights of their fellowmen and their posterity in those mighty charters, not the least of which this report attacks and spits upon.

And in such manner did our fathers build that if we destroy that upon which proximately and next nearest, rest our repose and safety—the constitution that we now have in Ohio, and puncture and riddle it, and tear it into shreds; under it, and the foundation of it all, like the tables of Sinai, stands this great compact to confront us and to halt us and to save us. Why should we be willing to destroy that, the like of which man never beheld since first light gladdened the earth? Why should we attempt to surrender up that which we would sacrifice our best blood to recover when once it is gone? Why leave here in this record that behind which tyranny may entrench itself?

As it is, the federal constitution cannot be amended so as to destroy that compact without our consent. If the federal constitution were swept away by consent of all the states, except Ohio, we could turn to that compact and it would speak to us of our liberty in the voice of Him who created man and endowed him with inalienable rights.

Every clause of that compact is adopted by our present constitution, as it was by the constitution of 1802, in terms or in spirit. And when we depart from our present constitution, and away from any clause of that compact, which we have thus adopted and thereby agreed to keep, by that act, that clause is reintegrate and restored. By that act it is awakened into quick life, and we do but invoke the power of such clause by that very act which violates it. And we should thank God it is thus. We should bow to Him in humblest gratitude that He did so endow our fathers with His divine wisdom.

Mr. DWYER: In support of the report of the committee on Judiciary and Bill of Rights I desire to submit the following:

After the formation of the confederacy of states in 1778, difficulties arose regarding the western lands, portions of which were claimed by the states of Virginia, Connecticut, Massachusetts and New York, the other states claiming that these lands should be held and disposed of for the common benefit of all. The matter became so serious that congress appealed to each of the four states claiming these lands to surrender their claims by acts of cession to the United States for the common benefit of all.

To bring this result about, in the year 1780 congress passed a resolution containing a pledge that the lands

when ceded to it should be disposed of for the common benefit of the whole United States, to be sold and formed into distinct states with suitable extent of territory, and to be admitted members of the federal union with the same rights of sovereignty, freedom and independence as the other states.

On this assurance New York and Massachusetts ceded their claims without any conditions except the assurance contained in the pledge made in the resolution of 1780. Connecticut followed suit, but would reserve certain territory. Virginia did likewise, and in its act of cession provided that the territory so ceded should be laid out and formed into states containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances would permit, and the states so formed to be distinct republican states, and admitted members of the federal union, having the same rights of sovereignty, freedom and independence as the other states, and referred especially to the resolution of congress of 1780, which was declared to be the condition of the deed. Under the act of congress of 1780 these lands when ceded became a trust on the part of the United States to be carried out according to the acts of cession, and these acts provided that the states when formed out of the territory should be admitted into the Union on an equal footing in all respects with the original states.

It was also provided that the lands should be disposed of for the common benefit of all the states, and that the manner and conditions of their disposition should be regulated by congress. In 1785 congress passed an ordinance for the future survey and sale of the domain in the west. All this was done prior to the ordinance of 1787.

From the foregoing it will be seen that the original states in their acts of cession, were careful to provide that the states to be carved out of the territory northwest of the river Ohio should be admitted into the Union with all the rights of sovereignty and authority of the original states. The ordinance of 1787 for the government of the Northwest Territory was not their act. They had no hand in it. It was solely an act of congress, and I claim that it had no longer any binding force on the states when admitted into the Union, except as to such matters as would be of national character, as the regulation of the navigable waters for the purpose of commerce.

The ordinance of 1787, as we know, provided for the writ of habeas corpus and trial by jury and judicial proceedings according to the course of the common law. Under this ordinance the first territorial government was formed at Marietta, Ohio. This government, when formed, paid very little attention to the provisions of the ordinance of 1787. It did not strictly confine itself in its legislative authority as provided for by the ordinance. When they could not find laws of the original states to suit their condition, they supplied their wants by enactments of their own. By the ordinance of 1787, when the territory should contain a population of five thousand free male inhabitants of full age, as the ordinance provided for, on proof to the governor, the territory should be authorized to elect representatives to the territorial legislature. By territorial laws passed these provisions were confined to freeholders of fifty acres in fee simple

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within the district, and only freeholders in fee simple of two hundred acres were eligible as representatives, and ten freeholders of five hundred acres each were to be selected, five of which the president was to appoint as his legislative council.

The two bodies were to make laws. The governor possessed a negative on all legislative acts, which he exercised without stint in vetoing bills.

The foregoing method of legislation did not show much spirit of republicanism notwithstanding the ordinance of 1787 provided for a government republican in form.

Article 5 of the ordinance of 1787 fixed the boundaries of the eastern state, now the state of Ohio, but congress changed it subsequently, against the protests of many of the people, who claimed it a violation of the ordinance of 1787. Because of their protests congress made some modifications of the boundaries to satisfy the people. This exercise of authority by congress in changing the boundaries, notwithstanding the so-called compact between the states in the ordinance of 1787, shows how congress viewed it, as being within its power to change or abrogate, as it did in the admission of new states. As showing what action was taken by congress in organizing territorial governments and states out of the Northwest Territory, and as to what action was taken on their admission into the Union as states, and the action taken by the highest courts of record of these states, as to what effect, if any, the ordinance had in controlling their action, I desire to present the following:

First, as to the state of Ohio: On April 13, 1802, an enabling act was passed by congress with the provision that said state when formed should be admitted to the Union on the same footing with the original states in all respects whatsoever. The only reference it made to the ordinance of 1787 is that the state should be republican and not repugnant to the ordinance of 1787, between the original states and the people of the states northwest of the river Ohio.

The preamble to the constitution of Ohio adopted in 1802 pursuant to the foregoing enabling act recites that "the people of the eastern division of the territory of the United States, northwest of the river Ohio, having the right of admission into the general government, as a member of the Union, consistent with the constitution of the United States, the ordinance of congress of 1787, and of the law of congress, entitled 'An act \* \* \* for the admission of such state into the Union on an equal footing with the original states and for other purposes, \* \* \*, do ordain' this constitution, etc.

On the 19th of February, 1803, congress passed an act recognizing the state of Ohio as one of the states in the federal Union, but made no reference therein to the ordinance of 1787. Neither did the new constitution adopted in 1851, under which we have ever since been living, make any reference to the ordinance of 1787.

Passing from Ohio, I will next consider what action was taken by congress in reference to the territory and state of Indiana. On the 19th of April, 1816, congress passed the enabling act for the admission of Indiana into the Union as a state. The fourth section of the act recites:

The representatives of the people shall form a state government, "provided that the same whenever formed shall be republican and not repugnant to those articles

of the ordinance of the 13th of July, 1787, which are declared to be irrevocable between the original states, and the people and states of the territory northwest of the river Ohio."

On the 29th day of June, 1816, by resolution, the representatives of Indiana in convention assembled accepted the terms of the enabling act, but no mention therein was made of the ordinance of 1787.

On the 29th day of June, 1816, the constitution of the state of Indiana was formed. In the preamble it recites:

We, the representatives of the people of the territory of Indiana, in convention met, at Corydon, on Monday, June 10, 1816, \* \* \* having the right of admission into the general government, as a member of the Union, consistent with the constitution of the United States, the ordinance of congress of 1787, and the law of congress "An act to enable the people of the Indiana Territory to form a constitution and state government, and for the admission of such state into the Union (being the enabling act) on an equal footing with the original states \* \* \* do ordain and establish the following constitution \* \* \*

Congress on December 11, 1816, adopted a resolution reciting:

Whereas in pursuance of an act of congress \* \* \* the people of said territory did form for themselves a constitution and state government which constitution and state government, so formed, is republican and in conformity with the principles of the articles of compact between the original states and the people and states in the territory northwest of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven.

Resolved by the Senate and House of Representatives of the United States of America in congress assembled, That this state of Indiana shall be one, and is hereby declared to be one of the United States of America and admitted into the Union on an equal footing with the original states in all respects whatever.

February 10, 1851, the state of Indiana adopted another constitution, which is still in force, in which no mention is made of the ordinance of 1787.

In considering the proceedings had between congress and the state of Ohio on its admission into the Union as compared with the proceedings had in reference to the state of Indiana on its admission into the Union, it will be seen that Indiana would be more forcibly bound by the articles of the ordinance of 1787 than would the state of Ohio. Yet we find from the decisions of the courts of the state of Indiana that the state did not regard itself as in any way bound by the terms of the ordinance. In the case of *Beauchamp vs. The State* (6 Blackford's Reports, 302), the supreme court of Indiana says:

The legislative authority of this state is the right to exercise supreme and sovereign power subject to no restrictions except those imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it.

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In support of the foregoing we cite the following cases:

Lafayette, Muncie & Bloomington Railroad vs. Gieger, 34 Ind.  
Fry vs. the State, 63 Ind., 558.  
McComas vs. Krug, 81 Ind., 327.  
8 Blackford, page 11.

In the case of Vaughan vs. Williams, 3 McLean's Reports, page 532, Judge McLean says:

When the people of Indiana came into the Union as a state, they were as much bound by the constitution of the United States as the people of any other state, and any and every part of the ordinance which conflicts with the constitution of the Union, so far as the state of Indiana is concerned, was consequently annulled. The common consent required to annul such part of the ordinance is found in the formation of the constitution and consent to come into the Union by the people of Indiana and the acceptance of the constitution and recognition of the state by Congress.

Again, citing 6 McLean's Reports, page 212, Columbus Insurance Company vs. Curtenius, the court says:

It was never doubted but that any provisions of the ordinance which were contrary to the constitution of the United States and the laws passed pursuant thereof, or to the constitutions of the states formed out of that territory were abrogated, because the common consent mentioned in the ordinance was then presumed.

The territory of Illinois was formed February 3, 1809. Section 2 of the act of congress provides that there shall be established within said territory a government in all respects similar to that provided by the ordinance of congress of July 13, 1787. April 18, 1819, congress passed an enabling act for the admission of Illinois, authorizing the state to be admitted on a footing with the original states in all respects whatsoever. Section 4 of the act provides that the state when formed is to be republican and not repugnant to the ordinance of July 13, 1787, between the original states and the people and states of the territory northwest of the river Ohio. On April 18, 1818, Illinois accepted the enabling act as passed by congress. No reference is made to the ordinance of 1787. In 1818 Illinois established a constitution, the preamble of which is as follows:

The people of the Illinois Territory, having the right of admission into the general government as a member of the Union, consistent with the constitution of the United States, the ordinance of congress of 1787, and the law of congress approved April 18, 1818—do by their representatives in convention, ordain and establish the following constitution.

In 1818 congress passed a resolution admitting the state of Illinois into the Union, in which it recites in substance as follows:

Whereas, pursuant to an act of congress, the people of said territory did form a constitution, which is republican in form and in conformity

to the principles of the articles of compact between the original states and the people and states in the territory northwest of the river Ohio, passed July 13, 1787; said state is therefore admitted and declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever.

In 1870 Illinois adopted a new constitution. No mention is made of the ordinance of 1787.

As to how the ordinance of 1787 was regarded in Illinois by the decisions of its supreme court, I quote the following: Phoebe vs. Jay, 1 Breese Illinois Reports, page 268. The court in deciding the case says:

Congress, however, admitted this state into the Union with this constitutional provision and thereby I think gave their consent to the abrogation of so much of the ordinance as was in opposition to our constitution. [The question was on the introducing of negroes and mulattoes into the state.]

In the case of People vs. Thompson, 155 Illinois Reports, page 452, in the syllabus of the case, we find:

The ordinance of 1787 passed by the congress of the federation for the government of the Northwest Territory, has no force in Illinois, except so far as its principles are embodied in the state constitution.

On January 11, 1805, congress passed an act organizing the territory of Michigan.

Section 2 of the act provided, "There shall be established within said territory a government in all respects similar to that provided by the ordinance of congress, passed July 13, 1787, for the government of the territory northwest of the river Ohio."

June 15, 1836, congress passed an enabling act for the admission of Michigan as a state.

Section 2 of said act provides that—

The constitution and state government which the people of Michigan have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed; and that the said state of Michigan shall be, and is hereby, declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original states, in all respects whatsoever.

Section 3 provides—

As soon as the assent herein required is given, the president of the United States shall announce the same by proclamation, and thereupon and without any further proceedings on the part of congress, the admission of said state into the Union as one of the United States of America on an equal footing with the original states in all respects whatever shall be considered as complete—

Nothing is said about the ordinance of 1787. January 26, 1837, an additional act was passed by congress reciting:

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That the state of Michigan shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatsoever.

No mention is made of the ordinance of 1787.

In 1835 Michigan adopted a new constitution. The preamble recites:

We, the people of the Territory of Michigan, as established by the act of congress of the 11th of January, 1805, in conformity to the fifth article of the ordinance providing for the government of the territory of the United States northwest of the river Ohio, believing that the time has arrived when our present political condition ought to cease and the right of self-government be asserted, and availing ourselves of that provision of the aforesaid ordinance of the congress of the United States of the 13th day of July, 1787, and the acts of congress passed in accordance therewith, which entitled us to admission into the Union upon a condition which has been fulfilled, do by our delegates in convention assembled mutually agree to form ourselves into a free and independent state, by the style and title of the state of Michigan.

In 1850 Michigan adopted another constitution, but nothing is said of the ordinance of 1787.

On the foregoing the courts of Michigan have held, in the case of *The La Plaisance Bay Harbor Company vs. The Common Council of the City of Monroe*, Walker Chancery Reports, 155, that "the ordinance of 1787 for the government of the territory of the United States northwest of the river Ohio is no part of the fundamental law of this state since its admission into the Union. It was then superseded by the state constitution, and such parts of it as are not found in the federal or state constitutions were then annulled by mutual consent."

In 1836 the territory of Wisconsin was established. Section 12 of the act provided:

The inhabitants of the said territory shall be entitled to and enjoy all \* \* \* the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said territory, passed on the 13th of July, 1787; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of said territory.

August 6, 1846, congress passed an enabling act which provided the territory of Wisconsin be and is hereby "authorized to form a constitution and state government for the purpose of being admitted into the Union on an equal footing with the original states in all respects whatsoever, by the name of the state of Wisconsin."

No mention is made of the ordinance of 1787.

The constitution of Wisconsin was adopted February

1, 1848, in which no mention is made in any way of the ordinance of 1787.

May 29, 1848, congress ratified this constitution, and the act recites:

That the state of Wisconsin be and is hereby admitted to be one of the United States of America, and is hereby admitted into the Union on an equal footing with the original states in all respects whatever.

No mention is made of the ordinance of 1787.

With reference to any binding effect of the ordinance of 1787 on the state of Wisconsin, I herewith cite from the decisions of its supreme court as follows:

In the case of the *Connecticut Mutual Life Insurance Company vs. Crothall*, 18 Wisconsin 109, in the syllabus, the court says:

The adoption of the constitution of this state by the people thereof, and the assent of the government of the United States thereto, and the subsequent admission of the state into the Union, are effectual to abrogate the ordinance of 1787 for the government of the territory northwest of the river Ohio, in so far as the provisions of that ordinance conflict with those of the state constitution.

Again, in *State ex rel. Attorney General vs. Cunningham*, 81 Wisconsin, page 441, in the syllabus, the court says:

The ordinance of 1787 and the organic act of the territory of Wisconsin became obsolete upon the admission of the state into the Union, but they may be regarded as in *pari materia* and helpful and of historical value in construing the sections of the constitution, which took the place of any of their provisions.

The court also cites *Polland's Lessee vs. Hagan*, 3 Howard, in support of this decision.

In view of the foregoing decisions of the states of Indiana, Illinois, Michigan and Wisconsin, it appears to me that any decision made by the supreme court of Ohio in conflict therewith would be outweighed by the decisions of the other four states, all having been, like Ohio, carved out of the Northwest Territory.

In addition to the federal authorities cited in the report of the committee, I desire to call special attention to *Coyle vs. Smith*, 121 U. S. 855, and to quote the second proposition of the syllabus of said case, as any national question or question requiring judicial interpretation of the ordinance of 1787 between the original states and the United States would have to be ultimately and finally settled by the United States supreme court:

The constitutional duty of guaranteeing to each state in the Union a republican form of government, gives congress no power to impose restrictions in admitting a new state into the Union which deprive it of equality with other states.

Mr. Doty moved that further consideration of Proposal No. 54 be postponed until tomorrow and that it retain its place at the head of the calendar.

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Resolution Limiting Debate.

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The motion was carried.  
Mr. DOTY: I offer a resolution.  
The resolution was read as follows:  
Resolution No. 128:

*Resolved*, That debate upon proposals upon their third reading shall be limited to ten minutes for any member upon the main question and five minutes upon any amendment or other subsidiary

motion; upon all other questions the debate shall be limited to five minutes. Time of debate shall not be extended except by unanimous consent.

The PRESIDENT: The resolution will lie over.  
Leave of absence was granted to Mr. Campbell.  
Mr. DOTY: I move that we adjourn until 9:30 o'clock tomorrow morning.  
The motion was carried and the Convention adjourned.