

The Clerk will read the amendment.

READING CLERK: Amendment No. 11 to Committee Recommendation R&P-1 by Delegates Adkins and Scanlan:

One page 3 section 5, Rights of Accused, in line 7 after the words "confronted with" add the words "and to examine under oath or affirmation".

THE CHAIRMAN: Delegate Adkins, the Chair indicated to Delegate Adkins some doubt as to whether the amendment would carry out what the Chair supposes is his purpose. Is it your purpose to provide that an accused should have the right to examine witnesses against him prior to trial?

DELEGATE ADKINS: Both prior to trial and during trial, if the evidence taken prior to trial is intended to be used during the trial.

THE CHAIRMAN: The Chair would suggest to you that the amendment you propose would not accomplish that. You would have to add a clause, perhaps prior to the clause beginning in line 7, providing for pretrial examination, and then something similar to the clause you have for examination during trial.

DELEGATE ADKINS: I must admit I am at a loss to see the point the Chair is making, but I am sure it is valid, so I will withdraw the amendment until I can reconsider it.

THE CHAIRMAN: Not necessarily. The Chair's interpretation was that the clause as amended would read, "to be confronted with and to examine under oath or affirmation the witnesses against him". Since the confrontation clause has always been construed to mean in trial, I suggest to you that the examination under oath would likewise be limited to examination in trial.

DELEGATE ADKINS: Without intending a lengthy debate, would it not follow from this clause that if the pre-trial deposition were offered at the trial, it would not be admissible unless at the time it were taken the witness had been subject to cross-examination?

THE CHAIRMAN: I think that is true without the amendment: The confrontation clause protects.

DELEGATE ADKINS: If it does, perhaps the amendment is not necessary. My thought is the language, confrontation, does not guarantee the right of cross-examination.

THE CHAIRMAN: The Chair certainly does not want to speak with authority on it,

but I always understood that the confrontation clause meant that you be confronted with the witnesses in the course of trial and that due process required that you have opportunity to cross-examine.

DELEGATE ADKINS: If the Chair can speak authoritatively on that case, I will not press the amendment. I know of no case, and the Committee Report suggests no report. Discussion with the General Assembly revealed that they know of no definitive meaning of confrontation which includes as a matter of absolute constitutional right the matter of cross-examination.

THE CHAIRMAN: May I make this suggestion that the amendment be passed over, and that Mr. Smith on the Committee staff be requested to research that overnight and the answer may or may not be in order. I do not know.

DELEGATE ADKINS: I am perfectly willing to accept that. May I say, Mr. Chairman, even though it may be implicit in the word confrontation, this matter was discussed at some length at the Commission level. The language used in this amendment is identical to that inserted in the Commission draft. The Committee Report states that the word confrontation implies the right of cross-examination, but they cite no authority. Indeed, I think there is no authority necessarily to imply that the word confronted could not be by judicial interpretation watered down to mean simply what the word confronted usually means, and that is giving of the testimony affirmatively in the presence of the party without necessarily right to cross-examination.

THE CHAIRMAN: Perhaps the Chair has misunderstood your purpose. I think the amendment that you offer would undoubtedly accomplish your purpose if you are not intending to obtain by it the right of pre-trial examination of adverse witnesses.

DELEGATE ADKINS: That was certainly not my initial intention.

THE CHAIRMAN: The Chair misunderstood your purpose. I think the amendment is perfectly proper.

For what purpose does Delegate Scanlan rise?

DELEGATE SCANLAN: As co-sponsor of the amendment, I offered a case in the Maryland Court of Appeals which makes it perfectly clear that the right of confrontation does not necessarily include the right to cross-examination, *Frye v. The Montgomery County Board of Appeals*. That