REVISING THE CONSTITUTION OF PENNSYLVANIA.

In view of the Act of June 4, 1919, creating The Commission on Constitutional Amendment and Revision, I have thought that lawyers will be interested in a brief summary of the questions which are likely to come before that body and before a constitutional convention, if such a convention shall be called. The consideration of these questions is plainly a matter of prime importance.

Since our separation from Great Britain we have had three State Constitutions in the sense in which we now use that word, one adopted in 1790, the second in 1838, and the present instrument in 1873, taking effect on January 1, 1874. The first and second lasted forty-eight and thirty-five years respectively, and the third is nearing its forty-sixth birthday. Conditions and ideas have changed and the fundamental law as well as the statute law must change to meet the times. The Constitution of the United States was so drawn that it has never needed an entire revision, although it has several times been amended. But in the matter of our State Constitutions we have not been so fortunate.

A constitution should have two parts. It should create the framework of a government and it should set limitations upon the powers of the government which it has created. In both of these respects it is time to consider whether important changes should not be made in the Constitution of Pennsylvania. In seventeen years we have had twenty amendments, and every session of the General Assembly sees numerous efforts, successful and unsuccessful, to put into motion the machinery of amendment.

The various amendments in regard to the borrowing capacity of cities well illustrate the need for constitutional provisions broad enough to care for modern needs and at the same time strict enough to protect the rights of person and property. The original restriction upon the borrowing power of municipalities would have prevented Philadelphia and

other cities from acquiring proper transit and other public facilities. Accordingly four separate amendments to Article IX of the Constitution have been adopted, each intended to increase the borrowing power to meet modern requirements. Each of these amendments was of course submitted at two successive sessions of the General Assembly and finally to all the voters of the State. A constitutional limitation upon the borrowing power of municipalities is obviously wise and necessary, because it prevents the voters who are not troubled with property from bankrupting their more successful neighbors by the simple process of large loans and huge taxes. And it is equally obvious that the exact nature of this limitation should now be fixed with some degree of permanence in the light of modern conditions. A study of this situation by the Constitutional Commission will no doubt lead to the solution of the difficulty. It will then become unnecessary to ask all the voters of the State every two years to pass upon a question as to which probably ninety per cent. of them are in blank ignorance.

The Constitutional Commission may propose amendments or they may submit a revised constitution and recommend the calling of a constitutional convention. In either event it is important for lawyers to think seriously of the problems involved and to help the process of change by well-considered suggestions.

If a revised constitution shall be suggested by the Commission, I hope that the revision may be in the direction of brevity. Our present constitution is almost twice as long as the Constitution of the United States, largely because it contains much matter which is properly statutory and not constitutional in character. Every lawyer will remember his surprise in finding in the State constitution provisions which he had first looked for among the Acts of Assembly. Certainly the fundamental law should not contain provisions which may safely be left to legislative action. For instance, it is hard to see why the precise method of charter-

ing banks should be set forth in Article 16, Section 11. If the Constitution provides a framework of government and protects persons and property against sudden aggression, either by official authority or by an unbalanced majority, it has done its duty. The right to have our persons inviolate and the right to acquire, use and save property form together the foundation of happiness. Without them, life is of little account. So far as possible the Constitution should be pared down to the bare essentials necessary to protect them.

And there is another reason for compressing the instrument as much as possible. The draft to be submitted to the voters will of course be that approved by a constitutional convention, whose members will, during the sessions, become to some extent experts in the questions involved. The average citizen will have to rely almost entirely upon the judgment of others in deciding how to vote. But so far as possible the document should be intelligible to everyone, and to be intelligible it must be short. The great length and complexity of the proposed New York Constitution of 1915 is generally supposed to have contributed to its defeat at the polls, in spite of the care with which it was drawn and the high character of its sponsors. Certainly a constitution should be able to commend itself to the common people by its brevity and by the plain and fundamental importance of each of its provisions.

It will be well now to take up in some detail the questions which the Constitutional Commission will have to face and with respect to which they will undoubtedly welcome the thoughtful suggestions of all citizens.

1. The Declaration of Rights.

The provisions of this article have remained almost unaltered since 1790.[1] This fact in itself should insure the greatest caution in the consideration of any proposal to

[1] Only two changes of any importance have been made since 1790. The Constitution of 1874 in Section 7 makes absence of malice or negligence a defense in indictments for libels relating to public matters; and in Section 17 forbids the granting of irrevocable privileges by the Legislature.

change any of them. Nevertheless certain questions deserve thought.

(a) *Social Legislation.* The language of section 1 is substantially equivalent in effect to the language of the Fourteenth Amendment. Our constitution proclaims the indefeasible rights of "enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation" and of pursuing happiness. Since the Supreme Court of the United States has declared that a man's right to earn his living is a property right,[2] the protection of the due process clause and of the State constitution appears to be the same. But it is possible that the State Supreme Court will take a position on social legislation different from the position of the Supreme Court of the United States. It might, for instance, declare a minimum wage act unconstitutional under the State constitution, although the Supreme Court of the United States has held by an equally divided vote without opinion that the Oregon Minimum Wage Act is not forbidden by the due process clause.[3] In case of such a decision by the State court the act would finally fail.

Should our State Constitution therefore contain a special provision enabling the General Assembly to legislate with respect to such subjects as minimum wage and health insurance? Such a provision would have to enumerate the kinds of legislation to be permitted; otherwise the interpretation of its language would fall upon the Supreme Court and the present situation would be virtually unchanged.

No one can say what the final opinion of the Supreme Court of the United States will be in the minimum wage matter, although, as now constituted, it would probably favor the constitutionality of such legislation if another case came up for determination. If the final opinion should be adverse to such statutes, no provisions such as I have referred to in a state constitution, would have any validity.

[2] Lochner v. New York, 198 U. S. 45, 53.

[3] Stettler v. O'Hara & Simpson O'Hara, 243 U. S. 629. See highly interesting article by Rome G. Brown, of counsel, in 1 Minnesota Law Review, 471.

(b) *Indictment.* Certain rights of criminal defendants should here be mentioned. Section 10 requires indictment by a grand jury "for any indictable offense," and forbids proceeding by information. An information is a proceeding with which most Pennsylvania lawyers are not familiar. It is an accusation of crime filed by the prosecuting attorney in place of indictment by a grand jury. The purpose of the constitutional provision is, of course, to protect the citizen from the expense and ignominy of a criminal trial unless a grand jury finds that the charge against him has sufficient weight to justify such a trial. In Philadelphia an average of from five to ten per cent. of the bills considered by the grand jury are ignored.

If the proceeding by information is substituted for the present system, the defendant will rely upon the district attorney for protection instead of upon a grand jury. If the district attorney thinks that there is proper ground for a prosecution, he will prepare and present an indictment; otherwise, he will refuse to do so. In the latter event it should still be possible to have presentment by a grand jury, to meet situations in which the district attorney may act improperly. The testimony of judges, district attorneys, and lawyers with experience in criminal work will be most valuable in this connection.

(c) *Courts Martial.* A third and very important question arising under the Declaration of Rights was the subject of discussion in the New York State Constitutional Convention of 1915. It was there proposed to add to the usual provision forbidding the suspension of the privilege of the writ of habeas corpus, these words: "Nor shall any military tribunal exercise jurisdiction over a civilian unless engaged in military or naval service while the regularly constituted state courts are open to administer justice." The labor forces and others, including George W. Wickersham,[4] favored this provision, but it was rejected by a narrow margin of fifteen votes. It was, of course, meant to prevent

[4] Rev Rec. N. Y. Const. Com., 4060.

the trial of offenders by military commissions when martial law had been declared to exist. The Supreme Court of Appeals of West Virginia had in 1912 brought this matter home to many citizens by deciding that certain civilians in that situation had no right to trial by a civil court, and this in spite of the provision of the State Constitution which forbade any citizen to be "tried or punished by any military court for any offense that is cognizable by the civil courts of the state.[5] It seems doubtful whether the Fourteenth Amendment covers such a situation.[6]

An effort will inevitably be made to introduce such a provision into our Constitution. Our natural civilian preference for civil courts induces us to favor it. The argument on the other side, however, is strong, arising from the possible necessity of preserving the existence of the State government by the use of the most drastic measures.

When this matter comes up for final determination, the fate of the proposed New York Constitution should not be forgotten. The labor delegates to the convention which framed that instrument asked for the provision guaranteeing trial in a civil court. When this was rejected they warned the Convention that the labor forces of the State would show their resentment by their votes.[7] Many competent observers believe that the defeat of the constitution at the polls was largely due to disregard of this warning.

One of the serious objections urged against the proposed guarantee is the fact that rioters would be able to give bail and immediately to engage in disorder, thus making the criminal process temporarily useless. Under military law there is no right of bail. This objection could be met by permitting during times of serious disorder, the suspension of the right of bail with respect to offenses forming part of the general disorder, such as looting, burning or unlawful assemblage.

[5] See Nance and Mays v. Brown, 71 W. Va. 519.

[6] See ex parte Milligan, 71 U.S. 12, and opinion by Poffenbarger, P. J. in Nance v. Brown, *supra* at 551.

[7] See Revised Record N. Y. Cons. Comm., 4224 and 4318.

(d) *Jury Trial.* Another question presented under the Declaration of Rights is that of trial by jury. The Fourteenth Amendment in requiring due process of law does not require trial by jury.[8] But Article I, Section 6, of our State Constitution declares that "trial by jury shall be as heretofore and the right thereof remain inviolate." This gives the right to a jury trial wherever that remedy existed at the time of the adoption of the first State Constitution.[9] It is at least questionable whether this privilege should extend to the many small civil actions in which the amount involved scarcely justifies the time and expense necessary to provide a jury for the litigants.

2. The Legislature.

(a) *Delegation of Power.* The question of the delegation of legislative power is likely to come to life within the coming years. There are two forms which such delegation may assume. The General Assembly may delegate to a State officer or commission the power to create what is practically statute law; or the General Assembly may permit a local unit to legislate for itself. The first of these two forms is certainly vicious in principle, since it leaves the citizen in entire uncertainty and at the mercy of a man or of a very small group of men with legislative power which he has not entrusted to them. Such a condition offends our common sense of fairness. It was necessary during the war to submit to it in national matters, but happily the situation is fast changing back again. The present State Constitution which vests the legislative power of the Commonwealth in a General Assembly has been construed as forbidding such delegations of power.[10]

The other form of delegation is the delegation of the powers of local government to a local unit. This has to a large extent been upheld in the local option case[11] and in similar matters, but a statute allowing Pittsburgh City

[8] Walker v. Sauvinet, 92 U. S. 90.
[9] Rhines v. Clark, 51 Pa. 96.
[10] O'Neil v. Ins. Co., 166 Pa. 72.

Councils to create new departments in the city government and to define their powers went further than the Supreme Court would allow.[12] On principle, there seems to be no reason why delegations of legislative power in such cases should not be unrestricted, so long as the fundamental personal and property rights of each citizen are protected.

(b) *Two Houses.* Questions of organization will also arise in considering the General Assembly. Should the tradition of two houses be maintained? Its reproduction from our European models of the eighteenth century was practically inevitable. But in the British government, for instance, the upper house represented and still represents a class whose interests are distinct from those of the Commons. In our country there is no such reason for the bi-cameral form of legislature. In city governments it is almost obsolete. There is, however, the advantage derived from greater delay and caution. The number of bills which pass one house and thereafter enjoy perpetual rest in the bosom of a committee of the other house, shows that the necessity for passing both houses is in itself often a guarantee of care and of proper conservatism. Incidentally, we may question whether a unicameral state legislature would, in the opinion of the Supreme Court of the United States, destroy the republican form of government guaranteed to every state by the Federal Constitution.

(c) *Proportional Representation.* Those who are interested in proportional representation should study the last three sections of Article II, which make its adoption practically impossible in the election of members of the General Assembly. If proportional representation is desirable and if there is any chance of wanting to put it into operation during the next forty or fifty years, the appropriate constitutional provisions should be made sufficiently elastic to allow of its introduction.

[11] Locke's Appeal, 72 Pa. 491 (overruling Parker v. Commonwealth, 6 Pa. 507).

[12] Pittsburgh's Petition, 138 Pa. 401.

3. Legislation.

(a) *Special Legislation.* The evils of local and special legislation led to the constitutional prohibition of 1873 against this form of legislative enterprise. During the session of the General Assembly immediately preceding the adoption of the present constitution nearly a hundred and fifty local and special laws were enacted for the city of Philadelphia alone. The Constitution now forbids such statutes upon almost every conceivable subject. Of course, many efforts have been made to evade the restriction by adopting some sort of classification, since legislation within the bounds of proper classification is not unconstitutional. The most ingenious of these efforts was the passage of an act which required one week of court to be held each term in any city of 8000 or more situated in a county of over 60,000 and distant more than twenty-seven miles from the county seat. The city of Titusville in Crawford County was the only city described by the act, and the Supreme Court rightly declared the act unconstitutional.[13]

The question of classification constantly recurs and is usually difficult to settle. It is proper when, in the opinion of the court, the purposes of the statute reasonable require it. Accordingly the Supreme Court has allowed the cities of the Commonwealth to be divided into three classes, but has drawn the line at four.[14] Obviously, such classification must stop somewhere, else the number of classes could be made equal to the number of cities. But it puts a pretty severe burden upon the courts to ask them to determine what is and what is not reasonable classification. Can this matter be determined in the constitution itself? If not, it is undoubtedly best to leave the final decision where it now rests.

(b) *Charitable Appropriations.* Few questions are more serious than that of State aid to private charities. This subject received careful consideration and was earnestly

[13] Commonwealth v. Patton, 88 Pa. 258.
[14] Ayars' Appeal, 122 Pa. 266.

debated in the Convention of 1873, and as a result, two sections of the Constitution were adopted. These provide that charitable appropriations cannot be made to individuals nor to sectarian organizations, and that every charitable appropriation must be by a two-thirds vote of all the members of each house. All of these limitations are obviously proper. We should not want to see the General Assembly giving $10,000 of State money to relieve the immediate necessities of an indigent citizen, nor should we enjoy the spectacle of denominational intrigue at every session of the Legislature.

But the question is constantly raised: Should any charitable appropriation be permitted except to institutions entirely under the control of the State? The average reader will be interested to see how large such appropriations are. Look at Smull's Legislative Handbook for 1918 and you will find that the total appropriations for the two years 1917–1919 were, in round numbers, eighty-two million dollars, ten per cent. of which went to charitable organizations not controlled by the State. A certain amount of supervision is of course exercised over these organizations. The State Board of Public Charities visits them and makes recommendations with respect to their appropriations. Legislative committees also examine to some extent the grounds for requests for money. But there is no escape from the conclusion that many millions of the people's money go every year to private citizens who are not subject to control in spending it.

Of course, this is by no means an unmixed evil. Hospitals, homes, schools and colleges are necessary and the State is not able to conduct them all. Many have been for years dependent on appropriations and would be crippled or destroyed by a sudden loss of that part of their incomes. It would certainly be wise to make any change slowly; for instance, by gradually reducing the total amount to be available for this purpose. In three States—Colorado, Montana and Wyoming—appropriations to any charity not controlled by the State are forbidden.

(c) *Initiative, Referendum and Recall.* Ten years ago the initiative, referendum and recall were live political topics. Today, in Pennsylvania at least, they are seldom spoken of. Perhaps legislatures have grown more responsive to the will of the people, or perhaps the people realize that bringing legislation into the voting booth does not improve the character of the legislation. The introduction into our constitution of these three instruments of government is not likely to be strongly urged at this time.

4. The Judiciary.

It is natural that lawyers should appreciate more than others the grave importance of constitutional provisions in regard to the judiciary, for their daily work leads them to realize the extent of the powers vested in the courts under the American form of government.

(a) *Appointment.* In considering this matter of the judiciary, the first question which suggests itself to most of us is the question as to method of selection: Should our judges be elected or appointed? I believe that most lawyers will agree that appointment for a long term or during good behavior is the preferable system, because it is likely to find a higher type of man to serve on the bench.

But the decision of this question is intimately connected with another: Should our judges be loaded with political, as distinguished from judicial, functions? Under the present system they must appoint, for instance, the Boards of Education in Philadelphia and Pittsburgh, the Boards of Revision of Taxes in Philadelphia and Wilkes-Barre, and must fill vacancies in the position of election officer. The first two of these duties are certainly political, for the principles which control the two bodies thus appointed are of necessity the ordinary principles common to the administration of all political offices. So long as a judge is required thus to participate to some extent in active politics, there is fair ground for demanding that he should be elected. Should we not have a constitutional provision forbidding

the imposition of non-judicial duties upon judges,[15] and at the same time provide for appointment instead of election?

(b) *Procedure.* It can be strongly argued that all matters of procedure should be left to the courts. Practice acts would then emanate from the Supreme Court, or from a State Board of Judges, instead of from the General Assembly, and the necessity of asking each session of the Legislature to tinker with matters of procedure would cease. Such a system prevails in England and might prove beneficial here, although the complexities of our practice statutes are not such as to cry out very loudly for a change. To allow the courts to act in this matter without control by the General Assembly will require a new constitutional provision.

(c) *Organization.* The present Constitution covers in considerable detail the organization of the various courts. Undoubtedly, it goes too far in this direction. If, for instance, the city of Philadelphia needs an additional judge in each of its common pleas courts, it should not require a constitutional amendment to make that possible.[16] The Constitution should provide for the organization and jurisdiction of all the courts only in the most general way, leaving to the General Assembly, or perhaps in some cases to local governments, the right to fix the number of courts, the number of judges and the respective jurisdictions of the several courts. Provided that a court is available for every suitor where justice may be administered by a judge learned in the law, the Constitution should not concern itself with further particulars of organization. Changing requirements in that respect can best be met by the General Assembly.

5. Taxation and Finance.

(a) *Uniformity.* Article 9 of the present Constitution deals with this subject. The opening words of its first section are of particular importance, requiring that "all taxes shall be uniform upon the same class of subjects." The

[15] See Constitution of Louisiana, Article 96.
[16] Commonwealth v. Hyneman, 242 Pa. 244.

necessity of inserting such a provision can hardly be overemphasized. To permit special legislation in the field of taxation would open the door to the confiscation of the property of the minority by the majority in temporary control. The direct inheritance tax act of May 12, 1897, P. L. 56, failed to meet this constitutional requirement as well as others, because it exempted from its provisions personal property to the value of $5000.[17] The existing $250 exemption in the collateral inheritance tax law is only saved because it dates from 1826 and is therefore not affected by constitutional provisions which are prospective only.

The General Assemblies of 1917 and 1919 have passed a joint resolution to amend the Constitution by adding a proviso that "the subjects of taxation may be classified for the purpose of laying graded or progressive taxes." This proposition will be submitted to the voters on November 4, 1919. If such a proposition should at any time be approved by the voters of the State, it will make it possible to tax the rich man at a rate higher than the poor man, and will in that respect follow the example of the Federal income tax law. In debating the wisdom of such a proposition it should be remembered that graded or progressive taxes may be made equivalent to confiscation.

(b) *Exemptions.* The question of exemptions is also worthy of consideration. The present Constitution allows the General Assembly to exempt public property, churches, cemeteries and charitable institutions. No one can quarrel with the exemption of public property, for it simply saves taking money out of one pocket to put it back into another. There may, however, be objection to a continuation of the exemption extended to churches and to charitable institutions not conducted by the State. So long as the Constitution permits such exemption it is inevitable that the General Assembly will exempt. The value of tax exempt real estate is enormous, amounting in Philadelphia alone to about $100,000,000. Add the value of funds held in trust for charitable

[17] Cope's Estate, 191 Pa. 1.

purposes[18] and the total amount of taxes lost to the State and local governments is seen to be very large.

There are two arguments in favor of the present constitutional provision. Churches and charities undoubtedly lift a burden from governments; for this service they should be recompensed by relief from taxation. To this it may be answered that their activities, and particularly those of the churches, should be supported entirely by those who are willing to support them. Those who are content to worship in a simple church should not be obliged individually to pay higher taxes because certain of their neighbors claim exemption upon a large and expensive structure, which occupies land otherwise valuable for business or domestic purposes. And the man who goes to no church has a still more just grievance. Our present system distributes the burden of taxation unevenly. The same considerations apply to charities, but with less force, because their work is generally approved by most of the community, and their property holdings seldom exceed their actual needs.

The other argument in favor of the present constitutional provision arises from the purely permissive character of the provision. The matter is left entirely to the General Assembly, within certain bounds. If certain exemptions are not to be allowed, it is the Legislature which must refuse them. But the Legislature never will refuse them, as a matter of fact, because every legislator will come to Harrisburg charged with a sense of responsibility to the interested church members of his district, and conscious that a continuation of the status quo will disquiet no one very seriously.

(c) *State Loans.* Most of us have in the past been proud of the fact that the Commonwealth had no bonded debt, but most of us were glad to vote for the amendment to the Constitution which will make it possible to spend fifty millions on good roads. Should a constitutional amendment be required whenever the State wants to borrow for any purpose other than the supply of casual deficiencies in revenue and protection from aggression?

[18] See Mattern v. Canevin, 213 Pa. 588.

In other states, restrictions with respect to the purpose, amount and interest rate of State loans are common, and in many, a popular referendum is required. If the borrowing of money by the State is restricted only by requiring a referendum, it follows that the credit of the State and hence the property of all its citizens may be pledged to an unlimited extent to meet obligations incurred in times of unwise enthusiasm. The present provisions of our Constitution seem to cover all urgent situations.

(d) *Municipal Loans.* The original limitation of Article 9, Section 8, upon the borrowing power of municipalities was 7% of the assessed value of their taxable property, with an extra 3% of grace for cities which had already exceeded 7%. By successive amendments the limit has been raised until it is now 10%. In calculating the debt there may be excluded money borrowed to buy public utilities which will pay for themselves in five years. In Philadelphia there may be excluded the capitalized value of the preceding year's earnings from such utilities. It is quite possible that these limits will prove unsatisfactory in the coming years. The problem could be solved by setting a limit which it would be impossible to pass except by vote of a large majority, say three-fourths or four-fifths, of the citizens concerned. In some states the imposing of restrictions upon municipal borrowing power is left to the Legislature.

6. Local Governments.

(a) *Home Rule.* The measure of authority over local governments exercised by the Constitution and by the General Assembly is very great. Article 14 of the Constitution affirmatively requires all county officers to be elected and prescribes eleven officers by name. Of these eleven it may very properly be urged that the prothonotary and clerks of the courts should be appointed by the court of Common Pleas, that the office of coroner is an anachronism, that the register of wills should be appointed by the Orphans' Court, and that the surveyor and recorder of deeds, whose duties

are purely non-political, should be appointed by the county commissioners. This would leave sheriff, commissioners, treasurer, controller, and district attorney to be elected. No good reason appears why the Constitution should absolutely require all these eleven officers in every county and require that they should all be elected.

By failing to restrict the General Assembly in the matter, the Constitution has permitted that body to interfere in local affairs almost without limit, so long as the prohibition of local and special legislation is respected. It follows that by confining itself to approved classifications of cities, counties, etc., the Legislature can exercise entire control over the forms of government of those units. It can prescribe the thickness of beams in cities or it can state what shall be subjects of taxation for township purposes. The temptation to interfere, in fact the necessity of interfering, is apparent. Should not the Constitution leave certain matters to the uncontrolled discretion of the local units involved? Such matters could be sanitation, police and fire regulations, building codes, and other subjects which will readily suggest themselves. So long as a citizen of the Commonwealth is sure of proper protection for his person wherever he may go within the State, and so long as he is protected against unjust taxes or other seizure of property, it does not seem important that there should be absolute uniformity throughout the State with respect to the conduct of local affairs. Of course, with respect to form of government the advantages of uniformity are obvious.

7. Private Corporations.

Article 16, which deals with this subject, is full of statutory matter. It establishes the right of cumulative voting, forbids foreign corporations to do business in Pennsylvania without appointing an agent upon whom process may be served, provides in some detail for the issuing of securities and for the increase of stock or of indebtedness, and makes special provisions with respect to banking and telegraph

companies. All of these are properly legislative matters and as such should be left to the General Assembly to decide.

If this article turns the attention of its readers to the importance of the constitutional questions which will shortly confront us, and if it stirs in them a spirit of critical suggestion, and of careful thought with respect to these questions, it will have served its purpose.

Shippen Lewis.

Philadelphia, Pa., October 1, 1919.