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TUESDAY, FEBRUARY 11, 1868: THE DAY NORTH CAROLINA CHOSE DIRECT ELECTION OF JUDGES

A TRANSCRIPT OF THE DEBATES FROM THE
1868 CONSTITUTIONAL CONVENTION

EDITED BY
JOHN V. ORTH*

From its organization as a state in 1776 until the ratification of its second constitution at the polls in 1868, North Carolina elected its judges indirectly: the voters elected the members of the general assembly, who in turn elected the judges.¹ A provision in the 1868 constitution, substantially unchanged in the 1971 constitution, established the present practice of direct election of judges.² Amid all the problems North Carolinians confronted during Reconstruction after the Civil War, judi-

* Graham Kenan Professor of Law, University of North Carolina at Chapel Hill. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. 1977, Harvard University.

The editor would like to acknowledge two important debts: the first to Professor Joseph S. Ferrell of the Institute of Government at the University of North Carolina, who generously shared his copy of the transcript of the 1868 Constitutional Convention; the second to Edward L. (Tex) Harrelson, a UNC law student and the editor's research assistant for Summer 1991, who meticulously double checked the copy against the original newspapers in the North Carolina Collection of the University of North Carolina. Professor Ferrell is presently preparing a complete edition of the Proceedings and Debates of the 1868 Convention.

1. N.C. CONST. of 1776, § 13 provides:

That the General Assembly shall, by joint ballot of both houses, appoint judges of the Supreme Courts of Law and Equity, Judges of Admiralty and Attorney-General, who shall be commissioned by the Governor, and hold their offices during good behavior.

Id.

The tenure of the attorney general was changed to a four-year term by amendment in 1835. *Id.* art. III, § 4.

2. N.C. CONST. of 1868, art. IV, § 21 provides:

The Justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The Judges of the Superior Courts . . . shall be elected in like manner . . . , and shall hold their offices for eight years

Id.

N.C. CONST. of 1971, art. IV, § 16 provides:

Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified.

Id.

cial selection attracted relatively little attention. Delegates to the constitutional convention that met from January 14, 1868 until March 17, 1868 spent only one day on judicial selection. That debate proved conclusive: the decision in favor of direct election of judges was never thereafter seriously reconsidered. The constitution the convention recommended to the voters provided for it, so that, although the poll on April 24, 1868 was required to ratify that constitution, the method of judicial selection had for all practical purposes been settled earlier, on Tuesday, February 11, 1868, the day North Carolina chose direct election of judges.

Only a sketchy account remains of the proceedings of the 1776 Provincial Congress that drafted and adopted North Carolina's Revolutionary constitution, but judicial selection cannot have been a divisive issue. Direct election of judges was unknown at the time, so the choice was between legislative and executive selection. The three states whose constitutions most influenced the North Carolina drafters split on the issue, Pennsylvania and Maryland opting for executive appointment,³ Virginia providing for election by the legislature.⁴ On this issue North Carolina sided with its neighbor. Although an extensive overhaul of the 1776 constitution was accomplished in 1835, no change in judicial selection was even considered. By contrast with the paucity of records from 1776, the 1835 Convention left extensive documentation. Its *Proceedings and Debates* were carefully recorded and promptly published.

Perhaps in an attempt to emulate the record of the 1835 Convention, the Convention that met in 1868 appointed a reporter;⁵ the unsurprising choice was Joseph W. Holden, son of the Reconstruction

3. See PA. CONST. of 1776, § 20; MD. CONST. of 1776, § 48.

4. VA. CONST. of 1776 provides:

The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behavior.

Id.

5. Introduced on Monday, January 20, 1868 and adopted on Wednesday, January 22, 1868, the resolution "relative to the appointment of a Reporter," provides:

Resolved, That the Committee on Contingent Expenses be directed to contract with some competent person to report the proceedings of this Convention in a condensed form, and to cause such reports to be published in some daily newspaper of this City. And it shall be a part of such contract that if the Convention before the final adjournment thereof shall determine to publish such reports in book form, then the property therein shall be in the State; but if the Convention shall not so determine, then the property in such reports shall be in the Reporter and he shall be at liberty to apply for a Copy Right.

Resolved further, That such Reporter shall receive a compensation not greater than the daily pay of a member.

governor William W. Holden and publisher of the *North Carolina Standard*, a Raleigh newspaper distinguished at the time by its ardent support for the Republican Party. Holden prepared a circumstantial account of the day-to-day life of the Convention, which regularly appeared in his newspaper. Unlike the *Proceedings and Debates* of the 1835 Convention, Holden's account was never collected and bound in a single volume but remains to this day only in newsprint. In addition to Holden's account, other newspapers provided additional perspectives. Most notably the *Raleigh Sentinel*, the leading opposition paper, reported on developments as seen by Conservatives (soon to be called Democrats). Finally, the Convention itself published its *Journal of the Constitutional Convention of the State of North-Carolina, at its Session 1868*, a barebones account of motions, reports, and roll call votes. The transcript that follows is a composite of all three sources: the basic account from the *Standard* in ordinary type, additions from the *Sentinel* in italics, and additions from the Convention's *Journal* underlined. Emphasis is indicated by the presence of both italics and underlining. Footnotes and material in brackets have been added by the editor.⁶

When the curtain rises on the Convention, meeting in Commons Hall in The Capitol in Raleigh on that cold day in February, the delegates are immediately confronted with a striking reminder of the forces that caused North Carolina to reconsider its constitutional order: soldiers of the United States Army are warming themselves by the fire. Although the "Boys in Blue" withdraw, a Northern element remains, newcomers to the state attracted by the opportunities occasioned by Reconstruction, "carpetbaggers" with Midwestern accents. One speaks from personal knowledge about the elective judiciary of western New York State; another recollects the Ohio Constitutional Convention of 1851. Their origins are cast in their teeth during the debate: a delegate in favor of retaining judicial selection by the general assembly claims that all opposition to that system comes from men "not natives of the State," a charge indignantly denied by reformers of North Carolina birth.

Other voices are heard, new to political assemblies in the state but of unquestioned local origin. Black delegates are active participants in the Convention. Curiously, their presence is most faithfully recorded by their opponents. The *Raleigh Sentinel* denies these delegates the title "Mr." and adds a parenthetical indication of race. A leading Conserva-

6. In keeping with the standard form for reporting debates—the form also used in the 1835 *Proceedings and Debates*—speakers' surnames have been printed in capital letters. Minimal editing has occasionally been required in order to blend the three accounts into one readable transcript. Delegates' given names have been added in brackets the first time their names appear.

tive denies that a black delegate is a "person of character," "a man whom he could notice." The *Sentinel* reports that "HOOD (negro) had something to say and said it."

In the unsettled conditions of postwar North Carolina with so many new participants in politics and with the thorough disruption of traditional patterns, suspicions of corrupt practices are only to be expected. On the day direct judicial election is chosen, select committees are appointed to investigate charges of bribery and electoral fraud. Not only is the Convention distracted by such charges, it also operates as a special legislative body. Ordinances concerning railroad finance and raising revenue to pay the expenses of the Convention are adopted, and no less than three petitions for divorce are taken up and referred to the special Committee on Divorce.

Notwithstanding all their distractions, the delegates do manage to focus their minds for a few hours on the question of judicial selection. The Committee on the Judicial Department, under the able chairmanship of William B. Rodman, later Associate Justice of the North Carolina Supreme Court, admirably arranges the debate. The Committee had split three ways on the issue of judicial selection, some favoring direct election, others favoring selection by the general assembly, still others in favor of gubernatorial appointment with legislative approval. The issue is framed in three resolutions, and the debate begins with three speeches, each in favor of a different alternative. An important concern, ever present but more to the fore in 1868, is the need to minimize the risk of corruption. Beyond that lies the perennial problem in a democracy of reconciling judicial accountability with judicial independence. Reflecting on the judges' role, Rodman observes: "It was not intended for them to reflect the wishes of the people, but merely to administer that justice which the State owes to every citizen."

In the end, the elective principle triumphs. Popular sovereignty seems to the majority of delegates to require faith in the people; other states provide comforting examples of continued judicial integrity. Ever since 1868 North Carolina has elected its judges directly, although, as Rodman correctly foresaw, "if the election be left to the people, the candidates will be nominated by party conventions and the Judges become partizans," at least in the sense of retaining party labels. The decision made in 1868 is being reexamined today. As part of the informed debate on changing the method of judicial selection, it is fitting to look back at the debate more than a century ago. Despite all the unfamiliar and sometimes repellant side issues, the delegates address the crucial concerns that remain relevant today.

TRANSCRIPT

[Tuesday, February 11, 1868]

The Convention assembled at 10 o'clock A.M., the President [Calvin J. Cowles] in the chair.

Prayer was offered by Rev. Mr. [Haynes] LENNON of the Convention.

The President announced a quorum.

Mr. [Plato] DURHAM arising said, Mr. President, I would like to know by what authority armed men come into this room?

PRESIDENT, I do not know sir, but I suppose they are only sitting by our fire warming themselves.

Mr. DURHAM, it is not customary for armed men to be seen in any Legislative body, and is unknown in the history of this State.

Mr. [S.S.] ASHLEY, Mr. President, I do hope the United States soldiers will not be expelled from this Hall. This is a manifestation of venom against the "Boys in Blue."

Mr. [J.C.] ABBOTT, if I were in charge of the soldiers I would order them out, but as I am not, I can have nothing to do with them.⁷

Mr. [John Q.A.] BRYAN — I cannot see what objection the gentleman can take to the soldiers, except it be that they are simply sitting there. No man who behaves himself need be afraid. If the Conservative gentlemen will behave themselves they need not fear.

Mr. DURHAM said he would tell the gentleman he was not afraid of either him or the soldiers. The Conservative gentlemen on this floor were not of a "scary kind."

The soldiers retired.

The Journal of yesterday was read and approved.

On motion of Mr. [E.W.] JONES, of Washington,⁸ the PRESIDENT announced a committee to wait on General [E.R.S.] Canby, Military Commandant of this district, and tender him the compliments of this Convention, and invite him to visit it whenever it may suit his pleasure: Messrs. Jones of Washington, [H.L.] Grant of Wayne and [John] Read.

And the following committee in accordance with the resolutions of

7. Abbott was accustomed to command. A native of New Hampshire, he had organized the Seventh Regiment of New Hampshire Volunteers at the outbreak of the Civil War. From colonel he rose steadily in rank, finally becoming brigadier general in January 1865. He was mustered out in September 1865 and settled in Wilmington, N.C.

8. When more than one delegate had the same surname, he was distinguished in the reported debates by the addition of his county.

Mr. Durham passed yesterday:⁹ Messrs. Durham, Ashley, and [James H.] Harris of Wake.

HARRIS (negro) asked to be excused, but the President refused to make any alteration.

Mr. [J.W.] GRAHAM, of Orange introduced a petition of divorce. Referred to the Special Committee on Divorce.

Mr. [Henry M.] RAY a memorial from citizens of Alamance. Referred to the Committee of the three on the distillation of grain.

Mr. [S.D.] FRANKLIN, a petition from Mrs. E.V. Todd, of Raleigh, praying for a divorce. Referred to the Committee on Divorce.¹⁰

9. From Monday, February 10, 1868:

Resolutions by Mr. Durham:

WHEREAS, it is a matter of common rumor that corrupting influences have been used to secure the passage of certain ordinances which have been passed by this Convention; and whereas, if these rumors are true, it is the duty of this body to ascertain who are the guilty parties, and expose said corruption; therefore,

Be it resolved, That a Select Committee of three members be appointed by the President, whose duty it shall be to ascertain and report whether corrupting influences have been used to secure the passage of any ordinance, which has been passed by this Convention, and if so, the names of the guilty parties, and all the facts connected therewith. The said Committee shall have power to send for persons and papers, administer oaths and examine witnesses.

He said it was rumored on the streets, hotels and every where, that money had been used to induce members to vote for certain ordinances or ordinance. It is the duty of the Convention to inquire; and if true, the infamous name of the delegate should go down to posterity; and if by any corporation or individual that its name or the name may be also known. He did not believe that any one would vote against the resolution; and if any delegate had been so base as to receive a bribe, he hoped that it would become known, or if false that at least the matter would be investigated.

On motion, the rules were suspended and the resolution adopted.

From Thursday, March 12, 1868:

The Select Committee, to whom was referred the matter of alleged corrupting influences having been used to secure the passage of certain ordinances which have been passed by this Convention, ask leave to report that they have had the same under consideration, and that so far as their investigation has extended they have not discovered any evidence of such corruption.

P. DURHAM, Chairman.

10. AN ORDINANCE FOR THE DIVORCE OF ESTHER V. TODD AND BENJAMIN W. TODD.

Section 1. *Be it ordained by the people of North-Carolina in Convention assembled,* That Esther V. Todd, formerly Esther V. Walton, now wife of Benjamin W. Todd, be and she is hereby divorced from the bonds of matrimony with her said husband, and that she shall be at liberty to resume her maiden name; and this ordinance shall take effect from and after its passage.

Ratified this 13th day of March, A.D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

Mr. [W.B.] RODMAN moved that a divorce petition, laid on the table, be taken up and referred. No objection.

Mr. HARRIS, of Wake, a resolution:

WHEREAS, it is a matter of common rumor that Plato Durham, delegate "so-called," from Cleveland, obtained his election by the dishonorable use of a certain official communication of the Freedmen's Bureau surreptitiously obtained; and whereas, if these rumors are true, it is the duty of this body to expose and purge itself of this corruption; therefore be it

Resolved, That a select committee of three members be appointed by the President, whose duty it shall be to ascertain and report whether such a corrupting procedure was adopted to secure the election of said Plato Durham as a delegate to this Convention, and, if so, that all the facts connected therewith be reported, to the end that the delegate "so-called" may be dealt with.

Mr. HARRIS moved the suspension of the rules.

Mr. DURHAM said he hoped the rules would be suspended and the resolution adopted.

The rules were suspended, when

Mr. [R.W.] KING, of Lenoir, moved to lay on the table.

Mr. DURHAM said he hoped the resolution would go on record. If it came from a man whom he could notice, he would proceed to do so.

Mr. KING, of Lenoir, pressed his motion, when Mr. HARRIS, of Wake, opposed.

Mr. [Mark] MAY said he thought the resolution should now be adopted, as it foreshadowed frauds in the election of a delegate to this Convention, and it was due to his feelings that the resolution be adopted.

Mr. DURHAM thanked the delegate for his kind expression, but said the majority of the Convention could dispose of the matter as it pleased. If the matter had come from a person of character, he would have given more notice to it.

Mr. HARRIS, of Wake, said I will compare character with the delegate from Cleveland, and he cannot bear more contempt towards me than I towards him.

The resolution was not tabled.

Mr. RODMAN opposed its adoption. He said that Mr. King of Lenoir had truly expressed his sentiments. That the resolution was ill-timed no one could doubt. He hoped the Convention would regard the matter in a proper light.

A [query] arose as to the propriety of a withdrawal, when Mr.

HARRIS signified his willingness to do so if deemed best by the majority of his friends.

Mr. KING, of Lenoir, moved to indefinitely postpone.

Mr. [David] HEATON said as long as the resolution had been introduced and brought before the Convention, and in view of the wish of the gentleman from Cleveland, he desired the resolution should be passed. Inasmuch as it has come from a responsible gentleman who represented a large constituency, the matter should be inquired into. If Mr. Durham is guilty then he has no right to a seat in this Convention; if he is not guilty, then he can purge himself.

Mr. DURHAM said there were rumors afloat for many days before the passage of the ordinance in relation in the W.C. & R.R.R. Co.,¹¹ that

11. AN ORDINANCE REDUCING THE AMOUNT OF BONDS AUTHORIZED TO BE ISSUED BY THE WILMINGTON, CHARLOTTE & RUTHERFORD RAIL ROAD COMPANY.

WHEREAS, By an act of the General Assembly of the State of North-Carolina, ratified the 20th day of December, 1866, the Wilmington, Charlotte & Rutherford Rail Road Company was authorized to place upon its road way property and franchise, a first mortgage to secure an issue of bonds, not to exceed in amount four million of dollars, which mortgage has been duly executed and recorded according to the provisions of said act; and whereas, the State holds a second mortgage upon said road for two millions of dollars, to protect which interest it is manifestly essential that the bonds to be issued under said first mortgage should be reduced in amount and their value enhanced by the endorsement of the State, so that the Company may be enabled to complete its road: therefore,

SECTION 1. Be it ordained by the people of North-Carolina in Convention assembled, and it is hereby ordained by authority of the same. That the President of this Convention, or the Governor, or the Public Treasurer of the State, or either of them, be, and they are hereby authorized and directed, in behalf of the State, to endorse the bonds authorized as aforesaid to the amount of one million dollars, which endorsement shall be in words and figures following, to-wit: "The principal and interest of this bond is guaranteed by the State of North-Carolina by ordinance of the Convention, ratified the 5th day of February, 1868"; Provided, That the amount of the bonds issued by authority of the said act of the General Assembly shall not exceed in the aggregate two million five hundred thousand dollars; and the remainder of the authorized to be issued, to-wit: one million five hundred thousand dollars, shall be delivered to the President of this Convention, or to the Governor, or to the State Treasurer, and by him or them cancelled and destroyed, or that said one million five hundred thousand dollars of bonds shall be cancelled and destroyed by the Trustees of said first mortgage, and a certificate shall be printed upon each of the remaining bonds, certifying that two million five hundred thousand dollars of bonds are all that are issued, or authorized to be issued, under the deed of trust or mortgage delivered to them, and that the additional one million five hundred thousand dollars of bonds have been cancelled and destroyed, and that the said certificate shall be signed by each of the trustees; Provided [sic] further, That five hundred thousand dollars of the remaining two million five hundred thousand dollars of bonds be deposited with the Treasurer of the State, as collateral security of the State, for the above named endorsement, and if the said Wilmington, Charlotte & Rutherford Rail Road Company shall fail to pay either interest or principal of said endorsed bonds, so that the State

delegates were being bribed into its support. He had been a friend to the ordinance, so had many other Conservatives, and a large number of Republicans. Yet the charge of corruption was boldly made. He felt it due to the Conservatives to introduce the resolution yesterday. He had then said he hoped no members had been so base as to receive a bribe, but if there were one he desired that his name should be known. Insinuations were made that he intended to strike at certain men. It was false. He had no such intention.

Mr. HEATON, the gentleman certainly does not intend to apply such a word as false to me.

Mr. DURHAM, no sir, unless you insinuate that I intended to strike at any person particularly.

Mr. HEATON, I have made no insinuation.

Mr. DURHAM, well, I will state again that my object in introducing the resolution was only to ascertain who were guilty parties, if there be such. It was due to every member here that the truth be ascertained.

But as to the resolution under consideration, I hope the Convention will pass it. I know the object of it. It is an endeavor to cast odium on a Conservative, whom some on the other side would be glad to see leave the hall.

The motion to postpone was lost, when the resolution was adopted.¹²

shall become liable for the same by reason of said endorsement, and shall pay the same, then the State shall become the owner of said five hundred thousand dollars of bonds; but if the said Rail Road Company shall pay both interest and principal of said endorsed bonds, so that the State shall not become liable for the same by reason of its endorsement, then the said five hundred thousand dollars of bonds shall be the property of said Rail Road Company.

Sec. 2. Be it further ordained, That this ordinance shall take effect from and after its ratification.

Ratified this 5th day of February, A.D. 1868.

CALVIN J. COWLES, *President*.

T. A. BYRNES, *Secretary*.

12. From Friday, February 14, 1868:

The President announced the following Committees:

...

Committee to investigate the case of Mr. Durham.—Messrs. Harris, of Wake, [Geo. W.] Gahagan and Pool.

From Saturday, March 14, 1868:

The Committee appointed to investigate the election of Mr. Durham reported that they had failed to collect sufficient evidence to inculcate Mr. Durham. Mr. DURHAM arose and said:

I have to say, sir, in reference to this report, that from the beginning, the whole matter has been a most fraudulent and cowardly attempt to cast reproach upon my character and to prevent an investigation of the alleged fraud in passing certain ordinances which

Mr. ABBOTT from the committee to confer with Gen. Canby¹³ reported four resolutions back to the Convention, requesting to be discharged from their consideration. Granted.

have passed this Convention. Fearing an investigation of the charges contained in the resolution introduced by myself to investigate these corruptions, these charges of fraud in my election were trumped up by parties inside and outside this Convention to intimidate and drive me from that investigation. And, sir, I must be allowed to say, in the appointment of the delegates to serve with me on the Committee on investigation, it was the intention of the President to prevent a full and fair investigation, or it was intended as an insult to myself. If the latter, I can only say that I cannot be insulted in any such manner. The relations between one of the members of the Committee (Ashley) and myself were known by the President to be very unpleasant, and he also knew that I had refused from the commencement of the session to recognize the delegate from Wake [Harris], the other member of the Committee. And yet these are the delegates that the President appointed to serve with me upon this committee.

The appointment was intended to prevent investigation and insult me. But as stated before, I was not insulted, nor can I be from any such source. It was my intention at first to refuse to meet these delegates. Soon afterwards, threats of violence were indicated if the investigation shall be proceeded with. I then convened the committee, merely because these cowardly threats were made.

The resolutions in reference to my election, introduced by the black scoundrel from Wake, were conceived in iniquity and fraud, not by him alone, but by certain parties outside of this Convention, who, when they could not combat the arguments of honorable men, resorted to this dastardly and lying manner to cast reproach upon my private character. And when the delegate from Pasquotank (C.C. Pool) signed the report without any evidence or ever a meeting of the committee, he acted most unbecomingly, to say the least of it.

Briefly, in conclusion, I say, as I am not allowed to proceed, without interruption, that the remarks I have made are only intended to expose the infamous fraud and damnable rascality which prompted those who originated this base attempt to heap odium on my character. Not that I regard your action, whatever it may be, for, sir, if the committee had reported that the allegations were true, I should have considered it a distinguished honor coming, I say, from such a source.

Mr. GRAHAM of Orange said that he was surprised at such a disrespectful report, reflecting upon the character of an honorable gentleman (Mr. Durham). He hoped that the majority of the Republican party on this floor would be careful enough of their character as gentlemen not to entertain this report for a moment, but send it back to the Committee from which it came, and if they should report at all, compel them to present a decent and respectable one. He (Mr. Graham) had always yielded due courtesy to the opposite side, and he would demand and insist on proper courtesy being paid to the Conservative gentleman.

After a long discussion, the report was recommitted to the Committee, with instructions to collect all the evidence in the matter and present it with their report.

Mr. COWLES vacated the Chair, took the floor, and entered into a long vindication of himself from charges of partiality brought by Mr. Durham.

Mr. DURHAM arose and repeated, in sum and substance, those charges, and said that while he deprecated the necessity of having been driven to the strong language, yet he had nothing now to apologize for—gross injustice and clownish discourtesy had characterized almost the whole of the proceedings of the Convention.

13. Not to be confused with the committee, appointed earlier the same day, to invite Gen. Canby to visit the Convention, this committee had been named on Wednesday, January 22, 1868 to consult Gen. Canby "upon any subject relating to the public interests."

Resolution of Mr. [A.W.] Tourgée in relation to staying of certain debts,¹⁴ reported back to the Convention without recommendation, since its purpose is comprehended in another resolution; resolution of Mr. [J.W.] Ragland on relief,¹⁵ transmitted to Major-General Canby; petition of Cooper Haggins, presented by Mr. [Edwin] Legg of Brunswick,¹⁶ reported back to the Convention.

Mr. HARRIS, of Wake, an ordinance to prohibit for a limited time the sale of property under a mortgage or deed of trust.

He said the reason for offering this ordinance was that sales were being urged in various counties, under deeds of trust and mortgages, which the relief ordinance passed before by this Convention did not prevent.¹⁷

The ordinance was referred to Committee on Relief, with instructions to report at an early date.

Mr. HARRIS, of Wake, a resolution to limit speeches to 15 min-

-
14. From Thursday, January 23, 1868:

The following resolution, introduced by Mr. TOURGÉE, was adopted.

Resolved, That the Committee appointed to confer with General Canby be instructed to enquire of him whether he would enforce an ordinance of this Convention, or upon its recommendation would issue an order staying the collection of all debts, except in cases of fraud, and wages for labor performed since May first, 1865.

15. There were actually two resolutions introduced by Mr. Ragland.

From Saturday, February 1, 1868:

Mr. Ragland offered the following resolution:

Resolved That the Committee appointed to confer with General Canby, be directed to inquire whether notes and bonds given since May 1st, 1865, in renewal of debts contracted prior to that date are subject to the power of General Order, 164.

On motion the rules were suspended and the resolution adopted.

From Thursday, February 6, 1868:

Mr. RAGLAND introduced the following resolution for relief:

Resolved, That the Committee appointed to confer with General Canby, be authorized to request him to stay the ruinous execution on new debts contracted since the 1st of May, 1865, so that property may not be sacrificed for less than its intrinsic value, and make an order to that effect, for the temporary relief of the people.

Put on its passage and adopted.

16. From Saturday, February 8, 1868:

Mr. LEGG presented a petition for relief from Cooper Haggins, of Wilmington, North-Carolina.

Referred to the Committee of three to confer with General Canby.

It cannot be determined from the records whether the petitioner's name was Haggins or Haggins.

17. Technically an ordinance "respecting the jurisdiction of the courts of this state," the ordinance of Wednesday, January 29, 1868, was known as the relief ordinance because it gave debtors relief by denying the state courts jurisdiction over contracts made before May 1, 1865.

utes. Laid over.¹⁸

On motion leave of absence was granted to Mr. Turner until Friday, and to Mr. Hood from Thursday until Monday.

Mr. JONES, of Washington, Chairman of the Committee to wait on General Canby, reported that they had called upon the General, and he stated to them that he would take pleasure in visiting the Convention on Wednesday at 11 o'clock.

[SPECIAL ORDER]

The following report of the Committee on the Judicial Department was taken up for consideration:

The undersigned members of the Committee on the Judicial Department respectfully report:

That there exists among the members of the Committee wide differences of opinion on fundamental points respecting the proper organization of the Judicial Department of the State government.

The most essential points of difference are two:

1st. In respect to the mode of appointing Judges. Some gentlemen think they should be elected by the people; others by the General Assembly; and still others, that they should be appointed by the Governor, with the consent of the Senate or of the General Assembly.

2d. In respect to retaining or abolishing the distinction between actions [at law] and suits in Equity, some gentlemen think such distinction should be abolished, and that there should be but one form of civil action.

It is not intended now to present any argument for or against any of these views, or even to express the opinions of the undersigned respecting them; but merely to state them.

If the opinion of the Convention can be obtained on these two points, the undersigned are of opinion that the Committee will have no further difficulty of agreeing substantially upon a plan for the organization of the Judicial Department of the government.

For the purpose of obtaining an expression of the opinion of the

18. After many tries by various delegates a motion limiting speeches was finally adopted. From Thursday, March 5, 1868:

The following resolution of Mr. [Saml.] FORKNER, limiting debate was taken up for action:

Resolved. That no delegate shall speak more than once on a question nor longer than fifteen minutes except it be by consent of Convention.

Mr. HOOD moved to strike out "fifteen" and insert "ten."

Adopted.

The resolution as amended was adopted.

Convention, the undersigned herewith submit, in the shape of resolutions, affirmatives of each different view. A vote of the Convention either way upon any one of these, will be received as a guide to the Committee upon the matter concerned, covered by the resolution, and they can then proceed to frame a plan of organization conformably.

Will. B. Rodman;

S. W. Watts;

C. C. Jones;

A. W. Tourgée;

G. W. Welker;

A. W. Fisher;

R. W. King;

W. H. S. Sweet;

T. L. L. Cox;

E. B. Teague.

1. Resolved, That it is the sense of this Convention; That the distinctions between actions at law and suits in Equity, and the forms of all such actions and suits shall be abolished, and there should be but one form of civil action.

2. Resolved, That it is the sense of this Convention; That the distinction between actions at law and suits in Equity, now existing should not be abolished.

1. Resolved, That it is the sense of this Convention; That Judges of the Supreme and Superior Courts of the State should be elected by the people.

2. Resolved, That it is the sense of this Convention; That Judges of the Supreme and Superior Courts should be elected by the General Assembly.

3. Resolved, That it is the sense of this Convention; That the Judges of the Supreme and Superior Courts should be appointed by the Governor, with the consent of the Senate, or of the General Assembly.

The resolutions in relation to the Supreme and Superior Court Judges was [sic] first taken up.

Mr. RODMAN said the committee submitted these three propositions in order to obtain the sense of the Convention. It would then proceed to frame a report in conformity thereto. He favored the appointment of Judges by the Governor and their confirmation by the Senate. There was a vast difference in the duties of the officers of the Executive and Legislative departments, and the officers of the Judiciary department. It was necessary to the existence of a Republic [sic] government that the first should be elected by the people — for the one repre-

sents the will, and the other the sovereignty or power of the people. The judges represent neither, but only the justice of the government. It was not intended for them to reflect the wishes of the people, but merely to administer that justice which the State owes to every citizen. Every reason urged for their election by the people seemed to him to fail entirely. The qualifications of a good judiciary are that they must be learned in the law, wise to apply it, independent, honest and fearless to enforce it even against the people upon some occasions. The judiciary should therefore be proof to any temptation, for not infrequent popular clamor has denounced an honest Judge for the fearless enforcement of the law, when afterwards at cooler moments candid men have confessed a higher respect for him. And indeed should a Judge condemn an innocent man or refuse to execute the law upon the guilty, he is held in anything but esteem. The question then recurs how best to obtain proper men to perform these high functions? The great mass of the people are unacquainted with those whose qualifications are superior for such exalted positions. At any rate if the election be left to the people, the candidates will be nominated by party conventions and the Judges become partizans. Often such conventions might put in nomination and into office influential politicians for the sake of votes. Therefore, it seemed to him on reflection that the best mode was that indicated by the U.S. Constitution, which allowed the President to nominate and the Senate to confirm. Now the Governor of North Carolina may not be acquainted with eminent jurists, but he could easily learn, and if it might happen that purposely or not he appointed a bad man, the Senate would correct. The Senate of North Carolina would not knowingly pass an unworthy candidate, and its members coming from all parts of the State, it would be well qualified to judge. Still it might be alleged in the instance that the Governor would nominate partizans. Probably that was an evil from which more or less there was no escape for the people of this country, and yet there was less danger of a Governor transgressing in this respect than a mere party convention.

The experience of the elective judiciary in other States also shows that such a system tends to impair the purity and wisdom of the bench. In New York for twenty years, the judiciary has been elective,¹⁹ and the almost unanimous voice of the profession and the public in that State pronounces the verdict that it has deteriorated. It is neither so pure or so wise as it was before. There the terms are very short. Here it is proposed

19. New York State had adopted the direct election of judges for eight-year terms in 1846. N.Y. CONST. of 1846, art. VI, §§ 2, 4.

to make them longer, which may somewhat relieve the evil, but could not eradicate it entirely.

He hoped no delegate would think that he took this view because he was opposed to the democratic ideas or the progressive spirit of the age. He was in full communion with those ideas and that spirit, but he now desired above all things to give the people of North Carolina the best form of government, and in doing so he would rely confidently upon their wisdom to confirm it.

Mr. [A.W.] TOURGÉE said he was a Republican by habit, instinct and reason. The people were best able to govern themselves, and he believed with Aristotle that in a Republic was the greatest wisdom. If the people were competent [to] choose officers to make and execute the laws, he held that they were competent to choose officers to interpret the laws. He would be untrue to the highest principles of free government if he should ever be led to approve anything less than that.

The delegate just seated had admitted that the people were competent to choose the makers of the law, and were the people then incompetent to choose the interpreters of the law? He held that the maker of the law was higher than the interpreter. To his mind the whole principle was plain. Not only have the people the virtue and intelligence to elect a part of their officers, but the virtue and intelligence to select all. If incompetent to choose one, they were incompetent to choose all, for the principle applies to all offices.

Now as to the proposed remedy that the Governor appoint and the Senate confirm he would simply reply by asking a question. Are the people more corrupt than their representatives? Are the people more easily bought than the Governor? If the people are corrupt all the departments of government are even more corrupt than they are.

New York had been referred to. Should that city—a modern Sodom—ever be cited in a question of law! From the circumstances of its position, it was and had been under the control of corrupt men. But that did not prove the elective system wrong in principle; though connected as it was in this instance with short terms, it might be considered dangerous. But in Western New York, from the Speaker's own knowledge, he could say that the character of the bench enabled him to confute all such charges. From what he had seen there, he was convinced of the excellence of the elective judiciary.²⁰

20. A native of Ohio, Albion W. Tourgée (pronounced Toor-ZHAY) was enrolled at the University of Rochester from 1858 to 1861. After a few months of teaching in Wilson, N.Y., he enlisted in the 27th New York Regiment. During intervals in the war, he read law and was admitted to the bar of Ohio in May 1864. Perhaps Tourgée was referring to some incident of his student days, or perhaps he was referring to some more recent events of which he had

In the New England States, it may be said there were examples against elective judiciary. But those States were so small that the Legislatures represented almost every town and village. But that does not prove that the election by the people is not best here. The people of this State clamor for an elective judiciary.

As to partizan judges and political influences, he could cite the recent election of Judge Sharswood, of Pennsylvania.²¹ Many men of opposite politics voted for him because he was an able jurist. Then in Ohio, he was aware of another equally marked instance. The people know who are best prepared to be Judges. If they elect, then it will be impossible to lobby into a Judge's position or use whiskey to seduce Legislators. The whole people cannot be thus corrupted.

If the Legislature had the appointment of Judges, with the notorious bargains and sales, Tammany Hall would buy up the Judgeships.²²

When the people choose a Judge and he proves false, they will not be mistaken in him again. They will know where the remedy lies.

In Pennsylvania and in Ohio, eulogies were pronounced by the Chief Justices on the admirable workings of the elective system. In all the young Western States, under the same fostering influence, the judiciary had early risen to renown. He did not claim that they were in all respects equal to the older ones, but in growth year for year they had shown themselves to be superior.

He had no prejudices against election by Legislature or appointment. If anything, his education had been in an opposite direction. But what he had seen had changed him into an ardent advocate of the elective system. Adopt that, and it would be the great step towards the establishment of a government of the people, by the people, for the people.²³

personal knowledge. The definitive biography of Tourgée is OTTO H. OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE* (1965). For a group portrait of various carpetbaggers, including Tourgée, see RICHARD N. CURRENT, *THOSE TERRIBLE CARPETBAGGERS* (1988).

21. George Sharswood commenced his term on the Pennsylvania Supreme Court in January, 1868, barely a month before Tourgée spoke. Although he had begun his judicial career in 1845, when the Pennsylvania judiciary was still appointive, he maintained his place under the elective system; in 1851 he had been endorsed by no less than five political parties. See *George Sharswood*, in *IX AMERICAN DICTIONARY OF BIOGRAPHY* 28-29 (1964).

22. At the time of Tourgée's speech, Tammany Hall, the famous and famously corrupt Democratic political organization in New York City, was under the control of William M. ("Boss") Tweed, who was elected to the New York State Senate in 1868.

23. Quoting from the famous peroration of President Abraham Lincoln's Gettysburg Address of November 19, 1863, Tourgée associated his cause with the then recently martyred Republican President. Delegates would also have recognized the allusion to the Battle of Get-

Mr. JONES of Washington said the election of Judges of the Supreme Court should be retained where it now exists, to wit, with the General Assembly. This system has always worked well, and the objection to a system that has worked well should show that the change contemplated would work better. There are few questions that will engage the attention of this people and country more important than that of the judiciary. How, and by whom they shall be chosen are questions of the greater practical importance. The doctrine that all power is vested in the people,²⁴ and that they should therefore subject every official to the popular vote, is not the one that has obtained universal acceptance in the election of Judges. Hence it is necessary to know how far the power of the people extends. And because that power may be exerted, either for good or evil, therefore the judicial ermine should be as far removed as possible from popular contests, and from the taint of partizan contact. He would concede that every man in the body politic was a sovereign, and while it was necessary under the present system to bring every thing down to the ballot, yet it was also important to know when that power should be limited. We talk of democracy—but what did democracy mean, any less than licentiousness; and licentiousness, any less than corruption? When in the history of North Carolina has it ever been contended that the judiciary were ever in the hands of the people? But with a competent judiciary, organized upon a rational basis, free from party influence, with a security against frequent changes, we may defy the fury of the storm. The waves of faction may then dash against the ship of State, and she will sail on proudly and successfully in the great current of prosperity and advancement. But inasmuch as reference has been made to the condition of things heretofore, he would ask, does the present condition of things require that the judiciary should be brought down to the level of the people? If so, it had not been demonstrated to him.

Again, in proportion as the civil code has been violated, so have the people gone farther from virtue into the pathes [sic] of vice. The election of Judges therefore by the people will have a tendency to lower the standard of integrity and public virtue; and also the high order of intellectual qualifications and talent to fill this office. Let every man who is twenty-one years of age have the power and privilege to elect Congressmen, Governors and members of the Legislature; but men who must sit down

tysburg, the turning point in the Civil War, for whose victims Lincoln dedicated the vast national cemetery.

24. Cf. N.C. CONST. of 1776, Declaration of Rights, § 1 ("That all political power is vested in, and derived from, the people only."). The idea is repeated in N.C. CONST. of 1868, art. I, § 2, and N.C. CONST. of 1971, art. I, § 2.

and interpret laws, let them be elected to office by more responsible persons than the mass of the people.

It is necessary that the Judges should be independent, for after all, a Judge is but a man. And unless he is removed from party influence, he cannot exercise the authority vested in him impartially and righteously. They had seen the advantage of wealth over poverty. The duty of the Judge on the bench is to protect poverty. It is not desirable that the people should so control the Judge, as to limit the power, by which alone he could furnish that protection which poverty expects from him. Three plans for election have been proposed, viz: by the people, by the Legislature, and by the Governor. On this second platform, he stood flatfooted. Let the Legislature appoint the Judges and not the Governor. He had always been opposed to a great consolidation of power, in the hands of any one man. The people of North Carolina when assembled in Legislature are just as apt to know what man is best to be their Judge as the Governor. He (the Governor) must have favorites as well as all men had. If then the power resides in the Governor of North-Carolina, he may abuse that power. The Legislature was less apt to do this. It was not so easy to be corrupted. He did not care if the people elected other magistrates and officers, but Judges were different and should be elected by the Legislature, because it was the securest. He would not grant additional power to the Chief Executives; indeed he did not attach so much importance to the office of Governor. When there has been a departure from the old system, and consequently a subjection of the Judges to the uncertain and variable vicissitudes of popular prejudices and elections, there has been a corresponding depreciation in public morals and private virtues. For these reasons, therefore, he would have the delegates think well before they voted.

Mr. HEATON said the purity of the judiciary of North Carolina had been long known, and adding to that the fact that the people of this State were much attached to old customs and established usages, he would discuss this question as calmly and fairly as possible. In Ohio, if he was allowed to cite that instance, the elective system had met with eminent success.²⁵ He recollected well, when in the Convention of 1851 of that State, this question was mooted, the same forebodings uttered by the gentlemen to-day had been set forth there also. The present Attor-

25. David Heaton was born and raised in Ohio. After attending Miami University in Oxford, Ohio, in 1841-42, he read law and was admitted to the Ohio bar. Until 1857 he practiced law in Middleton, Ohio, sometimes serving as justice of the peace. He served one term in the Ohio senate, 1855-57, before moving to Minnesota; in 1863 he moved to North Carolina. See Max Williams, *David Heaton*, in 3 *DICTIONARY OF NORTH CAROLINA BIOGRAPHY* 91 (William S. Powell ed., 1988).

ney-General and other distinguished jurists were members of that Convention. After a long discussion, the elective system was adopted, and judges had been chosen by the people whose character and fame are well known throughout the country.

But he doubted under present circumstances the adoption of the system here. He thought it the safer plan to pursue the method laid down in the United States constitution. Let the Governor nominate and the Senate confirm. And to say on the other hand, that the only safe plan was to elect by the Legislature, was a grave error. Legislatures were as liable to be corrupted as any. But he thought the medium ground to be the best. It would not shock a people, attached to old customs perhaps more deeply than any other of the Union. He hoped, therefore, that the Convention would decide that the Governor shall appoint and the Senate confirm.

Mr. ABBOTT said the judiciary of this state had stood high among the others in the Union. If the people had always elected their judiciary, it would be well enough to retain it now, but to adopt such a measure would be a very long step in advance indeed. The people were accustomed to appointment or elections by the Legislature, and the members of the bar as well as the public would no doubt oppose any great change. Most probably the delegate from Craven [Heaton] was nearest being correct. And when the delegate from Guilford [Tourgée] said that it was anti-republican not to elect the judiciary, he was in error.

Our government was not a pure democracy, with all its laws and offices forever fresh from the people. It was a combination of the democracy with sufficient power to keep the turbulent in check. It was evident that from the present, the power of the general government must be strengthened, without infringing the liberty of the masses. The people are liable to phrenzy, and the arm of authority should be ever outstretched to protect the integrity of the government.

The fewer persons to whom the Judges were under obligations, the better officers they would be. They would not be so liable to partiality.

The Convention should also draw a distinction between delegates and Judges. The first are the agents of the people. But the Judge comes out fortified by principles of eternal justice, and should not be influenced either way save by abstract and guiding principles. In times of popular phrenzy he had much rather repose on a Judge, who was free and untrammelled, than on one who was likely to go up and down with the popular temper like a thermometer.

The Governor will not be apt to appoint a bad man or the Senate confirm such a one. On the whole, he considered that method preferable.

While he said this, he did not disguise the fact that there was a growing feeling among delegates to give the election of all officers to the people, nor the great fact which ever protrudes itself, that more and more power comes from the people. He stood here not to combat this, but to say that in this instance, he thought it safer and more judicious to allow the Governor to appoint and the Senate to confirm, as these days come directly upon the heels of turbulent times.

In some States, the election of Judges by the people worked well, in others badly. In Vermont, where the people were educated, they had a very respectable elective judiciary.²⁶ In New York, it was universally conceded that the decisions of the Court and the character of the bench had been constantly lowering. If the elective system was to be adopted here, there should be at least long terms of office adopted.

Mr. [C.C.] POOL said that he was unwilling to allow this discussion to pass without entering his protest against the elective system. The gentleman from Guilford [Tourgée] said that such opposition was anti-republican. For the same reasons, doubtless, the delegate had objected to the declaration of independence. He had no reverence for the past.

Mr. TOURGEE — I object to the statement of the delegate. I opposed the section of the declaration because it was untrue.²⁷

Mr. POOL did not intend to misrepresent any one. But the delegate

26. Vermont had led the nation in direct election of judges. Lower court judges were elected there from 1777. *See* VT. CONST. of 1777, § 27.

27. On Saturday, February 8, 1868, the Convention had received the report of the Committee on a Preamble and Bill of Rights (of which C.C. Pool was a member). It had proposed including in the constitution a section based on the most famous lines of the Declaration of Independence:

SECTION 1. That we hold it to be self-evident, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

During the ensuing debate, in which the proposal became entangled in the question of the equality of the races, Tourgée offered the following amendment:

Strike out "that we hold it to be self-evident," in line first, also in line second, strike out "are endowed by their creator with certain inalienable rights," and insert, "are created free and equal in rights, certain of which are inalienable."

He said in the broad sense, the words of the declaration were heretical. But it is true that all persons are born free and equal in rights. That is all the Constitution had to deal with—the rights. He thought it therefore a better enunciation of the idea. He would also move to strike "self-evident &c." as it was cumbersome. In New Hampshire, they had varied from the declaration and in other States also. He hoped his amendment would be favorably considered, also because of its compactness.

Tourgée failed to persuade and finally withdrew his amendment. After debate the section was conformed even more closely to the Declaration of Independence, and in this form finally adopted:

SECTION 1. We hold it to be self evident that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are

had no respect for the past. He deemed innovations a benefit simply because they were changes. Now in the past there had been great men. And if it was anti-republican not to elect the judiciary, those great men had set up an anti-republican government in the United States. It was best to conform all the State governments as nearly as possible to the general government. Their government was a wheel within a wheel, and should conform as nearly as possible to the general government. Now the great judges who had adorned the bench in this State were elected by the Legislature, and it was generally so elsewhere. There were a few exceptions under the elective system, but in the present temper of the people he doubted whether it would be so now. At first all the States had adopted the Legislative elective system, and not until education became general did they dare to change. Not only were there seventy thousand new voters now, but the public mind was incited against that article of the constitution forbidding the impairing of contracts.²⁸ Under the elective system, with such a feeling abroad the delegate from Chatham, Mr. [J.A.] McDonald, could beat the best lawyer in the State for a judgeship. Ten years hence, this change might be favorable, but he now hoped the Convention would adhere to old forms. It was dangerous to submit too many issues to the people. The Convention should stand to the old constitution as nearly as possible. And in doing so, let the State Constitution be conformed as nearly as possible to that of the general government. And no State had presented a more untarnished reputation than the judiciary of North Carolina. After this discussion, he thought a compromise might be reached, to allow the Governor to appoint the Supreme and Superior Court Judges, and the people elect the magistrates.

Mr. [Samuel W.] WATTS held that neither of the plans were good. It seemed to him that a judicious compromise might be affected. For instance, the appointment by the Governor of the Supreme Court Judge, confirmed by the Senate; the Circuit Judges and the Magistrates to be elected by the people.

Mr. [G.W.] WELKER said the people of North Carolina were quite well qualified to vote intelligently for men to fill Judicial offices of great importance. Were the gentlemen, natives of this State, upon this floor prepared to declare that their constituency were not as intelligent and capable as the people of Ohio and other Northern States?

Mr. [Joseph H.] KING of Lincoln was opposed to any change in the

life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

The provision remains substantially unchanged to this day. See N.C. CONST. of 1971, art. I, § 1.

28. See U.S. CONST. art. 1, § 10, cl. 1.

present system. He had seen that all opposition to the present system came from men not natives of the State, and that, in his opinion, was a strong argument that the present system was good enough. He thought their strong opposition to it came from the fact that they were aspirants for the honors. He was opposed to any change.

Mr. [Isaac] KINNEY said he was a native born citizen of the State and he was very much in favor of electing all State officers by the people.

Mr. [Jacob] ING endorsed every word that Mr. Kinney had uttered; he was in favor of electing every officer in the State by the people.

Mr. [Abraham] CONGLETON ditto.

Mr. MAY said he represented a large white constituency [Macon, Clay, and Cherokee] and they were to a man, almost, in favor of electing all officers.

Mr. BRYAN wished to place himself in the same category.

Mr. HEATON said that Mr. Welker had drawn a wrong inference as to the spirit of his remarks; he did not intend to reflect upon the intelligence and capability of the people of North Carolina, etc.

[J.W.] HOOD (negro) had something to say and said it.

Mr. [R.F.] TROGDEN came here pledged to vote for the election system and thought its adoption would do more toward the ratification than anything else.

Mr. GRAHAM, of Orange, hoped the vote upon the subject would not be pressed today and moved to postpone until Friday next, and that it be made the special order for that day.

Mr. [D.J.] RICH opposed the postponement; also Mr. MAY, who thought it a waste of time.

The question on postponement was put and voted down.

[A.H.] GALLOWAY (negro) favored election by the people. He said that he would make an assertion, and was personally responsible for it, that the Judiciary in New Hanover was a bastard born in sin and secession. In their eyes, it was a crime to be a black or loyal man. He said that the Judge of the Criminal Court had already sent men to the work-house merely to prevent their voting upon the ratification of the Constitution.

Mr. GRAHAM said: As there seems to be a determination, on the part of the Convention, to force a vote upon this question today, I must enter my protest against such a Radical change in our government. It is not required by the Reconstruction Acts²⁹ and I do not believe is de-

29. Federal legislation required the selection of delegates by the state's male citizens, black as well as white, except those disfranchised for rebellion or felony, and stipulated further that the resulting state constitution must extend the suffrage on the same basis. Act of March

manded by our people. If there is anything in the past history of our State of which we are justly proud, it is the high character, learning and independence of those who have adorned the bench of our Supreme and Superior Courts. It is needless for me to mention their names. They are known, not only throughout the States of the Union, but in other countries, and I believe our people would see, with many feelings of regret, a system, from which they have derived so many benefits, supplanted by one which, to say the least, does not come well recommended. But it does seem to me, that it is only necessary that a part of our Constitution should be especially dear to our people to secure its destruction by this Convention.

I will also venture to assert that our present Judges give very general satisfaction and that there is no just cause of complaint even from colored persons or those who are called loyal men. I fear we shall never again see such men in office if the appointment of those who are to administer justice is controlled by all the passions and prejudices which have heretofore and will more especially hereafter sway our elections. But as this matter is pressed at this late hour, without allowing an opportunity for that full and free discussion which its importance demands, I enter my protest against it.

Mr. [Henry M.] RAY would favor the election by the people. Men had been murdered in his county [Alamance] by being condemned without proper evidence.

Mr. ASHLEY thought the matter ought not to be pressed today; time enough had not been given to consider the matter as it should be.

Here an effort to adjourn was made, but was lost.

Mr. ASHLEY continued, and, in advocacy of the elective system, he cited the example of Chief Justice Taney who outraged the whole country by his iniquitous decisions.³⁰ Even death itself would not take him for a long time, and if it had not been for the great love of the Northern people for the Union, they would, on his account, have burst asunder the bonds that held the Union together. If he was forced to vote today, he would support the elective system.

Mr. HEATON moved as a substitute for the first resolution [election by the people], the adoption of the last resolution [appointment by the Governor].

11, 1868, ch. 25, 15 Stat. 41; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of March 23, 1867, ch. 6, 15 Stat. 2; Act of March 2, 1867, ch. 153, 14 Stat. 428.

30. Roger Brooke Taney (1777-1864), the long-lived Chief Justice of the U.S. Supreme Court, was infamous in abolitionist circles for his pro-slavery decisions, among them the Dred Scott Case, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding blacks ineligible for U.S. citizenship), and *Abelman v. Booth*, 62 U.S. (21 How.) 506 (1858) (holding Fugitive Slave Act of 1850 constitutional).

Mr. JONES, of Washington, moved to take out the second resolution [election by the General Assembly], and make it a substitute for Mr. Heaton's substitute.

The yeas and nays were demanded.

The section [election by the General Assembly] was not adopted by a vote of yeas 30, nays 72.

Those who voted in the affirmative are:

Messrs. Abbott, Bradley, Daniel, Ellis, Eppes, Etheridge, Fisher, Forkner, Graham of Orange, Grant of Wayne, Grant of Northampton, Hall,³¹ Hare, Harris of Franklin, Hayes of Halifax, Hodnett, Hollowell, Holt, Jones of Caldwell, Jones of Washington, King of Lincoln, King of

31. On the last page of the *Journal* appears the following:

Errata:

From January 21st to February 21st, inclusive, in the yeas and nays, "Marshall" should read "Marler," and "Hall" should read "Williams of Sampson."

This presumably implements the following actions of the Convention:

From Tuesday, March 3, 1868:

The Committee on Privileges and Elections reported as follows:

The Committee on Privileges and Elections, to whom was referred the election returns from the Counties of Alleghany, Ashe, Surry, Yadkin and Watauga, have instructed me to report that the official returns of the various election precincts, from the district comprising said Counties, agree with the former report of General [sic] E.R.S. Canby, made to this Convention, which gave rise to the former action of this Convention, which declared that John M. Marshall was chosen instead of John G. Marler. Jno. M. Marshall received 1,123 votes, and John G. Marler, 1,030 votes, which shows that John M. Marshall is entitled to his seat. We, therefore, submit the following:

Resolved, That the seat now occupied by John G. Marler be vacated, and John Marshall be admitted to his seat.

The report was then adopted by the following vote, yeas 67, nays 17.

From Wednesday, March 4, 1868:

The Committee on Privileges and Elections reported as follows:

In behalf of the Committee on Privileges and Elections, I beg leave to make the following report, in the case of the contested seat of the delegate from Sampson County, Mr. Williams:

It is the opinion of your committee that the 1,037 votes cast for Hall were intended for Lorenzo D. Hall, and that Mr. Williams received only 873 votes, leaving a clear majority for Lorenzo D. Hall of 164 votes, entitling the said Hall to the seat now occupied by Mr. Williams in this Convention; and

WHEREAS this Convention is authorized and empowered by orders received from Head Quarters second Military district to settle the matter between the contestants; therefore,

Resolved, That the rules be suspended and the Convention take immediate action in this case.

E. FULLINGS,
for Committee.

Lenoir, Laffin, Lennon, Marler, McDonald of Moore, Nicholson, Parker, Pool and Read — 30.

Those who voted in the negative are:

Messrs. Andrews, Ashley, Barnes, Benbow, Bryan, Carey, Candler, Cherry, Chillson, Congleton, Cox, Dickey, Duckworth, Franklin, French of Bladen, French of Rockingham, French of Chowan, Fullings, Gahagan, Galloway, Garland, George, Glover, Graham of Montgomery, Gully, Gunter, Harris of Wake, Hayes of Robeson, Heaton, Highsmith, Hobbs, Hoffer, Hood, Hyman, Ing, Kinney, Lee, Legg, Logan, Long, Mann, May, Mayo, Moore, Morton, Mullican, Murphy, Nance, Newsom, Parks, Petree, Peterson, Pierson, Ragland, Ray, Renfrow, Rhodes, Rich, Robbins, Rodman, Rose, Smith, Stilwell, Sweet, Taylor, Teague, Tourgée, Trogden, Tucker, Watts, Welker and Williamson — 72.

The question recurring on section third [appointment by Governor].

The yeas and nays were demanded, and resulted yeas 38, nays 63.

Those who voted in the affirmative are:

Messrs. Abbott, Bradley, Ellis, Eppes, Etheridge, Forkner, French of Bladen, French of Chowan, Graham of Orange, Hall,³² Hare, Harris of Wake, Harris of Franklin, Hayes of Halifax, Heaton, Hodnett, Hollowell, Holt, Hood, Hyman, Jones of Caldwell, Jones of Washington, King of Lincoln, Laffin, Legg, Lennon, Mann, Mayo, Marshall,³³ McDonald of Moore, Nicholson, Parker, Pool, Read, Renfrow, Robbins, Rodman, and Sweet — 38.

Those who voted in the negative are:

Messrs. Andrews, Ashley, Barnes, Benbow, Bryan, Carey, Candler, Cherry, Chillson, Congleton, Cox, Dickey, Duckworth, Fisher, Franklin, French of Rockingham, Fullings, Gahagan, Garland, George, Glover, Graham of Montgomery, Grant of Wayne, Grant of Northampton, Gully, Gunter, Hayes of Robeson, Highsmith, Hobbs, Hoffer, Ing, King of Lenoir, Kinney, Lee, Logan, Long, May, Moore, Morton, Mullican, Murphy, Nance, Newsom, Parks, Petree, Peterson, Pierson, Ragland, Ray, Rhodes, Rich, Rose, Smith, Stilly, Stilwell, Taylor, Teague, Tourgée, Trogden, Tucker, Watts, Welker and Williamson — 63.

On motion, the report was received.

From Thursday March 5, 1868:

On motion, the report of the Committee on Privileges and Elections, accepted Wednesday, was taken up and discussed.

The previous question was called.

The report was adopted, yeas 43, nays 35.

32. See *supra* note 31.

33. See *supra* note 31.

The section was lost.

Section first [election by the people] was then taken up and divided.

The following portion of the section was taken up for consideration:

"That the Judges of the Supreme Courts [sic] of the State should be elected by the people."

On motion, it was adopted, yeas 56, nays 34.

Those who voted in the affirmative are:

Messrs. Andrews, Ashley, Barnes, Bryan, Carey, Candler, Chillson, Congleton, Cox, Dickey, Duckworth, Franklin, French of Rockingham, Fullings, Gahagan, Garland, George, Glover, Graham of Montgomery, Gully, Gunter, Heaton, Highsmith, Hoffer, Hood, Ing, Kinney, Lee, Logan, Mann, May, Mayo, Mullican, Murphy, Newsom, Parks, Petree, Peterson, Pierson, Ragland, Ray, Renfrow, Rhodes, Rich, Rose, Smith, Stilly, Stilwell, Taylor, Teague, Tourgée, Trogden, Tucker, Welker, Williams of Wake and Williamson — 56.

Those who voted in the negative are:

Messrs. Abbott, Benbow, Cherry, Ellis, Eppes, Etheridge, Fisher, Forkner, French of Chowan, Graham of Orange, Hare, Harris of Franklin, Hayes of Halifax, Hobbs, Hodnett, Hollowell, Hyman, Jones of Caldwell, Jones of Washington, King of Lenoir, Legg, Lennon, Long, Marler, McDonald of Chatham, McDonald of Moore, Moore, Nance, Pool, Read, Rodman, Sweet, Watts and Williams of Sampson — 34.

The balance of the section, viz:

"That the Superior Court Judges be elected by the people,"

Was adopted, yeas 63, nays 15.

Those who voted in the affirmative are:

Messrs. Andrews, Ashley, Barnes, Benbow, Bradley, Bryan, Carey, Candler, Chillson, Congleton, Cox, Dickey, Duckworth, Forkner, Franklin, French of Rockingham, Fullings, Gahagan, Garland, George, Glover, Graham of Montgomery, Grant of Wayne, Gully, Gunter, Hayes of Robeson, Heaton, Highsmith, Hoffer, Hyman, Ing, King of Lenoir, Kinney, Logan, Long, Mann, May, Mayo, McDonald of Moore, Morton, Murphy, Newsom, Parks, Petree, Peterson, Pierson, Ragland, Ray, Renfrow, Rhodes, Rose, Smith, Stilly, Stilwell, Taylor, Teague, Tourgée, Trogden, Tucker, Watts, Welker, Williams of Wake and Williamson — 63.

Those who voted in the negative are:

Messrs. Abbott, Ellis, Fisher, French of Chowan, Graham of Or-

ange, Hall,³⁴ Hare, Harris of Franklin, Hayes of Halifax, Hodnett, Hol-
lowell, Jones of Caldwell, Lennon, Marler and Pool —15.

On motion of Mr. ABBOTT, the Secretary was directed to send
General Canby a copy of an ordinance passed by this body in relation to
levying a tax to defray the expenses of this Convention.³⁵

The report of the Committee on Punishments, Penal Institutions
and Public Charities, was received and ordered to be printed.³⁶

A preamble and resolutions from the Georgia Convention asking
Congress for a loan of \$30,000,000 dollars for the benefit of Southern
planters, was received, and,

Referred to the Committee on Finance.

On motion the House adjourned.³⁷

34. *See supra* note 31.

35. AN ORDINANCE LEVYING A TAX FOR DEFRAYING THE EXPENSES
OF THIS CONVENTION.

SECTION 1. *Be it ordained by the people of North-Carolina in Convention as-
sembled,* That, for the purpose of raising monies to pay the expenses of this Con-
vention, according to the acts of Congress in such case made and provided, a tax of one-
twentieth of one per cent, shall be levied on the land in North-Carolina according to
its valuation in the year 1860, subject to such changes therein as have been since
made by law, and on the personal property within said State, according to the valua-
tion thereof to be made in the year 1868.

SEC. 2. *Be it further ordained,* That this tax shall be collected, paid and ac-
counted for at the Treasury of the State at the time when and in the same manner as
other State taxes are by law required to be.

SEC. 3. *Be it further ordained,* That the collecting officers shall be subject to the
same penalties for failure to collect, pay and account for the taxes hereby levied as
they now are for such failure in respect to other taxes.

SEC. 4. *Be it further ordained,* That the said collecting officer shall receive the
like compensation for the collection of the tax hereby levied as for the collection of
other taxes.

SEC. 5. *Be it further ordained,* That this ordinance shall be in force from and
after its passage.

Ratified this 6th day of February, A.D. 1868.

CALVIN J. COWLES, *President.*

T.A. BYRNES, *Secretary.*

36. The report, which eventuated in Article XI of the constitution, is printed with the
proceedings of March 3, 1868.

37. The resolution favor of abolishing the distinctions between actions at law and suits in
equity was taken up the next day and passed 50 to 38.

