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STENOGRAPHIC REPORT

OF THE

ARGUMENTS AND PROCEEDINGS

BEFORE THE

COMMITTEE OF THREE,

APPOINTED BY THE

COMMANDER-IN-CHIEF

OF THE

Military Order of the Loyal Legion of the United States.

HEADQUARTERS OF THE OHIO COMMANDERY,

MASONIC TEMPLE, CINCINNATI,

OCTOBER 11, 1904.

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INTRODUCTORY.

The following summary of the facts will conduce to a clear understanding of the points involved in the proceedings and arguments that follow :

(1) At the stated meeting of the Ohio Commandery held on November 4, 1903, the following amendments to the then-existing By-Laws of the Commandery were unanimously adopted in due course and order of business :

SEC. 3. The Recorder shall have printed on one ticket the names of all Companions properly nominated in accordance with the provisions of Section 1, and forward a copy of the same to each Companion with his regular circular of announcements for the May meeting, with the request that he indicate with a cross (X) mark, in ink or with an indelible pencil, the name of the nominee for each office for which he desires to vote, seal the same, write his name on envelope and return the same to the Recorder in the envelope furnished him for the purpose.

Companions who do not so return their ballots by mail may vote in person at the annual meeting.

SEC. 4. Immediately after the reading of the minutes at the annual meeting, the tellers and clerks shall take a convenient place in or near the assembly room of the Commandery; the Commander shall declare the polls open, and Companions present may then deposit their ballots, and the Recorder shall then deliver to the tellers of all ballots of Companions received by mail, to be counted as ballots cast in person. When a reasonable time has been allowed for the casting of the ballots (to be determined by the Commander, or by the Commandery, if objection be made to the Commander's decision) the Commander shall declare the polls closed, after which no ballots shall be received. The tellers and clerks shall then retire to a private room, ascertain the result of the ballot, and report to the Commandery; and those having a majority of the votes cast for each office to be filled shall be declared by the Commander as duly elected to serve during the ensuing year.

170
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(2) On February 4, 1904, Companion Cornelius Cadle filed with the Recorder a so-called appeal, requesting that it be forwarded by the Commandery-in-Chief for a decision by that body as to the constitutionality of the mode of voting contemplated by the amended by-laws, which was forwarded.

(3) The Commander of the Ohio Commandery, upon suggestion of the Board of Officers, in view of the meeting of the Commandery-in-Chief, to be held in Cincinnati in October ensuing, appointed a committee of the following named Companions to act as counsel for and in behalf of the Ohio Commandery in the proceedings upon said appeal:

Brevet Major Lewis M. Hosea, Chairman.
 Brevet Brigadier General B. R. Cowen.
 Brevet Lieutenant Colonel W. R. Warnock.
 First Lieutenant A. B. Isham.
 Major General J. Warren Keifer.
 Brevet Brigadier General Charles H. Grosvenor.

(4) The Reference Committee of the Commandery-in-Chief, consisting of General John R. Brooke, of Pennsylvania; General Charles King, of Wisconsin, and Major W. P. Huxford, of District of Columbia, met at the rooms of the Ohio Commandery, at Cincinnati, on the day preceding the meeting of the Commandery-in-Chief, at the same place, and the arguments of a preliminary nature which follow were presented to said committee. The report of the committee to the Commandery-in-Chief, adverse to the by-law in question, was supported against a motion to table by a margin of very few votes; and, on motion to adopt, was upheld by a slightly larger plurality. No stenographic report of the arguments before the Commandery-in-Chief was permitted to be taken.

(5) The report of the committee was based on a previous action of the Commandery-in-Chief in 1886, upon a "feigned issue" presented by the Ohio Commandery. A proposed by-law was appealed to the Commandery-in-Chief, covering substantially the same ground, and the Commandery-in-Chief adopted the report as its opinion. The Committee of Reference in 1886 considered the question as one "regarding the voting by proxy," and were of opinion "that, under the constitution of the order, the proposed

change would be contrary to the spirit, if not the letter, of that instrument;" but that the "subject was worthy of very careful consideration by the congress of the order," and recommended the "reference of the matter to the Committee on Revision, created by the Fifth Quadrennial Congress."

(6) The action of 1886 was claimed to be without force as a governing precedent, for reasons shown in the argument herein. In the argument before the Commandery, it was shown that in 1903 the Commandery-in-Chief had practically settled the matter by adoption of the following decision and declaratory resolution, in re *Smedburg*:

"Article XVI., Sec. 3 of the constitution provides that The Chief and Supreme Judicial power shall be vested in the Commandery-in-Chief. For the exercise of judicial power a concrete case must be presented in an orderly manner, on which the judgment of the Commandery may operate as a final determination, and the action of this Commandery invoked either by a Commandery or a member of the Order aggrieved by its action on an appeal transmitted through his Commandery."

(For full text of the By-Law appealed from, see last page, following the argument.)

THE CASE OF THE OHIO COMMANDERY
AS PRESENTED BEFORE THE
COMMITTEE OF THE COMMANDERY-IN-CHIEF.

MILITARY ORDER OF THE LOYAL LEGION OF THE UNITED STATES,

HEADQUARTERS COMMANDERY OF STATE OF OHIO,

MASONIC TEMPLE, CINCINNATI, October 11, 1904.

The Recorder-in-Chief, having officially notified the Ohio Commandery of the Loyal Legion that a committee of three, viz :

General John R. Brooke,

Major W. P. Huxford,

General Charles King,

Had been appointed by the Commander-in-Chief to report in writing to the Commandery-in-Chief their decision as to the constitutionality of By-Law III., designating the mode and manner of electing officers of this Commandery now in force, the Commander appointed the following committee to take full charge of the Commandery of the State of Ohio's interest in the said matter, and to represent this Commandery before said committee and the Com-

mandery-in-Chief at its meeting in this city on the 12th of October, 1904 :

Brevet Major Lewis M. Hosea, U. S. A. (resigned), ex-Commander, Chairman.

Brevet Brigadier General B. R. Cowen, U. S. V., ex-Commander.

Brevet Lieutenant Colonel W. R. Warnock, U. S. V., ex-Commander.

First Lieutenant A. B. Isham, U. S. V., ex-Commander.

Major General J. Warren Keifer, U. S. V., ex-Commander

Brevet Brigadier General Chas. H. Grosvenor, U. S. V., ex-Senior Vice Commander.

The Special Committee of Three from the Commandery-in-Chief convened at the Headquarters of the Commandery of the State of Ohio, Masonic Temple, Cincinnati, on the above date; whereupon the following proceedings were had and arguments heard, as reported by the official stenographer employed by the Ohio Commandery for the purpose of preserving a record of the same, to-wit :

The Special Committee having taken their places, General John R. Brooke, Junior Vice Commander-in-Chief, presiding, the Chairman said :

GENERAL BROOKE—Gentlemen, we are assembled here as the committee appointed by the Commander-in-Chief of the Order, to hear the Ohio Commandery on the subject of certain by-laws; and the first thing that strikes this committee is that a stenographer has been appointed to be the official stenographer of the Ohio Commandery, and is present to take notes.

This committee desires to know if those notes are to appear in the newspaper reports tomorrow morning, or at any other time? If so, the committee desires to know that now.

MAJOR HOSEA—I think I can answer that for the committee, that it is only for the purpose of preserving an official record of the whole proceedings—not for newspaper publication.

GENERAL BROOKE—Very good. This committee is now ready to proceed in the way of hearing anything that they desire to say

on the part of the appellant or of the Commandery of Ohio, through its committee.

COLONEL CADLE—Mr. Chairman, I have prepared my argument, and Major Van Dyke is to do the talking. We wish to know which is to be heard first, the appellant, or the other side?

MAJOR HOSEA—I think—if the members of the committee will permit me—there ought not to be any question about that.

The Commandery of the State of Ohio is here upon the defensive; an appeal is taken from its order, and the burden of proof ordinarily is upon the one who presents the appeal.

GENERAL BROOKE—The committee was just about to announce their decision, that it is ready to hear the appellant.

MAJOR VAN DYKE—I take it upon myself to say that I appear before this committee as much in behalf of the Ohio Commandery as the committee selected for that express purpose, because the interests of the Ohio Commandery in this matter are paramount with me, as with them.

The by-law, as passed by the Commandery, was passed against the protest of several who did not make themselves very prominent in opposition to it. However, that is a matter—

MAJOR HOSEA—I dislike to interrupt the gentleman, but my colleague, General Grosvenor, states, and I think with great propriety, that, inasmuch as we desire to present a question of the jurisdiction of this committee, we, perhaps, ought to take the lead in that, because if the point should be sustained, the further hearing of argument would be unnecessary.

GENERAL BROOKE—Let me understand the point as to jurisdiction; what do you mean?

MAJOR HOSEA—We desire to present the point that this committee has no jurisdiction to hear this matter; we object to the—

GENERAL BROOKE—To the jurisdiction of the committee?

MAJOR HOSEA—To the jurisdiction of the committee; and if the committee proceeds in accordance with ordinary legal practice, I think that should be first heard.

GENERAL BROOKE—Very well; that is proper, that the plea to the jurisdiction should be heard.

ARGUMENTS ON THE MATTER OF JURISDICTION.

MAJOR HOSEA—The committee is appointed under the resolution adopted by the Commandery-in-Chief at its 1903 meeting, viz :

“Companion J. Langdon Ward submitted the following: *Resolved*, That in all cases to be submitted for the decision of the Commandery-in-Chief the papers shall be forwarded to the Recorder-in-Chief in triplicate, and where practicable, at least ninety days prior to the next meeting of the Commandery-in-Chief; that as soon as practicable after the receipt of the papers in each case a committee of three shall be appointed by the Commander-in-Chief for its consideration, to each of whom one copy of the papers shall be forthwith transmitted by the Recorder-in-Chief. The committee so appointed shall report in writing, and return to the Recorder-in-Chief the copies of the papers submitted to them. One copy of such papers shall be filed with by the Recorder-in-Chief, and one copy, with the decision of the Commandery-in-Chief thereon, returned to the Commandery submitting the case.”

The jurisdiction of the Commandery-in-Chief in a case like the one before the members of this committee is to be found in an article of our constitution, which provides that the supreme judicial power of the Order shall be vested in the Commandery-in-Chief; also, the supreme executive power.

Another provision is that the legislative power of the Order shall be vested in the Congress of the Order.

Here you find a complete division of governmental powers precisely analogous to the division of powers in the United States Government, as found in the Constitution of the United States.

What judicial power is I would not have to present to a committee—or body—of lawyers; and, perhaps, it is not necessary at the present time to go very deeply into that question. Suffice it to say—and it is only by reason of the presumed ignorance of this committee in matters of law that I make this remark, although possibly it is a question that appeals to the intelligence of every reading man—that judicial power has its limitations. It is not

parliamentary power ; it is not executive power ; it is the power to hear and decide causes. And one of the limitations upon judicial power is that it must and can only act upon a case that arises in ordinary litigation, where a right has been infringed, and where a remedy is sought between individuals, or between States, or between corporations and individuals, etc. In other words, there must be an actual case of a right being infringed and litigation arising therefrom before the judicial power can act.

Now it is not in accordance with the practice of courts to appoint a certain number of its members to hear and pass upon a case which is to come later before the Court for consideration ; the old principle, "*delegatus non potest delegare*," applies here : A power which is delegated can not be re-delegated. We are entitled to a hearing before the whole Court, and not by a committee of a few of the Judges of that Court ; so that I make, therefore, the point that in passing this resolution the Commandery-in-Chief exceeded its powers.

Moreover, it provides for a consideration by you of the facts which are to come for decision before the Commandery-in-Chief.

But as others are to speak, I will not extend these remarks further than to say, that, viewing this matter as we do, we think for this reason first, that the committee has really no jurisdiction ; that the authority found in this resolution is null because it is a resolution improvidently made by the Commandery-in-Chief, without due consideration of the distinction between its parliamentary powers and its judicial powers.

Another point, perhaps bearing upon this, has reference to the appeal itself. That will be more clearly apparent when the nature of the appeal—when the circumstances of the appeal, and the facts surrounding it—are brought to your attention by those who will present this appeal.

I would state what, perhaps, the committee already know, that I appear here merely by the selection of the Commandery of Ohio as the Chairman of a Committee of Counsel, and my associates on that committee, General Warnock, General Grosvenor, Doctor Isham and General Cowen, are all here, and I, therefore, will end these remarks, with due modesty, out of consideration for the distinguished gentlemen who desire to be heard.

GENERAL GROSVENOR—I would like to be heard just a moment on this question myself.

My point can be put in very simple phraseology, can be understood without any particular citation of legal authorities.

There is not any appeal here, in my judgment. What is the indispensable quality of an appeal? An appeal is described and must be described as a claim upon the part of somebody to a superior body to do some act; to restore to him something that he has been deprived of; to right some wrong that has been perpetrated against him.

Now is it possible that every time a member of one of these subordinate bodies concludes to take it into his head to get an opinion from the Commandery-in-Chief, every time that he can discover some act on the part of the particular Commandery to which he belongs, to furnish an opportunity to ask for a judicial opinion from the dominant body as to whether or not his original opinion is right or wrong, he may do so?

Now, that is all there is in this question, and it can not be extended beyond that exact situation.

This Commandery proceeds to adopt a by-law. Nobody objects to it, and from a parliamentary standpoint everybody voted for it. It is not disclosed here that anybody voted against it.

MAJOR HOSEA—The record shows that it was unanimously adopted.

GENERAL GROSVENOR—The record shows, as suggested, that it was unanimously adopted; it went into force; it was acted upon a long time afterward; some member of this Commandery concludes that he would like to have an opinion of the dominant body as to whether that by-law ought to have been adopted or not. I submit that that is no appeal; I think there is no one quality of an appeal in the situation. If you open that sort of door, I can take the record of any one of these subordinate Commanderies and crowd the Commandery-in-Chief with questions that will occupy the whole of their time.

If somebody thinks he has been injured, the time and place to make his arraignment was to protest against passing this by-law, and show wherein his rights have been invaded. Suppose, for instance, that an election has taken place under this by-law, that this by-law has been operated under; somebody who has been

defeated for an office, or somebody who wishes to protest against the election, he has a right, perhaps, to be heard here; but there is nothing disclosed here whatever. It is merely asking an opinion from the Commandery-in-Chief as to whether or not a certain by-law is a competent and proper and legitimate by-law of the subordinate Commandery.

That is my proposition precisely.

COLONEL WARNOCK—Mr. Chairman, I would like to make a suggestion or two along the same line.

There are two reasons why I think this committee has no jurisdiction over this matter—two reasons which I will give in their inverse order, the last being referred to by General Grosvenor.

There is no appeal here; an appeal must be taken from some act that has been done by the Commandery to which parties have objected at the time. As General Grosvenor has well said, you may cook up one afterwards, and may pick out anything in the record and ask for a judicial interpretation, and there would be no end to the questions that might be brought before the Commandery-in-Chief. In my experience in attending these Commanderies I have known perhaps a dozen instances where matters have been dismissed because of the fact that there was no case made. Nobody had had a right denied him; nobody had a right that was being withheld from him, and the refusal to accord which was being appealed from. An appeal must be from a right that has been denied, or infringed; and neither has been in this case, because the record shows that no one of these parties who were present at the time made any protest or any objection whatever; so that, upon the general proposition of an appeal, there is no question here, but a simple abstract one which the Commandery-in-Chief has, from its very first existence, refused ever to entertain.

Now, as to the other; we object because we think that this committee has been illegally and unconstitutionally provided for. What is the Commandery-in-Chief? It is a power, it is a body composed of the Commanders, ex-Commanders, Vice ex-Commanders, Records and ex-Records, for the purpose of considering the judicial questions that arise in the Commanderies, and to exercise the chief executive power.

The Commandery-in-Chief of 1903 presumed to add to its duties, to add to its functions a sort of a side body of men, and to invest them with the same authority. In 1903 they said there shall be a committee composed of persons who were appointed by the Commander-in-Chief for the purpose of considering the judicial questions that are presented, and they shall then make their report in writing. It does not provide for any hearing before that committee; it does not provide for the Commandery-in-Chief hearing the appellees, or appellants either, for that matter; but they are simply to take original jurisdiction of the question that is to be presented to them through the Recorder-in-Chief without any notice. Now, what are they going to make their report to? Why, they are to make their report to the succeeding Commandery-in-Chief, a different body of men. Ever since 1903 there have been new persons who have become eligible to membership here. What right have they to pass upon the report of a former committee? None whatever. During the time elapsed since 1903 there have doubtless occurred deaths of members, and others have been installed to membership here. It is entirely a distinct body of gentlemen that is here. A committee was appointed by the former body. A body composed of different constituent parts to the present body, can not, of right, report to a successor; all these questions are and of right ought to be brought before the Commandery-in-Chief that is to hear them. The present Commandery is that of 1904, assembled in the city of Cincinnati for the first time, which, prior to this time, had no existence. This appeal, if there is any at all, brought in proper form, should be announced by the Recorder to this Commandery-in-Chief. This Commandery-in-Chief then takes what course it chooses. It may appoint a committee, or it may delegate the power to the Commander-in-Chief to appoint the committee; but it has not had the opportunity. It is cut out of that; it is denied the right to a power that is given by the constitution; so that we are here confronting a committee, with all due respect, whom we have the highest confidence and respect for individually and collectively, but that is an unconstitutional committee, an illegally constituted committee. The committee of 1903 had not any power to take away from the Commandery-in-Chief its prerogatives. And we are here not only as members of a committee appointed to present this matter on behalf of the Ohio

Commandery, but we are here as well as members of this Commandery-in-Chief, to ask for our rights.

We say you have no jurisdiction. We have a right to have the matter brought before the Commandery-in-Chief; we have a right to there make our own motion as to how this is to be considered. The Commandery-in-Chief of 1904 demands its rights, and has a right to say how this shall proceed. I think the sooner that can be off our record, and off our books, that assumption of power on the part of the Commandery-in-Chief of 1903, the better.

The Commandery-in-Chief has no legislative power; it has nothing but judicial powers. You act as a court, not upon fictitious cases, but upon actual cases that are brought here. As was well said by General Grosvenor, you are here sitting as a court, and can only sit to decide questions coming up in the regular way to be heard by courts.

I submit, in all fairness, that the Commandery-in-Chief of 1904 has the right to originate its own committees; it may delegate that to the Commander-in-Chief to appoint the committee to hear this, and he may appoint these gentlemen, but I hope he will be regular about it.

If gentlemen are to be technical and stand upon their legal rights, we desire to stand upon our legal rights.

If it goes into a Court of Equity we would have something more to say; but I respectfully submit that the committee has no legal rights in this case.

GENERAL BROOKE—Will the Companion inform me, or the committee, when the Commandery-in-Chief of 1904 was born?

GENERAL WARNOCK—When it was born? Well, I suppose that the Commandery-in-Chief of 1904 was, just like Topsy, it "just grewed." I suppose it is like, perhaps, the American Congress, we have it always with us; but it has different component parts. New parts come into it, and each succeeding one is supreme. It can make, and it can unmake, and it is not bound by any of its predecessors, except as to mere constitutional questions.

GENERAL BROOKE—The Commandery-in-Chief of 1904 is not yet organized.

GENERAL WARNOCK—That is the reason that we feel that this is all premature; that this ought not to be heard until it is organized and says how we shall proceed.

GENERAL GROSVENOR—That is just the point.

GENERAL WARNOCK—The Commandery-in-Chief may see fit to appoint a committee of six men upon its own motion; it has the power to do so; it is not bound by the 1903 Commandery-in-Chief.

GENERAL BROOKE—That is not the question I asked the Companion; he has answered that very courteously.

CAPTAIN JOHN O. FOERING—I do not want to take issue on this question; but when committees are appointed by a preceding Commandery, they are supposed to report to the next meeting of the Commandery succeeding them; you would never get through with your business if you would appoint a committee of this Commandery, and that question came up at the next meeting in 1905, the same issue came up. The committees, with our short sessions, can never get through. A committee appointed today will probably ask to report in 1905. The same question will arise then, no jurisdiction—

MAJOR HOSEA—I rise to a point of order: I think it only fair to say that this is not an open meeting.

MAJOR HUXFORD—I would like to ask if, in the judgment of Companion Warnock, the Commandery-in-Chief is not a continuing body? In that does it differ from any parliamentary body?

GENERAL WARNOCK—I should say not. That is, not for the purpose of fastening upon a succeeding Commandery-in-Chief action which they have taken on a subject generally when a particular matter comes up that affects the succeeding Commandery-in-Chief. There are certain general principles that run all the way through, I grant you, certain matters of practice; but the point is this—

GENERAL BROOKE—The question is very plain; those coming in anew as members of the Commandery-in-Chief are much in the minority compared to those who hold over during their lives, as far as their numerical strength goes.

GENERAL WARNOCK—They have the same rights; but the principal thing I object to is this, that a preceding Commandery-in-Chief endeavors to provide for something that must and will occur, subject to adjudication by a succeeding Commandery-in-Chief. It would be very competent for this Commandery-in-Chief of 1904 to appoint a committee; and they might appoint it with in-

structions to report at a succeeding time, because an appeal has been made to this present body; but in 1903 they seek to appoint a committee that shall take up and consider questions growing out of matters that will or may occur after the adjournment of 1903.

GENERAL BROOKE—Therefore you hold—let me understand you—that the Commandery-in-Chief of 1904 is now a living body?

GENERAL WARNOCK—Will be after 10 o'clock.

GENERAL BROOKE—Will be; is it now?

GENERAL WARNOCK—No, sir.

GENERAL BROOKE—What then is there to prevent the action of the Commandery-in-Chief of 1903 taking any action that it sees proper?

GENERAL WARNOCK—Because the Commandery-in-Chief of 1903 was *functus officio*, was dead, at the moment it adjourned.

GENERAL BROOKE—But the resolutions adopted by the Commandery-in-Chief of 1903 are living resolutions?

GENERAL WARNOCK—But we claim that those resolutions are unconstitutional and illegal.

GENERAL BROOKE—The question of the constitutionality of that should go to the Congress.

MAJOR HOSEA—I want merely to add a word—

GENERAL BROOKE—I think that this committee has a right to ask any one speaking before it any pertinent question which may arise in their minds.

MAJOR HOSEA—Surely.

GENERAL BROOKE—Therefore, it is very necessary that you should advance argument before this committee, which has been instituted in accordance with the resolutions of the Commandery-in-Chief of 1903, which Companion Warnock can not dispute as having the right to organize such committees at the time; as he says now that this Commandery-in-Chief of 1904 may constitute committees to report to some subsequent Commandery. Where is the difference between the two?

MAJOR HOSEA—My view of that, Mr. Chairman, is this: If the committee will kindly draw the distinction which I suggested in the first instance, between parliamentary powers of the Commandery-in-Chief and its judicial powers, I think the difficulty now before you will vanish. With respect to its judicial powers, it is a court—it is not a parliamentary body, but a court. And while in

session as a court it may adopt orders proper for a court. But when it adjourned it was at the end of the term; a new term of court will begin tomorrow. Here is a case which has come into the court for the consideration of the court at the new term, not for the consideration of the court at the term which has expired; that is *functus officio*.

GENERAL BROOKE—Let me interrupt you to say that usually a court can appoint referees and have a case heard before a referee.

MAJOR HOSEA—Quite frequently that is done.

GENERAL BROOKE—Is not this committee in the position of a referee?

MAJOR HOSEA—When the appointment of a referee becomes necessary, such appointment will be made by the court that hears the case and which decides upon the propriety and necessity of appointing a referee; but the appointment of referees and masters has reference only to such details as are desirable to dispatch in order than the mind of the court may not be wearied in deciding the more important matters of the case, with matters of detail.

GENERAL BROOKE—Excuse me, I want to shorten the discussion as much as possible, Companion, because the action of the committee will necessarily be prolonged, or rather its labor will be prolonged by a prolonged discussion as to judicial rights—

MAJOR HOSEA—This is a judicial question, Mr. Chairman.

GENERAL BROOKE—And also as to the constitution of the committees, its legality, etc.; but the Commandery-in-Chief lives always. It is not dependent upon its individual organization. "*Le Roi est mort, vive le Roi.*" The President dies; long live the President! There is no interregnum; the Commandery-in-Chief represents the head of our Order, and it never dies. It not that so?

MAJOR HOSEA—That is quite true, if your Honor please. I will endeavor to shorten this discussion as much as I can, and in a word, say all that I desire to say further.

The real question here has been decided for 400 years; a similar question arose before the court of Kings Bench, in England, in the troublous times of King James I., when it was sought to obtain the individual opinions of judges before the trial. Lord Chief Justice Coke then replied to the King's Ministers: "The Judges are not to give their opinions by fractions, but entirely; that is, as a whole, according to the vote, whereupon they should

settle upon conference. This taking of opinions singly and apart is new and dangerous." The proposition here is to submit the question of this appeal to not all of its members of the court, but to three of its members in advance of a hearing.

The proposition is one which, as I say, addresses itself to the mind of any lawyer as one so preposterous, so contrary to every sense of right, that with all due respect to the members of the committee as individuals (I take it that goes without saying), we protest against this judicial committee of the court to which this action is appealed. We say that the appointment of the committee was wrongful. The circumstances of its appointment, we, if necessary, will discuss later; but I do not desire to prolong this discussion, and will let it rest with that.

MAJOR HUXFORD—I want to ask Companion Warnock, and also Companion Grosvenor, if it has not happened frequently in the course of legislation in the highest legislative body in the land, that committees have been appointed prior to the adjournment of one Congress, to report to the next on certain matters?

GENERAL GROSVENOR—Yes, but it done by the legislative body which has the express power to create such committee for a particular purpose, and because there is a question pending to be referred to that committee; but did you ever hear of Congress creating a committee to hear and determine every suggestion that somebody in the United States might make? That is my position.

MAJOR HUXFORD—It might not necessarily be every matter, but it may be created to hear and determine some specific thing, and to make a report thereon to some succeeding Congress. I want to know if that is not a fact that such committees are so appointed, and that the membership of those committees is changed prior to the time of their report to the next succeeding Congress?

GENERAL GROSVENOR—Certainly not; it can not be done. The committee can not change its composition, because the term does not expire. No committee is ever appointed to report after its death; and tomorrow you will be dead as a committee of the former House; you will not have any existence as a committee of the former House; yet you are attempting to perform an act of legislation tomorrow, when you died at 10 o'clock tonight. There is where you stand; and it will show you in the most absurd position that any gentlemen ever got into.

MAJOR HUXFORD—That is a matter of opinion.

GENERAL GROSVENOR—I did not mean that, not that any gentlemen got themselves into, but that they were placed in.

GENERAL KING—You said the most absurd position any gentlemen ever got into.

GENERAL GROSVENOR—I will take that back. Do not use that (addressing the stenographer).

GENERAL WARNOCK—There is no analogy, because this is a judicial body.

MAJOR VAN DYKE—It seems to me that these gentlemen seem to think that you have complete jurisdiction of this matter; it seems to me that they think you are to decide it once for all; that is the way they seem to talk: I may have misunderstood—

GENERAL BROOKE—Are you done, gentlemen?

MAJOR HOSEA—We have nothing further, I believe, on our side to suggest.

GENERAL BROOKE—Gentlemen, it may be unnecessary for me to read the action of the Commandery-in-Chief in this case. (Here the Chairman read a letter beginning)

“PHILADELPHIA, September 1, 1904.

“COLONEL J. P. NICHOLSON, Recorder-in-Chief, Etc.,

“*Dear Sir and Companion*—I am in receipt of your letter of the 30th ultimo, referring to the receipt by you of the case submitted by the Ohio Commandery concerning proxy voting,” etc.

You have seen that letter before, have you not?

MAJOR HOSEA—I have not.

GENERAL BROOKE—Under this the committee deems that in the execution of the duties devolved upon it by the Commander-in-Chief it will proceed in this case.

GENERAL GROSVENOR—I would like to ask the commission—

GENERAL BROOKE—And further, having made its report it will then be for the Commandery-in-Chief of 1904 to take such action as it may deem proper in the case.

GENERAL GROSVENOR—That is what I wanted to inquire, whether your construction of the letter is that you will decide this question ultimately and finally, and that there is to be no hearing; if not, we can be heard in the Commandery.

GENERAL BROOKE—Certainly.

GENERAL GROSVENOR—Then I ask leave to respectfully withdraw from further consideration of this case.

GENERAL BROOKE—Do not take this down. The Commandery-in-Chief never dies, you admit that?

GENERAL GROSVENOR—I admit that for certain purposes. It dies on its adjournment for all legislative purposes instantly.

GENERAL BROOKE—You claim this is a judicial purpose?

GENERAL GROSVENOR—I do. Therefore I say it can not come here to determine that.

MAJOR HOSEA—I would like to be enlightened. I do not quite see the connection between the letter in question and the proposed action of the committee. I beg to be informed what the connection is. Is it that the Commandery of Ohio, through some mistake of a clerk who penned that letter, is to be bound by a recital that it has submitted a cause to the Commandery-in-Chief? I do not quite see the connection.

GENERAL BROOKE—That is what the Commander-in-Chief says: "To whom shall be submitted the case submitted by the Ohio Commandery."

MAJOR HOSEA—The Ohio Commandery has never submitted any case; it certainly has submitted nothing to this committee.

GENERAL WARNOCK—Our records do not show that we did.

GENERAL BROOKE—The Recorder of the Commandery-in-Chief seems to show it here.

MAJOR HOSEA—I would ask the Chairman of this committee, the members of this committee, if they were not at once advised, upon the appointment of this committee, by the Ohio Commandery, of the error in the matter, although I was not aware that it was embodied in this letter; or perhaps I am mistaken about that—if they were not advised that it was an appeal, not by the Commandery of Ohio, but by an individual member.

GENERAL BROOKE—Is it necessary to take all this down? I will just read you the order of the Ohio Comandery, dated
"May 16, 1904.

"COLONEL JOHN P. NICHOLSON, Recorder-in-Chief, Etc.

"In response to your request of the 14th inst. for a copy of the rule and the official circular promulgating the action involved in the appeal made by Companion Cadle, I have the honor to transmit herewith such data."

November 2, 1903, you held a stated meeting of your Commandery here. The Commandery-in-Chief met, I think, on the 19th of October, 1903, and at that meeting the resolution whose legality you have called in question, or constitutionality rather, was passed, evidently for the purpose of providing some source of gathering for the consideration of the succeeding Commandery-in-Chief data upon any questions such as this, and to make report as the committee authorized by that resolution of the Commandery-in-Chief in 1903, to the succeeding meeting of the Commandery-in-Chief.

I hold, gentlemen, that the Commandery-in-Chief exists always. I may be wrong; but that is my belief, that the majority of this membership is, of the next preceding Commandery-in-Chief, the succeeding Commandery-in-Chief which meets tomorrow. There are a large number of members who have been members of the Commandery-in-Chief for many years—a very large preponderance of them.

This is the situation; there has been a further communication here that we have had under consideration, from the Commander-in-Chief, and from the committee through the Recorder-in-Chief, of which Major Hosea is Chairman, and also from Companion Cadle. The Ohio Commandery has sent to each of the members of this committee a letter, of which the following is, so far as it affects this case, a copy:

“September 10, 1903.

“Dear Sir and Companion:

“The Recorder-in-Chief, having officially notified the Ohio Commandery of the Loyal Legion that a committee of three, viz: General John R. Brooke, Major W. P. Huxford, and General Charles King, has been appointed by the Commander-in-Chief to report in writing to the Commandery-in-Chief their decision as to the constitutionality of By-Law III., designating the mode and manner of electing officers of this Commandery, now in force, I hereby appoint the following committee to take full charge of the Commandery’s interest in said matter, and to represent this Commandery before said committee and the Commandery-in-Chief at its meeting in this city on the 12th of October next.”

(Signed by A. C. Thompson, Commander.)

I wish to call your attention, gentlemen, to the language of

this communication, "and to represent the Commandery before said committee and the Commandery-in-Chief." Certainly Commander Thompson felt that the report of this committee would be before the Commandery-in-Chief, when you read that communication.

GENERAL WARNOCK—I would suggest that it is not the Ohio Commandery that is appealing this case, as would appear from the other letter that you read.

GENERAL BROOKE—The Commander-in-Chief who wrote that letter is not present.

MAJOR HOSEA—I do not quite see that our position is in any way different from what we understand it. We are appointed, it is true, to represent the Ohio Commandery before this committee and before the Commandery-in-Chief. If I, as an attorney, were employed to represent a client before the court below and the Supreme Court of the State, it would not necessarily follow that I was precluded from making all necessary objections to the jurisdiction of the court below. It might never go to the Supreme Court.

GENERAL BROOKE—Don't you understand by what this committee has been hearing that you have not been restricted in any way, possibly except a desire on the part of the commission to finish its labors as soon as possible.

MAJOR HOSEA—I understand, then, that the committee determine that it has jurisdiction to hear, and will continue, and make its report to the Commandery?

GENERAL BROOKE—We have not yet announced that.

MAJOR HOSEA—Then we await the decision of the committee.

GENERAL BROOKE—We are still discussing the matter of the constitutionality of this resolution; have you anything to say, gentlemen?

MAJOR VAN DYNE—I have nothing further to say. I may have a few words upon the general proposition, if the committee decides to continue the hearing.

GENERAL BROOKE—Suppose that you do not hear anything from the committee? The committee considers, being old soldiers, it will obey the order given it by constitutional authority. The question of the legality or the constitutionality of its existence may

be determined tomorrow, or before the session of the Commandery-in-Chief closes.

The committee is ready to proceed. I understand that the committee in charge of the affair, so far as the Commandery of Ohio is concerned, considers itself the defendant in this case; and not the one who originated the case. Do you wish to take that position?

GENERAL WARNOCK—We deny that we appeal from the action of ourselves.

GENERAL BROOKE—You take the position that you did not appeal.

GENERAL WARNOCK—That we did not appeal, and that the record shows that nobody did appeal until three months afterwards.

GENERAL BROOKE—The record in this case appears to have been submitted by the Ohio Commandery.

GENERAL GROSVENOR—Yes, when it was called for.

GENERAL BROOKE—Submitted through the regular course of official correspondence.

MAJOR HOSEA—I beg pardon; the letter of Colonel Nicholson through a mistake so shows, but the record will be found in other papers and the mistake very easily corrected.

GENERAL BROOKE—That is a matter in which, I presume, Colonel Nicholson will take his own part.

GENERAL WARNOCK—I presume the Chairman, when he reads that manuscript, will read that Colonel Cadle took an appeal from—

(The remainder of sentence, through some cause, was lost by the stenographer.)

GENERAL BROOKE—That is signed by the Recorder-in-Chief the 16th of May last.

GENERAL WARNOCK—Showing the action of Colonel Cadle, but not the action of the Commandery.

GENERAL BROOKE—Here is the letter of Companion Cadle and the Recorder of the Ohio Commandery, dated February 4.

(Some gentlemen approached the table and conversed with a member of the Committee of Three *sotto voce*.)

MAJOR HOSEA—We would like to be favored with the remarks of the Companion. If he has any suggestions to offer the committee, we would like to hear them.

GENERAL BROOKE—I beg your pardon; I say the committee has heard nothing.

MAJOR HOSEA—If I have offended, I sincerely beg pardon; the gentleman is unknown to us, and we supposed he was conferring with the committee, and we wanted to have the benefit of his conversation.

GENERAL BROOKE—That may have been upon some other subject; so far as the committee is concerned, it knows nothing about that conversation.

This is a letter addressed to the Recorder of the Commandery of Ohio, dated

“February 4, 1904.

“Major W. R. Thrall, Recorder Ohio Commandery of the Military Order of the Loyal Legion, Cincinnati, O.:

“*Dear Sir and Companion:*

“This Commandery, at its stated meeting in October, 1903, having adopted an amendment to its by-laws authorizing Companions to forward by mail their votes for officers of the Commandery to be elected at the annual meeting in May, such votes to be counted by the tellers and have the same effect as ballots cast in person, I desire to enter my appeal to the Commandery-in-Chief for a decision by that body as to the constitutionality of such mode of voting, and ask that this appeal may be entered on the minutes of the Commandery and forwarded to the Commandery-in-Chief. Yours respectfully,

CORNELIUS CADLE.”

This is the forwarding letter, dated

“May 9, 1904.

“Colonel John P. Nicholson,

“Recorder-in-Chief, Etc.:

“*Dear Sir and Companion:*

“I have the honor to enclose herewith an appeal from the action of this Commandery to the Commandery-in-Chief, made at our stated meeting, February 3, 1904, by Companion Cornelius Cadle. Very truly yours,

W. R. THRALL, Recorder.

There are some further communications in there in answer to a communication—

GENERAL GROSVENOR—Will you kindly read for our benefit the letter of the Recorder-in-Chief, Colonel Nicholson, notifying the Commander-in-Chief of the appeal, as they call it, the very first letter you read?

GENERAL BROOKE—The first letter is the one which we have not got here, the letter of the Recorder-in-Chief to the Commander-in-Chief; but it was evidently dated on the 30th of August last.

GENERAL GROSVENOR—I am trying to get at this—the letter written by Colonel Nicholson—

GENERAL BROOKE—By the Recorder-in-Chief to the Commander-in-Chief?

GENERAL GROSVENOR—Will you kindly read that?

GENERAL KING—That is the same thing; I would like to hear you read that.

GENERAL BROOKE—"I am in receipt of your letter of the 30th ultimo referring to the receipt by you of the case submitted by the Ohio Commandery concerning proxy voting.

"In compliance with the requirements of a resolution adopted by the Commandery-in-Chief at its last meeting, I do hereby appoint the following named Companions a committee to whom shall be submitted the case submitted by the Ohio Commandery."

GENERAL GROSVENOR—All I wanted to say was this, I have no doubt that the letter of Colonel Nicholson, which appears to be absent from the record, describes the condition exactly as the Commander-in-Chief has put it in this letter of appointment; that is to say, he says there is a case made by the Commandery of Ohio—

GENERAL BROOKE—Oh, no, he does not.

GENERAL GROSVENOR—Oh, yes, he does.

GENERAL BROOKE—No, he does not say the case "made," but "submitted by the Ohio Commandery." (The Chairman read the letter same as before.) If that is not submission, I do not know what military language you would use in submitting a paper to a higher authority.

GENERAL GROSVENOR—They submit a paper; but there is no case made by the Ohio Commandery. That is the first proposition; second, that Companion Cadle did not appeal from any by-law of the Commandery providing for proxy voting, and, therefore the word "proxy," which has a wide and distinct meaning, has worked its way into the record improvidently. I might use a stronger term than that. There is no "proxy voting;" and I should like to have seen the original paper upon which that order was issued; there is no such question here. You are here to try

a question that does not arise. It will be enough for us to submit this whole case by saying that there is no by-law of the Ohio Commandery providing for "proxy voting." Proxy voting is the substitution of an agent to do a thing for a principal. I, A, appoint B to appear at a certain place and vote for me. There is no by-law here such as that. Therefore, the very keynote, the very foundation of your jurisdiction falls to pieces, for there is no such question here, and never will be.

GENERAL BROOKE—The committee having decided that matter of jurisdiction, we will go on with the hearing of the case so far as you desire to present us, either side. It will be for the Commander-in-Chief to decide whether this committee is a constitutional committee or not. Is there anything further to hear from you, gentlemen? If not, the committee will retire to consider the subject.

MAJOR HUXFORD—I desire to know if the appellant desires to be heard in this matter.

MAJOR VAN DYKE—I have a few words to say, perhaps, some matters of information. The appeal from the action of the Commandery was made at the time of the action, or perhaps a very short time thereafter. That is neither here nor there—

MAJOR HOSEA—The record shows that it was made in February; the record shows that the action appealed from was taken in October.

MAJOR VAN DYKE—My memory may not serve me right. The question is not here one of sentiment, not one of what will be the desires of the greatest number; the question is, is this by-law constitutional? That is all. The Constitution of the Order, Art. XVII., Sec. 4, provides that:

"Each Commandery shall have power to adopt rules and regulations for its own government, which shall not conflict with the Constitution and By-Laws of the Order."

A by-law could not be in contravention of the Constitution; by-laws are passed for the purpose of carrying into effect the provisions of the Constitution. The question is, does this by-law contravene the Constitution in any way, or fail in any way, or oppose in any way, the carrying into effect the meaning of the Constitution.

Art. XI., Sec. 1., says (referring to the officers) :

“They shall be elected annually by ballot, by a majority of the votes cast,” etc.

Now, I am not a lawyer, nor the son of a lawyer. Francis Bacon refers to lawyers as “hair-splitters.” I am not a “hair-splitter,” but does a vote cast refer to a ballot sent by mail, passing through the hands of anywhere from five to twenty people? I have always thought the word “ballot” in its very self, expressed the idea of something cast—not sent by mail. Even in proxy voting one is authorized as a proxy to cast a vote. Colonel Nicholson, Recorder-in-Chief, has been authorized to cast the vote of the Commandery-in-Chief. This by-law is further faulty in this respect, that it does not provide for a continuation of the election in case there should be a failure to elect upon the first ballot.

Here is something I wish to remark upon: “The by-law in question was adopted in due course, under methods of procedure governing the Ohio Commandery, by substantial unanimity of action.” That fact is nothing in favor of the constitutionality of it: it simply expresses the sentiment of the majority of those who were present. There was a minority, a respectable minority at least, if not a very large one, that saw from the vote, which was taken by ayes and nays, that their few small voices would have no effect. At any rate, I think it better to be right with few than wrong with many. They refrained from voting, but the unanimity of the vote is nothing in favor of the constitutionality of the by-law. I am not so old but I can remember that certain States down South, with great unanimity, passed ordinances of secession, but I do not know that that “unanimity” affected the integrity of our Constitution in any way. All the argument which is set forth here which I have heard so far would be very good argument before Congress—

MAJOR HOSEA—Will Major Van Dyke permit me to ask him a question? I only wish to ask does his memory extend to the time when the soldiers on the field were permitted to vote?

MAJOR VAN DYKE—Yes.

MAJOR HUNFORD—How did the soldiers in the field vote? Did they send their votes home by mail, or did an authorized

committee from their respective States collect the votes, the votes being personally cast?

MAJOR HOSEA—I think it quite immaterial whether it was sent by Uncle Sam in his capacity as postmaster or sent on by individuals.

GENERAL BROOKE—As a matter of fact, were they not cast upon the field and carried by duly authorized commissioners to their respective homes and there registered?

MAJOR HOSEA—Unquestionably, and the reason was to see that the vote of the soldier got into the ballot box as he desired. So under this by-law it is sent in a sealed envelope, covered by his own signature, and passed into the hands of the tellers that break the seals.

GENERAL BROOKE—I merely asked the question to correct a misapprehension as to the manner of sending the votes home.

MAJOR HOSEA—I answered it, endeavoring to correct a misapprehension.

GENERAL BROOKE—It was not clear what you meant by that.

MAJOR HOSEA—The vote was taken outside of the States in which the elections were held.

GENERAL BROOKE—Certainly.

MAJOR HOSEA—Proper methods were used, naturally, to see that the vote was carried and deposited as the vote of the soldier, just as this by-law takes precautions to insure the same result.

GENERAL BROOKE—It was deposited by the individual voter in a ballot box prepared for the purpose; was not that the case, Companion?

MAJOR HOSEA—In that case there was a State Messenger; I think the poll boxes were carried—how is that?—the poll boxes were carried by the messenger; but the whole point was that the soldier, instead of being required to go to the State and put his vote in the ballot box there, was permitted to cast it where he was in the field fighting the enemies of his country. He was not deprived of that privilege of an American citizen simply because the exigencies of the case did not permit him to go to the polls at home and deposit his ballot in person.

GENERAL BROOKE—That is not the question I asked you. Did not the soldier deposit his ballot in person at a point designated?

MAJOR HOSEA—Unquestionably; just as in our ballot the voter deposits and puts his signature on it.

GENERAL BROOKE—I was simply asking that question. If you desire anything else, I will listen to it for an hour.

MAJOR HOSEA—I was only endeavoring to answer questions, as requested by the distinguished Companion on the other side of the table.

GENERAL BROOKE—I was simply interjecting for my own information.

MAJOR VAN DYKE—I still insist that a vote by mail is not a ballot. I will read a paragraph here:

“It will be conceded that this provision does not attempt to prescribe the details of election methods further than to require a specific individual expression of each voter by a ‘ballot,’ in contradistinction to a *viva voce* voting or other loose methods liable to abuse.”

Well, of course, a *viva voce* vote may become the method or not. That is not the question; but “other loose methods” are methods of sending votes by mail and calling them ballots. I know no looser method of voting than that, when they pass through the hands of a score of people, as I said.

I will say, in conclusion, I believe it is the best possible thing to provide some means whereby, constitutionally, every member of the Commandery, whether he lives in the Philippine Islands, or Alaska, or South America, or Greenland, shall be enabled to cast his vote for the officers. As a matter of fact, this by-law did not produce fifty votes above the ordinary vote of the Commandery.

MAJOR HOSEA—That is a mistake, also, Major Van Dyke, as far as it is worthy of noticing. It more than doubled the vote of the Commandery at any preceding election.

MAJOR VAN DYKE—That does not cut any figure, either.

GENERAL BROOKE—If you are finished, the committee will retire and consider.

GENERAL WARNOCK—No, we want to be heard on the merits of the case.

GENERAL BROOKE—Oh, very well. Have you finished?

MAJOR VAN DYKE—Yes, sir.

ARGUMENT BY MAJOR HOSEA ON THE MERITS.

Out of respect for the committee, and the personnel of the committee, although we deny its jurisdiction, we will present very briefly our views, under protest: not wishing in any way to prejudice their action, for we recognize the delicate position in which this question places the committee, and the natural reluctance which they would feel in undertaking to determine a question of this nature under these circumstances. We feel very great respect for the personnel of this committee; we believe that they are intending to do their full duty.

I desire at the outset to again call the attention of this committee to the fact that they are here as *judges*, not as *legislators*, and that it is their duty as judges to approach this question absolutely free from all bias. I trust and believe that no member of this committee has permitted himself to be influenced in any way by whatever might have been said to him prior to coming here, and, if so, I have sufficient confidence in this committee to believe that they will divest their minds of all preconceived opinions, and approach the consideration of this question as an upright and honest judge should do.

GENERAL BROOKE—I will interrupt you, sir, to say that this committee is composed of gentlemen, who are—

MAJOR HOSEA—I realize that—

GENERAL BROOKE— — members of the Order of the Loyal Legion, and they propose to do what they conceive to be their duty, without fear, favor or affection.

MAJOR HOSEA—We are endeavoring to prove that, Mr. Chairman, in a—

GENERAL BROOKE—I merely wish to assure you, so you can avoid any reference to that.

MAJOR HOSEA—We assure you of that, notwithstanding that we object, and object strongly, to your jurisdiction; and it is necessary for me to bring your mind first to the fact that you are here not as members of a parliamentary body, not as members of a committee of a parliamentary body, but as a committee of the judges who ultimately will pass upon this case.

We have to call your attention to that fact, for it is an unusual and irregular proceeding for a judicial body to appoint

certain of its members to hear a cause in camera before the case comes on for hearing. Such a thing never was heard of. I have shown you that four hundred years ago it was denounced as contrary to law, and the matter has never been questioned from that time to this. We do not present these objections in any captious spirit; we believe that they they are fundamental; that they lie at the very foundation of this Order, and we are so firmly convinced of that that we desire to present these views to you again—and, if necessary, yet again—in order that you may clearly apprehend the grounds upon which we present them.

Now, what is this case? Taking it from the record, you will find that at the October meeting of this Commandery, in 1903, a by-law was unanimously passed which made this change in our by-laws as they theretofore existed, viz: That non-resident members of the Commandery finding themselves unable to be present at the Annual Meeting in May shall have the privilege of voting for officers of the Commandery. If you have not a copy of the by-law there I can furnish it to you.

GENERAL BROOKE—We have it here, Sir.

MAJOR HOSEA—It provided, in the first place, that a committee of the Commandery should be appointed to select candidates for the several offices, two for each of the offices to be filled; that these names should be printed in the form of a ballot; that a copy of them should be sent to every member of the Commandery, and that non-resident members who found themselves unable to be present at a meeting should have the privilege of indicating on that ballot whom they desired to vote for for the several offices; that that ballot should be placed in an envelope furnished and sent with it; that it should be sealed by the recipient and indorsed by his signature upon the outside thereof. We have the signature of every Companion of our Commandery on file here; it was a mere matter of identification, just as your signature to a check is identified at bank. It further provides that at the annual meeting, when the tellers are appointed for the election these envelopes are passed into the hands of the tellers; the tellers break the seal and deposit the ballot. This by-law, as the record will show you, was unanimously adopted. No objection appears until in the month of

February following, when the appeal is taken by our distinguished ex-Commander, Colonel Cadle.

Understand, gentlemen, that while we are discussing matters here, and we may perhaps be betrayed into some heat, I take it that you will understand that these things do not affect our cordial feelings all around among ourselves, and I trust that the committee will get no wrong impression on that line.

That appeal does not say—Colonel Cadle does not allege—that he was in any way injured by this action. He does not say that any rights were infringed by the action appealed from. He does not say that his rights or privileges in any way as a member of the Order, or that the rights or privileges of anybody else in the Order, are in any way impaired or infringed by this action. Yet he appeals from it.

We say that this is not such an appeal as is contemplated under the judicial power of the Commandery-in-Chief. We show you by references which, as I say, it would not be necessary to adduce to any lawyer of experience, what judicial power is; what judicial power has always been. Another reference on that point—to show you how ancient are these principles for which we contend here—a case arose where the King's prerogatives were supposed to be in danger; there was considerable friction. A certain case had come on for hearing before the Court of King's Bench, concerning rights between individuals, but, incidentally, as a matter purely collateral, some question of the King's prerogative arose. The Bishop of Winchester was present at that trial, and he hastened to the King and presented it as a case affecting the King's prerogative, and the judges were given to understand that in a case involving a question of the King's prerogative the King must first be consulted in the matter, before the judges should render their decision in the case. And the Bishop of Winchester said to the Court that if this was not done in this case the King would issue an order that the matter be held up. The Court went ahead and decided the case, however, and the judges were brought before the King, who, in great heat, began to castigate them verbally for this dereliction of their duty. The question was then put to them: "In a case where the King believes his prerogative or interest is concerned, and requires the judges to attend him for their

advice, ought they not to stay proceedings until His Majesty is consulted with?" And all the judges shouted, "Yes!" "Yes!" "Yes!" But Lord Coke replied: "*When the case happens I shall do that which shall be fit for a judge to do.*" In other words, that his duty and his power under his oath as a judge did not permit him to pass opinions in advance of the actual litigation that came before him.

And a further illustration of this very situation is found in an address by Judge Lurton, the distinguished Presiding Judge of our United States Court of Appeals, a couple of years ago, delivered before the Ohio State Bar Association. Answering the assertion that the judicial power of the government was too great, he pointed out the essential weakness of the judicial power is that it has no initiative: it can not render opinions until a case arises between litigants which makes it necessary to do so. I need not show to your reason and intelligence as sensible and intelligent men how important it is to preserve that distinction in mind. If the Supreme Court of the United States could give an abstract opinion to every citizen who desired it this country could not exist a week; it would overturn the government; and the Supreme Court is no stronger in that respect than any court in the land. It has no power to say what the Constitution is, or what it means, or what it does not mean, until a case arises between individuals, wherein, incidentally to the relief required to be administered in that case, it may be necessary to determine a constitutional question.

That is the principle we contend for here; that because a member of this Commandery desires to get, in advance of a case arising, an abstract opinion as to what the constitution means in a given case, that he shall not have this right to come to the Commandery in Chief and get it. We point you to these precedents, going back for four hundred years; we point you to the constitution of the Order, which says that your power in this respect is simply a judicial power of the Order.

Another word of explanation: The constitution of this Order all the way through, is—as Webster characterized the Federal constitution,—an instrument of enumeration, not of definition. Do you suppose that the framers of our constitution, when they conferred judicial power upon the Commandery-in-

Chief did not know what it meant? Do you suppose they did not know that it did not mean the power to give an opinion upon this, that and the other thing, upon the mere request of any member of the Order? Can you not see that such a rule would be subversive of the rights of every member of this Commandery, and of the Order itself?

The constitution of the Order says that each Commandery shall have the power to adopt such rules and regulations for its own government as shall not conflict with the constitution of the Order. What does that mean? Why, simply that for purposes of local self-government each Commandery is supreme within its sphere—as limited by what? The only provision with respect to the election of officers is merely that the election shall be by ballot. Now what does that mean? Every man of experience knows that where you have in any Order an opportunity for *viâ voce* voting,—proxy voting,—an opportunity for voting in any way other than by ballot where every man expresses his opinion in some settled and distinct form,—you have an opportunity for carrying people off their feet, and voting for this man, or that man, who for the time being and for the moment may be popular; just as we elected officers in our Civil War—before we learned better—because this or that man was the popular hero of the hour; and we know what followed from that practice until we got rid of it.

Now here we present, as we think, a method of procedure strictly within our powers; an action which does not affect any other Commandery of this Order; an action which we say is in accordance with the constitution—that is, a vote by ballot. This is a provision under the operation of which the majority of the ballots shall elect. It is a provision under which, if the first ballot is not decisive, those present will cast the next ballot. We can not help nonresident members any further than that. We can give them an opportunity to vote in the first instance, with the privilege—if they do not want to vote for those nominated upon the official ticket—that they can vote for some other name. But this, gentlemen, is a mere matter of the working out in detail of the operation of this by-law, and does not change the question before us, whether or not the by-law is in accordance with the constitution.

I say, that it is not only in accordance with the letter of the constitution, but it is in accordance with its spirit in every way. How are you going to ascertain the spirit of the constitution? Why, from the instrument itself, naturally and of course. That is a plain legal proposition, which has always been a rule of law for time out of mind. If you look carefully through this constitution, you will find this: that, wherever else it touches upon a question of voting, it prescribes particularly how that vote shall be cast, namely, by a majority of the members present at a meeting—in every other instance; and there are some thirteen of them. Now we have a maxim of law which is a very good maxim in common every-day life—“*Expressio unius est exclusio alterius*”—the mention of one thing is by inference the exclusion of another. And in this constitution in every other instance where voting is specified you find prescribed the exact method of voting; but in this one instance where it touches local self-government of a Commandery, there is no definition, except the limitation to a ballot, and to a certain date.

Certainly there must have been some meaning to that. If it was the intention of this instrument to require the officers of a Commandery to be elected by the votes of those present, why didn't it say so? There are very good reasons why it did not say so; because it provides among other things that under certain circumstances 15 members may constitute a quorum for business. In the State of Ohio we have had a membership for many years past of about 900; our total vote for the ten years preceding, in any one year, up to the last election—and here I want to touch upon a remark of my friend, Major Van Dyke—the largest total vote in any one year was 147; the lowest vote in any one of the ten years was 62—out of a membership of 900. In the very first year of the operation of this letter ballot the total vote jumped to 267; next year the vote under it will be 500.

Can you say that is unfair or inequitable which is intended to give the widest possible opportunity for members of the organization to assert their rights? Can the gentlemen on the other side point to one single instance—and I challenge them to do it—where the operation of this by-law is unfair to anybody—where it infringes any rights of anybody?—where it in any respect is not equitable, fair and honest?

Gentlemen, there was a time when, with our guns upon our shoulders, our swords by our sides, we risked our lives in defense of principles of right, of fairness, of decency, of equity: shall we stultify ourselves at this late day by undertaking to set aside that which is in accordance with the letter of our constitution; that which by every proper consideration is in accordance with its spirit, and where no one appears to tell you that it operates unfairly, that it infringes anybody else's right, that it is not in every way conducive to the best interests of the Commandery?

I may for one moment address to one member of this Committee an argument applicable in the District of Columbia. There you have your whole membership confined within ten miles square: you may not find it necessary to adopt any such by-law as this, and you need not do so if you do not want to: but is that a reason why we should not adopt it in Ohio? We have our membership scattered all over the State of Ohio: we have in Ohio about 585 members, of whom 139—say 140 in round numbers—reside in Cincinnati. Our vote for ten years, excepting one single year, has not exceeded 140, and then it was only 147. We have outside of the State of Ohio in other States of the Union 269, if my memory is correct about the figures—but that is not very material, it is in that neighborhood—269. We have in foreign countries, 13: our total membership today is in the neighborhood of 800. Can you not see, therefore, how equitable and fair a thing it was for us, who realized that for twenty years the non-resident membership of this Commandery had been practically denied their power of voting for officers—there was nothing strange about it—that we should desire to extend to them a privilege which had been so long denied them. And how have we extended it? By simply extending the conduit of the ballot box to the voter. That is what we have done, and nothing else. We have simply made the postal service of the Government of the United States, which is the conduit for everybody's messages, the conduit for that message which bears the ballot of a member from himself to the tellers at the elections. That is what we have done. That man deposits his ballot in the ballot box just as much when he puts it in the mail in Cleveland, by every intendment of the law, as if he were here in Cincinnati depositing it in the ballot box here—if we had one! But we have none: we have

never had a ballot box. The tellers are the custodians of the ballots; and the man's vote sent by mail under cover, under seal and verified by his own signature, goes into the hands of the tellers intact.

Now who is there to complain? My friend, Major Van Dyke, suggests that he understands that a ballot is something that is "cast." Well, I do not want to enter upon a quibble of words. That goes back to the good old Greek times when the thing was done in that way:—when the ballot was inscribed upon a shell. But is there a member of this Commandery, or any one else, within sound of my voice that does not know that in every corporate body where a ballot is required there is a requirement that it shall be written upon a piece of paper? Is there anybody that does not know that the ballot which every American citizen deposits to register his will at the polls is a small piece of paper with names printed upon it? Why, it is idle to talk about a question of that sort.

With these very disjointed remarks, gentlemen, I will close what I had to say.

I think you will see that we are sincere in our desire and intent to maintain this by-law. We intend to maintain it if possible before the larger body by which you are appointed.

We have, with due respect—and we certainly feel very great respect for the personnel of this committee—we have felt it necessary that we should interpose our objection, which was somewhat technical, because we felt that this method of treating a judicial question has within its body, like the Trojan horse, naught but disaster to this Commandery. If judicial questions affecting vital issues like the constitution of the Order are to be referred to a committee under a resolution which makes no provision whatever for an argument or for any consideration except what it may see fit to give to it, how long is it going to be—not now—but how long will it be before somebody will take advantage of that and get something done which would be disastrous to this Order?

We are Americans all, gentlemen, and we propose to insist upon our rights. If we are tenacious of them, I know that this Committee will not consider that to our detriment. Our ancestry and our experience teach us to be a little careful and cautious about what we consider our fundamental rights. We think this

is a question involving fundamental right. We say there is no case here for your consideration, because there is no appeal here upon a judicial question. If these gentlemen had objected to this matter at the time, non constat, if they had presented sufficient reasons, it never would have been passed. But the record shows that it was passed unanimously. These gentlemen were present. Why did they not then interpose their objections? Are we to understand that my friends in their old age have become so modest that because the vote upon the affirmative of the proposition was so strong as to show the sentiment of the Commandery, that they did not have the manliness to step forward and record their protest against it?

No, gentlemen, this appeal—I think I am justified in saying, as a matter of inference from the record—was an afterthought; but whether it was, or not, it is nothing more than an effort to obtain from the Commandery-in-Chief an opinion, an abstract opinion, an academic opinion, that they have not any power to render.

Gentlemen, I think you very much for your attention.

ARGUMENT UPON THE MERITS BY GENERAL WARNOCK.

Mr. Chairman and Gentlemen of the Committee:

The Ohio Commandery, some months ago, believing it to be for the best interests of the Commandery, because of the fact that its membership was so very widely scattered, and in order that the Companions resident in other States and in distant portions of this State, should have some voice and some interest in the matter, passed a by-law by which a Companion desiring to participate in the election of officers might write in the ballot which was sent to him the name of each distinct office he desired to be filled, together with the name of his candidate for said office, and then place his own signature upon the ballot, seal and transmit it to the Recorder, the ballot to be counted the same as if the Companion himself were present. By that act no one was designated as his proxy. No proxies were authorized, as was indicated by the phraseology of the Order, which authorized the

existence of this Committee. There is no question of that kind involved.

There seems to be an utter misunderstanding of what we were complaining about, if anything, or as to who made the complaint, in the Order that was made appointing this Committee. The Ohio Commandery is not here complaining about its own action; on the other hand, the Ohio Commandery is here insisting that it did right, that it acted for the best interests of the Commandery, and that it had the right under the provisions of the constitution to enact its own by-laws and regulations, as is found on page 29, "Each Commandery shall have power to adopt rules and regulations for its own government which shall not conflict with the Constitution and By-Laws of the Order."

Now what was the reason for this action on the part of the Ohio Commandery? Outside of the city of Cincinnati and its immediate vicinity there is a total membership of 585 scattered among different States and scattered over the extreme limits of the State of Ohio, 300 miles away from this city. (A voice: "Some in foreign countries.") In the city of Cleveland we have 100 members, 300 miles distant from this place. It is a rare occasion that will bring out more than half a dozen men from that distant city. We feel that this large membership at Cleveland and Akron; 46 in the State of Tennessee; 26 in the State of Kentucky; 4 in Alabama; 10 in California; 9 in the District of Columbia; 8 in Louisiana; 21 in New York; 3 in Oregon; 10 in Pennsylvania—scattered as they are hundreds of miles apart throughout this country, and paying \$3,385 of the dues that are paid every year, and the membership living here paying only \$1,385—the Companions outside of this city thus paying two-thirds, yes, three-fourths of all the dues; and with the infirmities of age creeping upon them, all these men unable to come here are absolutely and utterly disfranchised under the old provision that we had. Isn't there any equity in this action? So universally was it conceded to be just and right that not a single dissenting voice was heard when that action was taken—not one. And we are told here that there was a respectable minority—yes! it was a minority. It was respectable, but it was so minimized that it would require almost a microscope to see it. They did not have the courage as they said, on that occasion to protest or to

give expression to any rights that they may have had; and three months after that date—three months—write a letter to the Recorder, asking that it be forwarded in the nature of an appeal; and that is the reason we say that there is no case before you, gentlemen. Many persons have lost legal rights by sitting silently by and not asserting them. It is a familiar principle, well known, that a person to preserve his rights must act with diligence in order to preserve those rights; and many persons have sat by and seen rights taken from them without uttering a word of complaint, and having been adjudged in that case to have been negligent, they have been given no relief. We claim that there is not any case for you to act upon; that there is no appeal that was taken until three months afterwards, and then only a letter by a single member of the Ohio Commandery.

Look at the equities in this case. Now it is said that this is in conflict with the Constitution of our Order. What is the provision of our Constitution? It is found in Article XI., Section 1, to the effect that the officers shall be elected annually by ballot. It is said that this mode of electing, of sending these ballots through the mails, with the man's name signed to it, upon the official ballot that has been sent to him to be filled out, is in derogation of the constitution. What is a ballot? Why, originally it did not mean anything about paper either printed or written upon; originally a vote by ballot was a ball deposited in a box; and if you stand strictly upon the technical meaning of the word "ballot," it must be a "ball." But since that ancient practice has long gone out of use we have now come to regard a "ballot" as a written or printed ticket. That is what it is. There is nothing in the meaning of the word that demands that it shall be cast in person, not a single iota. Let me give you an illustration of how modern usages and modern facilities have changed the method of not only voting, but in many instances in our court proceedings as well, we have passed the barbaric ages. We have passed those archaic times when men wrote on the bark of trees. We have now arrived at a liberal interpretation of these matters.

For instance, with regard to one institution of learning incorporated under the laws of Ohio, there is a provision that its alumni trustees must be elected by ballot. That institution is not simply an order composed of gentlemen who have banded together

for certain noble and patriotic purposes. It is a corporation organized under the laws of the State of Ohio. Now it has been decided by the courts that the provision regarding the election of the alumni trustees by ballot shall be interpreted to permit them to cast their ballots for such trustees by writing their preference on a piece of paper and putting it in an envelope and signing their own name upon it, and sending it in to the Secretary of the Board of Trustees; and it is there opened by him and counted, just as are the ballots of those present in person. (A voice: "It is sent by mail.") Sent by mail. The same is true of Yale and Harvard, institutions incorporated under statutory provisions.

Why, there is no such sacredness surrounding that word "ballot" as to impress upon it that old archaic usage. We have gotten out of that. At the present time the law permits even service on a witness to be made by telephone, and you may serve a man with notice involving his property rights by mail, although technically speaking a personal service is required. Why, so sacred have the United States mails become that its services are resorted to in all these matters that are vital to a man's personal and property rights. Yet they stand up here and say that a "ballot" is something that must be cast, as though there was something sacred in the manipulation of the paper, in dropping it into the ballot box which would be destroyed by any other way of getting it there. The United States mails is as sacred a medium as the dropping of a piece of paper into a hat, or a box, or upon a table; and I claim that there is not any provision of our constitution that is violated by reason of the fact that we have adopted the United States mail as a means of doing justice to more than two-thirds of the membership that has for years been deprived of the right of franchise. Let us see what the voters say: In 1894 there were only 105 votes cast; in 1895, there were 147; in 1896, 115; in 1897, 115; in 1898, 105; in 1899, 69; in 1900, 62; in 1901, 120; in 1902, 119, in 1903, 126; in 1904, the first year of the operation of this new provision, 267. Why, heretofore, under the old provision that required a man approaching, as the majority are now, three-score years and ten, to come 100 miles, or 200 miles, or 300 miles, in order to put a ballot in a box or on a table, permitting the 145 men who live in Cincinnati and who can come in person, to have the absolute power of dictating every

office and every measure that affects the vitality and the prosperity of this Order; and yet they were generous enough, magnanimous enough, at a meeting composed largely of those very same men, to say: "We will grant you the right—you gentlemen that live 100 miles from Cincinnati, you gentlemen that live 300 miles away, as 100 of them do in the northeastern part of the State, we will give you some consideration; we recognize the fact that the years have grown and that you have borne your share of the burden; you shall have a voice; you are paying two-thirds of the expenses, you are paying \$3,300 a year, and we are only paying \$1,300 here, we will let you have a voice in the affairs of the Commandery." Is there not equity in that, and justice, and right? The Military Order of the Loyal Legion was not created for the purpose of permitting a few men in Cincinnati, or in Philadelphia, or in any other city to dictate its policy and fill all its offices, and to run it to suit themselves. The rest of us have some rights, and are entitled to some consideration. The Ohio Commandery is not complaining about this very respectable minority for coming in at a late day; but we have a grievance when we say that we were all deprived of the constitutional right to make our own by-laws so long as they are not in conflict with the constitution of the Order, and that only provides that the election shall be by ballot. We claim we are voting by ballot.

Another thing: I find in looking through this constitution and by-laws, a great many other places where it speaks of the different votes. In one place it says, a vote shall be taken, and it shall require two-thirds of the members present at the meeting. I find, turning over to another place, in speaking of the vote, it says a majority vote of the members present. I find several instances where the constitution refers to a vote, that it shall be confined to the "members present." In no place where it requires a ballot to be taken does it require that the ballots shall be the ballots of the majority of those who are present. It does not say that—it does not say that. And where that is not expressly stated, as has been well said by Judge Hosea, in his opening, it not having been expressed must be excluded. So then we are fairly left to the inference that the framers of this constitution meant that it must be by ballot, but that it need not be by a ballot of "those present."

I do not like to consume further time in regard to this matter; but we do feel keenly here that we will be deprived of one of the rights granted us by the constitution if we are not permitted to do justice to these men who constitute the larger part of our membership and contribute two-thirds of the financial support to the institution.

In closing, gentlemen, I simply revert again to the proposition that this is an appeal taken after the adjournment of the Commandery of 1903, and that it comes up before the Commandery-in-Chief of 1904; that it is contemplated even by this Order which has been read in the record that your report is to be made to them, and I claim that *ab initio* the Commandery-in-Chief sitting in 1904 should originate the entire proceeding in this matter.

It is not a personal matter to this Committee, but it is a legal right that we have, to have the Commandery-in-Chief take such action and to name such committee, and if it be this Committee, we will be well pleased; but that we think it an infringement of our constitutional rights to have the Commandery-in-Chief sitting in 1903 appoint a general committee, a sort of *omnium gatherum* of grievances which they are to hear, and then make its report to the Commandery-in-Chief, before which committee we can only appear after your minds have been preoccupied. And I do not care how honorable a man is, if he has made up his mind, you have to efface what he has got in there in some way before he can hear the case impartially.

With these few remarks I respectfully submit the matter for your consideration.

GENERAL BROOKE: Anything further, gentlemen? If not, the Committee will go over the matter in their room.

Whereupon the Committee retired to consider.

THE BY-LAW APPEALED FROM.

BY-LAW III.

Nomination and Ballot for Officers.

Section 1. At the stated meeting of the Commandery in February of each year the Commander shall appoint a committee of seven to nominate a ticket to be voted for at the annual meeting held in May of each year.

This Committee shall be called together by notice from the Recorder at least sixty days previous to the annual meeting, when they shall proceed to nominate two Companions for each office (being ten for the Council) to be filled, and to report the same to the Recorder, who shall cause a copy to be posted in the office of the Commandery within ten days thereafter for the information of Companions. Within ten days after such posting, on presentation to the Recorder of a petition signed by at least ten Companions, asking that another Companion be named, such Companion shall be placed in nomination for any of the offices to be filled at said annual meeting. The Recorder shall cause such Companion so named to be forthwith so posted as a nominee for the office named in the petition. Such petition may name one Companion for each office to be filled at such annual meeting, and any number of such petitions may be so filed, but no Companion's name shall be counted as a petitioner if it appears on more than one petition recommending more than one Companion for the same office.

Sec. 2. At the stated meeting in April of each year the Commander shall appoint two tellers and two clerks of election, to serve as such, for the annual election of officers. In case of the disability of either of the tellers or clerks, the Commander shall fill the vacancy at the earliest date practicable.

The Recorder shall furnish said tellers and clerks a copy of the rules on this subject, by which they shall be strictly governed in the performance of their duties at said election.

Sec. 3. The Recorder shall have printed on one ticket the names of all Companions properly nominated in accordance with the provisions of Section 1, and forward a copy of the same to each Companion with his regular circular of announcements for the May meeting, with the request that he indicate with a cross (X) mark, in ink or with an indelible pencil, the name of the nominee for each office for which he desires to vote, seal the same, write his name on envelope and return the same to the Recorder in the envelope furnished him for the purpose.

Companions who do not so return their ballots by mail may vote in person at the annual meeting.

Sec. 4. Immediately after the reading of the minutes at the annual meeting the tellers and clerks shall take a convenient place in or near the assembly room of the Commandery; the Commander shall declare the polls open, and Companions present may then deposit their ballots, and the Recorder shall then deliver to the tellers all ballots of Companions received by mail, to be counted as ballots cast in person. When a reasonable time has been allowed for the casting of the ballots (to be determined by the Commander, or by the Commandery if objection be made to the Commander's decision) the Commander shall declare the polls closed; after which no ballots shall be received. The tellers and clerks shall then retire to a private room, ascertain the result of the ballot, and report to the Commandery; and those having a majority of the votes cast for each office to be filled shall be declared by the Commander as duly elected to serve during the ensuing year.

Unanimously adopted November 4, 1903.

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