tee—a great deal for them to consider. I really think we will save time by allowing the committees to perform their duties, formulate their reports and return them to this convention and have them printed, and after this is done, we can have a full discussion upon all questions that may come up. I therefore move, Mr. President, if I may be supported, that this convention adjourn until 4 o'clock this evening. I am satisfied that we will be saving time. In committee yesterday the Judiciary committee spent three or four hours in the discussion of the serious matters there coming before it, and if that discussion is made there and we can get up an article to meet the approbation of the convention, it is better to fix the whole thing in that way than to have a long discussion and amendments offered in this convention. I hope my motion will meet with the approbation of this convention.

NOTICE OF MOTION TO AMEND RULE XI.

Mr. BATTEN. I have a motion to make before that motion is put. I hereby give notice that tomorrow, July 18th, 1889, I will move to amend Rule 11 of the standing rules as follows: "Amend by adding after the word "Convention" at the end of the second line of said rule, the following: 'and in no case shall any member be allowed to occupy more than fifteen minutes at any one time except by unanimous consent of the Convention.'"

A MEMBER. I move an amendment of the motion to take a recess, that it be to adjourn until tomorrow at 10:00 o'clock. (Seconded).

The CHAIR. It is moved and seconded that the convention now adjourn until ten o'clock tomorrow morning. (Vote). Carried.

TWELFTH DAY.

THURSDAY, *July 18, 1889.*

Convention called to order by the President at 10:00 A. M.

Prayer by Chaplain.

Roll Call. Present: Messrs. Ainslie, Allen, Anderson, Andrews, Armstrong, Batten, Beatty, Bivens, Brigham, Campbell, Cavanah, Chaney, Clark, Coston, Crutcher, Gray, Hagan, Hammell, Hampton, Harkness, Harris, Hasbrouck, Hays, Hendryx, Heyburn, Hogan, Howe, Jewell, King, Kinport, Lamoreaux, Lemp, Lewis, Maxey, Mayhew, McConnell, McMahon, Melder, Myer, Morgan, Moss, Pefley, Parker, Pierce, Pinkham, Poe, Pyeatt, Reid, Robbins, Salisbury, Savidge, Sinnott, Shoup, Standrod, Steunenberg, Stull, Sweet, Taylor, Underwood, Vineyard, Whitton, Woods, Mr. President.

Excused: Messrs. Ballentine, Beane, Glidden.

Absent: Blake, Crook, Pritchard, Wilson.

JOURNAL read.

The CHAIR. If there are no corrections, it will stand approved.

MR. PARKER SWORN IN.

Mr. REID. I desire to present the credentials of Mr. A. F. Parker, delegate elected from the county of Idaho, and move that they be received and he be sworn in. (Motion seconded.) Carried. Mr. Parker is sworn in by the president.

QUESTION OF PERSONAL PRIVILEGE.

Mr. AINSLIE. Mr. President, I rise to a question of personal privilege, and desire to send to the clerk's desk and have read——

The CHAIR. We are inclined to think at this time that this will be out of order until we get through with the regular order of business.

Mr. AINSLIE. I understand a question of personal privilege is in order at any time.

The CHAIR. I am not sure but what the gentleman is correct. The chair will withhold any ruling on that question.

(Secretary reads extracts from the *Salt Lake Tribune* of July 17th).

AINSLIE. Now, Mr. President, the representatives of the press through the courtesy of this convention,

have seats upon the floor for the purpose of furnishing the papers they represent with a fair and honest account of the proceedings of this convention. Now, sir, the statement, the first part of it there, that I stated that I was ready to withdraw from the democratic party is too ridiculous for denial. No such assertion was made on this floor by me, but I will give the representative of that paper the credit of having come to me this morning and apologizing for that portion of the dispatch, but, sir, it is a very singular thing to me how history repeats itself in this convention, so far as deliberative bodies are concerned, that the representatives of that paper invariably at democratic conventions or legislatures, and here now in the constitutional convention, invariably misrepresent and falsify the positions and statements of democrats, but never makes a mistake as to the republicans. That is the truth. I have never seen the positions of the republicans misrepresented or falsely stated by the representative of that paper on this floor, but I will say that it has been the habit and constant practice of the correspondent of that paper to falsely state the positions of the democrats, not only in their conventions but to cram the columns of the paper full of lies about democrats upon every question, nearly, that may arise touching the position of the Mormon people in this territory. Now, sir, I have been a democrat ever since I have been old enough to know the difference between democrat and whig, and it is too late in life to have any idea in the world of changing my political opinions. I have no desire to answer that part; any such assertion refutes itself.

Now, Sir, as to that man Hoge, I never saw the man that I know of in my life until the other day and I did not know who he was then until I was introduced to him. I never had any conversation or conference with him nor said a half dozen words to him, except what was said at the Overland Hotel when it was crowded with people. I did not know what his business was here and did not care what it was, but I do have to say that this

man Hoge has always been regarded as a republican. Now, sir, I have no consultation with a man like that who has been fighting the democratic party ever since I have been in the territory, so far as I know. I know that in '82 when I ran for congress, as well as the time this man Hoge was on the committee—the territorial committee—there was no consultation with them, but he did the best of his ability to secure the vote of the Mormon element of Bear Lake county for the republican candidate in congress. I know nothing about Mr. Hoge personally and nothing of his political history except what I have seen published in the *Idaho Statesman.* I never met him until the other day, when I was introduced to him and asked him how long he was going to remain, or something of the kind, but I never had any conference with him.

Now, sir, it has been the purpose of this paper to abuse not only me, but the democratic party of Idaho Territory, ever since this man Charlie Goodwin got to be editor-in-charge. I believe the proprietor of it claims to be a democrat. Well, I have heard of such democrats before—men who talk democracy and vote republicanism. They start out professing to be an independent and fair sheet—an independent and fair newspaper. They are against polygamy and polygamists among the Mormons of the territory. I have not been apologizing for bigamists or polygamists in any manner, shape or form, and while I have had the honor to serve the people of Idaho Territory in Congress four years, I never yet, to my knowledge, have received any letter or communication from any Mormon in regard to any political matter whatever. The only communication I received from a Mormon for any service at all, was one from Bear Lake or eastern towns of Idaho, asking that the postoffice be established at some settlement. Well, I will attend to that for anybody, whether Mormon, Gentile, Negro or Indian. People have their rights and are entitled to postoffices, and when they send petitions signed by a sufficient number of people to present to the postoffice de-

partment, I would recommend that a postoffice be established and that they have those advantages.

But this paper is continually assailing me for some purpose or other, because probably I may have said some time or other that I did not like the *Salt Lake Tribune,* and I suppose you know my opinion of it partly, and that it is the most infernally filthy sheet that was ever published on the face of God's green earth, and my opinion of the conductors of the sheet is about equivalent to that of the paper. Now the other day I expected to rise to a question of privilege on this first assertion, "is here in constant consultation with the Mormon wing of the democratic party in the interest of the Church," etc. Upon stating my intention to rise to a question of privilege on behalf of the democratic party as represented in this convention, I was requested by several republicans not to do so, that a full and fair retraction would appear in the columns of this paper. This has never appeared. Now I say if such a sheet as that possesses the privileges accorded them on this floor, of misrepresenting and falsifying the people—falsifying the democratic delegates of a large part of this territory, that probably may have a majority or be almost equal in voting strength to the republican party—I say when they are accorded privileges by the courtesy of this convention, that they should not be permitted to abuse them, but I hope that any correspondent, no matter what paper it is, democrat or republican, will be fired out of this hall when they falsify the position and principles of the democrats as they have done in this instance. I think I have stated my position clearly and I submit the question to the convention.

Mr. CAVANAH. Mr. President, I have read the *Salt Lake Tribune* for twelve or fifteen years. I have been in sympathy with it, and its fight against Mormonism, and believed everything it has said. My faith was a little shocked at those letters issued by the paper. I have heard no democrat in caucus or out of it but what has stood squarely as anti-Mormon. I have good friends

on this floor, both democrats and republicans, who know that I have voted that from the commencement. And they know that I have been a strong anti-Mormon democrat, and I would like to know where this information comes from. If there are any Jack-Mormons in our party, I would like to know it. I have voted, not for political emolument, like some republicans have; I have voted from strictly honest conviction, and I feel as if I am imposed upon the same as the rest of my party in this issue, and I strongly protest against it. It is unmanly—it is unfair. We were sure—I was sure that if we would say nothing about that article that was in the paper a week ago, that there would be a full retraction. Is this the retraction?

Mr. MAYHEW. Mr. President, I am willing to accord to every one of my republican brethren on this floor, and heretofore have always been willing to accord to every republican in the few past legislatures I have had the honor to be a member of, the privilege of expressing their sincere and honest convictions against the questions of polygamy and Mormonism. I do not think it is fair, just or honorable for any correspondent of a newspaper or any association of persons, I do not care what their political proclivities and sentiments may be, to continually put a brand upon the party that we claim and which we purport to be a member of, to brand them by false representations as to their sentiments upon any given question. I say that it brings odium and disgrace and shame upon the party that is national in its character, and I must say that the democratic party, so far as my knowledge extends, has a desire for the prosperity and desire for the greatness of this country equal to that of our republican brethren. Now, I say when a correspondent of a paper does use language and sentiments and utters ideas and language that is derogatory to the true character and position of any political party, that that correspondent, when he has been accorded the privilege of this floor to correspond with his paper, should not be permitted to falsify the position of

any member of this convention, making no difference what his political sentiments may be. I read with some astonishment the two articles that appeared in the *Salt Lake Tribune* and in the *Statesman,* that the democratic party in its caucus had invited or had in its midst a Bishop Hoge. Now, Mr. President, I don't know Bishop Hoge, I never saw Bishop Hoge, and I may say that I can express an honest sentiment when I say that I do not know that I ever saw a Mormon. I never have had the misfortune to live in a section of the country where Mormonism was taught—where that class of people resided, and I will say this, that there was no man in the democratic caucus on that day that we were charged with having Mormons in our midst, except the members of this convention and the members of the democratic caucus. If any member of that caucus should have said that we had Jack-Mormons or any Mormons in that gathering, they are sadly mistaken, and how it can be so uttered and stated to the people at large that we were closeted with those Mormons, and that that Mormon was about to influence the democratic caucus—I say it gives to the world and to the people of this territory to understand that the democrats are associated with the Mormons in order to perpetrate and continue their infamous crimes. It is wrong to do so—it isn't right, and I think, Mr. President, the correspondent, I don't care who he may be, is a falsifier in placing men just as honorable as any upon this floor in a false position, and I hope that this convention, both democrats and republicans, will not permit anything of that kind in the future to be done. For one, as a democrat, if I thought any democratic paper or editor should falsify the position of any republican in this house or upon this floor, I should feel it my bounden duty to rise in my place on this floor and refute such false assertions. I think our republican brethren here are as equal in honor and as honest in the conviction of their sentiments, so far as Mormons are concerned, as democrats. We would claim on the part

of the democrats some rights. So far as my sentiments are concerned, so far as my action in this convention will be or ever has been since I have been a resident of this territory, it has been universally against Mormonism and polygamy, and I think by God's will and power, I shall always continue so, and I hope no man, correspondent, or any one else, shall be permitted on this floor as correspondent or otherwise to falsify men as honorable as any in this territory or upon this floor. It is not right; it is ungenerous; it is impolitic. I regret that such is the case. I feel the sting, coming from the editors connected with that paper and those papers, so bitterly that sometimes I cannot refrain from uttering sentiments that would not be very pleasant to their ears. I have nothing to say against the paper generally. I say the *Salt Lake Tribune* is a paper of great value to the people; it is a newsy sheet and many articles have been written and published in that paper that I heartily endorse and suppose I shall continue to endorse, but not when it comes to vilifying and falsifying members of this convention. I hope that in the future it will not be continued.

Mr. POE. Mr. President, I come from that section of this territory where we have not been cursed with the evil of Mormonism. We in our section of the country have not experienced the evils emanating from that church and the priests of that church, of so much interest in that section of the country. I have been educated to believe that the institution of Mormonism was inimical to our institutions; that it was a curse to our land, and therefore I have been opposed to the institution, and now all that I ask in behalf of my party in this convention is that we be dealt with fairly. We came here for the purpose of constructing a constitution which will redound, not only to our credit but to the interests of the state of Idaho. And as I say, all that we ask is fair-play. Whatever position we may take as a party, we are willing that not only the members of this convention, but that the world should criti-

cise. But whenever we extend the courtesy of this convention, in common with our republican members, to correspondents to report the proceedings of this convention, we desire that whatever we may say shall be stated, and we are willing to stand by it; but we do not accord to the press or any one else the right to falsify, and whenever they misrepresent this convention, through the courtesy of this convention, and publish to the world falsehoods that place us in a light that is not true and that is calculated to bring reproach and shame upon us as a party, I say that we have a right to demand an absolute retraction with the same publicity that the falsehood was circulated. I am not disposed to ask this convention to expel the correspondent of that paper from this convention, but I believe it is a right we have to have such retraction made as would be sufficient to contradict the falsehood that he has uttered. As far as I am concerned, I rest content with my own rectitude and the rectitude of my party. And whatever we do as a party, whatever measure we may take as a party, let the world criticise it. But I hope that this convention will not permit any gentleman the courtesy of this floor who will continuously through the medium of his paper, circulate to the world a falsehood. I maintain, gentlemen of this convention, that we as a party are entitled to the retraction in that paper of those false assertions, and that retraction I think we are entitled to have at the hands of this convention. I think it should be made, not in the kind of language that has been presented in what is purported to be an apology or retraction in the past, but that it should be so plain and unequivocal that the world must see that they mean the correspondent of that paper, sitting here in a position to know what he utters to be either true or false,—that it must be in such plain, unequivocal terms that the world must at once concede the fact that that man has either wilfully misrepresented the facts or stated those which he knew to be untrue.

A gentleman of his erudition, of his learning, of his

knowledge of language, I can't conceive it possible that he can get up before this convention and assert to the world that he was mistaken in the language uttered by Mr. Ainslie—I can't conceive that the language uttered by Mr. Ainslie when he introduced that resolution could by any possibility be construed into a statement that he withdraws from the democratic party. It cannot be; therefore I say that the gentleman must have wilfully asserted that which he knew to be untrue when he penned those words. And I do not believe there is a man in this convention but knew the falsity of the words, but he thought that as he has been in the habit of falsifying and vilifying the democratic party as to their position upon this Mormon question, he would be upheld by the adherence of his party in the utterance of this falsehood, but I do not believe, gentlemen, that you will uphold any man in falsifying your brethren in this convention. As I said before, let the truth go to the world, but, gentlemen, save us from the false pen,—from a gentleman who wields with such venom a slanderous pen.

Mr. BATTEN. Mr. President, this question of privilege which has been moved by the gentleman from Boise is one that affects equally every democratic member on this floor.

Mr. McCONNELL. Mr. President, I would like to ask the unanimous consent of the convention to have a resolution read.

The CHAIR. Does the gentleman from Alturas yield?

Mr. BATTEN. I will yield.

SECRETARY reads:

"*Resolved* that the correspondent of the *Salt Lake Tribune* be requested to publish a retraction of the charges against the Honorable George Ainslie or be denied the future privileges of the floor." (Applause.)

Mr. McCONNELL. And I move its adoption.

The CHAIR. It is moved and seconded that the

resolution be adopted. The question is now before the convention.

Mr. McCONNELL. Mr. President, we are here as the repesentatives of an honest and honorable constituency, and let us represent them fairly on this floor. If any charges have been made against any member here, democrat or republican, by a member of this house or correspondent of any paper, he should, if an honorable gentleman, make the amende honorable, and it is my opinion as a republican that there should be no false charges, no lies disseminated against any democrat or any republican. (Applause.) The honorable gentleman from Boise I have known a great many years. We have been political opponents when to be political opponents meant war to the knife, but I have never known him to stoop to a dishonorable act, and I stand here today to ask that the convention do the fair thing by Mr. Ainslie. (Applause.)

Mr. BATTEN. Mr. President, the resolution as drawn seems to me indefinite. I do not know to what charge it refers, nor have I in my mind all that was read at the clerk's desk. It seems to me from my recollection now that there were several matters charged, and I would like to have the resolution reformed to read definitely what charges are referred to, so that we may vote or discuss it intelligently. It simply says the charge made by the correspondent of the *Salt Lake Tribune*. I would like to know to what charge reference is made. As I understood the reading of the newspaper articles a moment ago, there were several referred to.

A MEMBER. Mr. President, if the resolution that has just been offered prevails, and I am sure the good judgment and spirit of fairness that prevails in this body will see that it is carried, then I have nothing more to say. I simply rise in my place to refute the charge which has been made against every democratic member in the article read by the clerk. I must say, and I know I will be borne out by every democratic member here, that Mr. Hoge's name, whoever he may be, was not for

one moment or one instant mentioned in our caucus; the spirit that dominated that caucus was a spirit of patriotism. Nothing but a unanimous sentiment prevailed in our caucus by all lawful and constitutional methods to stamp out polygamy, and I am sure our republican friends will see that we are not left to rest under that stigma of the charges so unjustly heaped upon us, and I am glad it has emanated from a republican member to see that we have ample justification in this matter.

Mr. BATTEN. Mr. President, I called for information but have not received it yet. I don't know whether I am in order or not as to this question. I had not intended when the gentleman from Boise rose to a question of personal privilege, to interfere in the matter whatever. But there have been some references made upon that question here that I, as a republican, do not feel like letting go unchallenged, at least without answering. However, that question of personal privilege is before the house and also the resolution of the member from Latah. I don't know which we are discussing, but I have something to say upon both of them.

Now with reference to the suggestion made upon the question of personal privilege, the gentleman from Boise has referred to the man who, from all accounts, must be an infamous character, as having been identified with the republican party. I have been in the territory of Idaho ten years prior to the time the gentleman refers to that this person was a member of the republican party. He may have been, for aught I know, a member of the territorial republican committee, but if so, I have no knowledge of it, and I will not take issue with gentleman upon that point, for he probably has information that I know not of. I have this, however, to say, that if he ever was a member of the republican party, we long since repudiated him and he has left us and gone to some other party; but it is not fair now to charge us with having harbored a man like that. Of course, the republican party cannot be responsible

for every member that may choose from some improper motive to join its ranks. But men of that kind do not find a congenial home in the republican party, and generally find their way out of it and go to some other party. I do not know where Bishop Hoge belongs today and do not care, but he does not belong to us and it is not right in a non-partisan convention like this to attempt to shoulder him upon us. In fact, Mr. President, I have understood this to be a non-partisan convention, and I have understood that my friend from Boise goes so far as to only drink non-partisan drinks. I have understood that when he takes his drink, instead of taking straight old democratic Bourbon, he pours a little republican soda-water into it, or if it is not accessible, then he puts a little more of the Bourbon into it than he does the soda-water. However, we will pass that. It is not fair, Mr. President, to charge upon us that we are responsible for the actions of Bishop Hoge, or that we are in sympathy with him. Now I, for one, have not charged upon our democratic brothers that they are in sympathy with the Mormon element. I have been from the start in hopes that we would all stand solid upon this one question, and so far as I have had anything to do upon that matter, I have done my level best to be in accord with them or get them to be in accord with us, that we may act harmoniously upon that question. I hope before this convention adjourns it will publish to the world that the republican party and the democratic party stand side by side upon that question as one solid alliance.

Another member also referred, I thought, in reflecting terms upon the republican party. Now I rise to defend the republican party against any charges of the kind. We are not here to utter any slanders or cast any reflection upon our friends of the democratic party. But I will not allow this moment to pass without saying a word, at least, in defense of my old friend, the polished and able editor of the *Salt Lake Tribune*. And I would be sorry to see the power of that man or the

influence of that paper torn down. I do not believe, however, if this whole convention acted as one man it could tear down the influence of Judge Goodwin or detract from his pure character or break down the influence of that paper. I admit, Mr. President, that a mistake has crawled into the columns of that paper. I admit that Mr. Ainslie has been misrepresented, but the question with me is this: whether that was intentional misrepresentation,—whether the correspondent of the *Tribune* intentionally sent the dispatch to misrepresent Mr. Ainslie. Now it is very easy in the course of a debate, when a correspondent is sitting by and listening, to misunderstand and by that means to misrepresent in the columns of a paper. I understand from Mr. Ainslie himself that the correspondent of that paper has been to him and has apologized for the mistake he made and will correct it. Now upon that point I say that if that resolution offered by the member from Latah is on the mistake referred to by Mr. Ainslie, action upon that resolution should for the present be deferred, for the reason that if the correspondent of the *Salt Lake Tribune* has already apologized to the gentleman from Boise, I have no doubt he will make that apology public and have it so published in the paper.

Mr. AINSLIE. That was only in regard to the statement that I was ready to withraw from the Democratic party.

Mr. BATTEN. I do not know what that resolution refers to. It is indefinite and it seems now from the statements of my friend Ainslie that there is more than one doubt. But I will go as far as any one to censure a paper or a correspondent who wilfully publishes a misrepresentation of any member on this floor, although I think if we are in the business of correcting all correspondents and all newspapers, we probably will have a summer's undertaking before us. But I propose this as to the correspondent of the *Tribune* or of any other paper, that if he has made a mistake, give him time to publish a correction of that mistake, and not by at once

passing a resolution censuring him and placing him before the world in an improper light. Let him have a few days in which to correct that mistake. If he doesn't do it, then I think is the proper time to adopt a resolution of that kind. And I am not in favor of the resolution until we find whether this correspondent, upon learning of the mistake he has made, is unwilling to correct it. If he is willing to correct it—admits the mistake—then I think we should not allow it to go further. If we do, if we pass resolutions on the spur of the moment, a wrong impression may be sent out to the community. I don't want any one to think for a moment that I am personally at any time unwilling to do justice to an able political opponent. There is one gentleman upon this floor who can bear testimony that two years ago I rose in the council chamber of this building to come to his defense upon a matter in which I thought I was justified, and came to his defense and stated matters which I thought were true. For that I was most ungraciously lashed by the *Statesman* in this city here. I let the matter pass. I did not rise to any question of personal privilege, but I am at all times willing to be just to any political opponent as well as to political friends. I ask at no time any unjust advantage of any political opponent, and I am willing now to do justice to Mr. Ainslie or to any other Democratic member of this house, but I do ask that we shall not be rash and pass resolutions here condemning a correspondent in a matter in which he may have innocently erred. Give him the time to do the honorable thing and if he refuses to do it, there will be time to pass the resolution. I say here, I will not, for one, vote for that resolution at this session and this time. If that correspondent is given time to do the right thing and does not do it, then it is a matter for proper consideration.

The gentleman from Shoshone asks me as to whether he may not do that until this convention adjourns. He can do this within a day or two. If he does not do it within that time then we can adopt the resolution. I

do not propose to wait a week or two weeks or anything of the kind. I simply ask that that correspondent shall have the same opportunity that any other gentleman shall have to correct an error.

Mr. CAVANAH. I would like to hear that resolution read again.

Mr. MAYHEW. Will the gentleman permit me; I will say to my friend that the same matter appeared in the *Statesman* here. The next issue came out and that paper very kindly and gentlemanly stated that they were mistaken—humbly apologized in the first issue. The *Tribune*—the same thing appeared in that paper—and there has never been any apology, and that has been a week ago.

Mr. BEATTY. When did this matter appear.

Mr. MAYHEW. I don't know—I never read it.

Mr. BEATTY. I understood this morning from Mr. Ainslie that the correspondent had been to him and recalled a matter stated yesterday, and I don't know what we are talking about scarcely.

Mr. MAYHEW. Don't you recollect the editorial in that paper read this morning that they would not make any corrections and that it was not a mistake?

The CHAIR. You will please proceed in order, gentlemen.

Mr. BEATTY. I understand this resolution is not directed to the *Tribune,* but to the correspondent of the *Tribune* and the *Statesman,*—I don't know which—if the resolution is indefinite, that that correspondent is meant. Now I will say I understood the member from Boise that the correspondent had made some apology to him concerning some one of these matters referred to—I don't know which now. Now, all I ask is that that correspondent have a reasonable time in which to correct the error.

The CHAIR. The secretary will read the resolution for the information of the convention.

SECRETARY reads:

"*Resolved* that the correspondent of the *Salt Lake*

Tribune be required to publish a retraction of the charge published against Hon. George Ainslie, or be denied the privileges of the floor."

Mr. CAVANAH. I move, Mr. President—

Mr. McCONNELL. I desire to explain concerning that resolution—I mean in respect to the charge, that greatest of all charges which could be published against a democrat of Mr. Ainslie's standing, that he was about to go over to the republican party. (Laughter).

Mr. HAGAN. I agree with the gentleman who last spoke, that it is a grievous and serious charge to say that any democrat at this time would leave that party and go to the republican party. (Laughter.) The democratic party here needs no defense on the question of Mormonism, and from the sentiment expressed in the caucus of that party, I think the members need not and will not be put upon their defense. I think this thing should have passed over by a simple question of privilege from Mr. Ainslie. There will be a time in this convention when the republicans can show how patriotic they are, and probably when the crop of senators increases we will have more excuses and probably more speeches upon questions of privilege than we have now, and we therefore set a precedent at the present time that all the various candidates after statehood for senators shall now come up and lay the foundation for future greatness upon questions of privilege, or that we shall pass resolutions for clap-trap or buncombe, and I do not refer to this only, because I believe that ought to be a standing rule. I say taking all things into consideration, I have no apology to make for my party upon this question of Mormonism. Early in life I commenced my fight against it and have always had my sentiments crystalized very young in opposition to its practices. Polygamy and bigamy is not the crime of Mormonism, but above and beyond it all there is a theocracy that rules and controls its destinies. This is more dangerous to this country than any of its parties, because in its theocracy it centralizes its power for bad and never

exercises it for good. There is the question, and we democrats and republicans here in this convention should so frame the organic law of this land as to strike down theocracy first, and then fall all the other evils of the institution. To do that we must attack, of course, those practices, and we will do it at the proper time, and I say that so far as I know, the republicans of this convention and democrats, too, are in one harmonious accord upon the proposition and it requires no member here, I take it, to get up to express himself upon the question of Mormonism. I congratulate us all that we have reached one question upon which we seem to unite. I remember that in the fight referred to by the *Tribune* against Mormonism in Utah, it stood shoulder to shoulder with the democratic party there, and advocated together with the democrats in Utah every principle that went to strike down this theocracy of which I spoke. It has made a long, a manly and honorable fight, and those attacks it now makes upon the democrats and the democratic party I think are made through correspondents thoughtlessly; if not thoughtlessly, then certainly maliciously, because the editor of the *Tribune* knows that at home there were no more active men that rallied around the labor party in that territory than he found in the democrats living there, to fight that. They went to our party to select their candidate for Congress; they had to come to the democratic party of that territory to protect the laborers against the corruptions of republican office-holders in the territory over and over, who went there and became Jack-Mormons. I do not apply that here because in this young state we shall hear no uncertain sound in its constitution. In all the political parties of this territory we shall never lack any disposition to do right in this matter, and therefore I say for one that I am proud to say my party has but one voice upon this question, and I congratulate them upon that and also congratulate the convention itself. I am in favor of the resolution because I think the bravest man in the world is the man that apologizes when he is

wrong. And I hope that he is as brave as the gentleman from Alturas says he is, and will accord to Mr. Ainslie the apology or retraction that is due him—and I think he will—there will be no difficulty about that and should be none about the resolution. It is a misrepresentation to my knowledge. I have nothing further to delay this convention for, and I hope the resolution will pass.

Mr. CAVANAH. I wish to make an amendment to that resolution and I would like to hear it read again.

SECRETARY reads.

Mr. CAVANAH. I move that all be stricken out after the words, "Hon. George Ainslie."

Mr. McCONNELL. I will accept the amendment.

Mr. CAVANAH. I make it for this reason; I don't want this convention to place themselves in as ridiculous a position as the last legislature here did and be laughed at all over the country.

Mr. HAGAN. I think the amendment is a good one and hope it will be accepted.

Mr. McCONNELL. I have accepted it.

The CHAIR. I would suggest that the word "required" be changed to "request" and then it be left to him to make such amende as he sees fit.

Mr. McCONNELL. I will accept the amendment.

The CHAIR. It is moved and seconded that all that portion of the resolution after the name of Mr. Ainslie shall be stricken out.

Carried.

The question now recurs upon the adoption of the resolution as amended.

Mr. SHOUP. Mr. President, I wish to offer a substitute to the motion now pending.

SECRETARY reads: "That the resolution be left to a select committee of ten, five democrats and five republicans, and that the said committee shall be required to report tomorrow. James M. Shoup." (Seconded.)

The CHAIR. Gentlemen, it is moved and seconded that a committee of ten be appointed, five republicans

and five democrats, to report tomorrow. (Vote.) Motion lost.

The question now recurs on the adoption of the original resolution as amended. (Vote.) Carried without a dissenting vote.

Mr. REID. I call for the regular order of business.

The CHAIR. Presentation of petitions and memorials. None. Reports of standing committees.

COMMITTEE REPORTS.

Mr. McCONNELL. The committee on Education desires to report.

SECRETARY reads report:

"To the President and Members of the Idaho Constitutional Convention, Gentlemen: We your committee on Education, Schools, School and University Lands, beg leave to submit the following report. W. J. McConnell, Chairman."

The CHAIR. The report will lay upon the table and be printed.

Mr. CAVANAH. The committee on Manufactures, Agriculture and Irrigation desires to report.

SECRETARY reads:

"Mr. President and Members of the Constitutional Convention: The committee on Manufactures, Agriculture and Irrigation submit the accompanying report. Frank P. Cavanah, Chairman."

The CHAIR. The report will lie upon the table and be printed.

Mr. BEATTY. The majority of the committee on Elections and Suffrage desires to report.

SECRETARY reads:

"Mr. President, your committee on Elections and Right of Suffrage have performed the duties thus far assigned to them, and as a result the majority of your committee respectfully submit the report found herewith. Beatty, Chairman, Salisbury, Hays, Heyburn.

Mr. AINSLIE. In explanation of my views, I ask leave to submit the voice of the minority.

SECRETARY reads:

"Mr. President, the undersigned members of the committee on Elections and Right of Suffrage, being unwilling to concur in the report of the majority of said committee, respectfully beg leave to submit their minority report.[1]

While we fully realize the importance of harmonious action as tending to recommend to the favorable consideration of Congress the constitution which may be adopted by this convention, we are conscious of the fact that the general government has ever been jealous of the rights of its citizens, and has thrown around the right of suffrage every safeguard consistent with the constitution of our country.

We believe that the right of suffrage and of holding office should be firmly fixed in the organic law of the state, and thus rendered secure from liability to frequent and constant changes at the whim of a legislative body too often governed by passion and prejudice; that one of the main objects of a constitution is to place restrictions and limitations upon the legislative power and not open the door to uncertainty and oppression which too often follow the ill-considered legislation of partisan bodies.

To put it in the power of the legislative assembly to place at their will additional qualifications, restrictions and limitations upon the qualifications of electors is to us a hitherto unheard of and monstrous doctrine, dangerous alike to the peace, good order and stability of a state government, un-American in its theory and unrepublican and undemocratic in its practice and tendency.

The incorporation of such a provision in the constitution as recommended by the majority of this committee, we cannot endorse, and we candidly believe it would receive the prompt rejection by Congress of the Constitution.

In the report of the minority, we have amply provided the qualifications and disqualifications of electors and have fully empowered the legislative assembly to enforce such provisions by all adequate and appropriate legislation.

We therefore recommend the adoption of the minority report as a substitute for that of the majority of the committee.

Respectfully submitted,
GEORGE AINSLIE,
F. W. BEANE,
A. E. MAYHEW."

The CHAIR. Both reports will lie upon the table

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[1]—The remainder of this report is taken from the Journal of the proceedings of this convention. (p. 117.)

and be printed. Any further reports? None. Final readings?

Gentlemen of the convention, we have finished the regular order of business for the day. What is your pleasure?

COMMITTEE CHANGES.

Mr. AINSLIE. I am requested by Mr. Beane to ask indefinite leave of absence for him, and that Judge Hagan be substituted as a member of the committee on Elections and Suffrage in his place, and Mr. King be substituted in Mr. Beane's place in the committee on Schedule.

The CHAIR. If there is no objection to the request made by Mr. Beane, as presented by the gentleman from Boise, it will be so ordered.

AMENDMENT OF RULE 11.

Mr BATTEN. I desire to offer a motion.

Secretary reads: "I move to amend Rule 11 of the standing rules, as follows: Amend by adding after the word "convention" at the end of the second line in said rule, the following: 'and in no case shall he be allowed to occupy more than fifteen minutes at any one time except by unanimous consent of the convention.' Batten."

Mr. AINSLIE. I move its adoption. (Seconded.)

Mr. REID. It lies over under the rule, one day.

Mr. BATTEN. I gave due notice of it on yesterday.

The CHAIR. Yes; notice was given. As I understand it, notice was given, but it has to lie over one day after it is offered.

The rule relating to amendments is as follows: "These rules shall not be altered except after at least one day's notice of the intended alteration, and then only by a vote of the majority of those present in convention."

Notice of intention seems to sufficiently specify the nature and character of the alteration. The chair holds the notice is sufficient and the matter is now before the convention. If the gentleman from Alturas will allow the gentleman to make one suggestion, he could move

that after the words "by unanimous consent" the words "by a vote of the majority of the convention" be inserted.

Mr. REID. M. President, I oppose the resolution. As I understand it, its purport is to cut off debate and not allow but fifteen minutes. We have a standing rule that members shall not speak more than once or twice. Every gentleman who is attending this convention came here with a view to work expeditiously and faithfully, which we have done, and also to consider these matters properly. We discuss most of them in the committee and report them here, but when we are laying the foundation for a great state, making fundamental law, I am sure, while I want to shorten the session as much as anybody, and am as anxious to go home as anybody, and made as many sacrifices perhaps as any other member of the convention in order to attend to it and do my duty here, yet I think members ought to be allowed to discuss these matters thoroughly. Every man of us often has some new idea, some new phase to present, and if there be any one place in which there is safety in a multitude of counsellors, it seems to me it is when we are making organic law. Members are not disposed to speak too long. Speeches have been terse, brief and to the point, and I think members ought to be allowed discretion in that. If we find the privilege is abused, we can hereafter take this matter up, and I move an amendment that the matter lie on the table.

Mr. BEATTY. I second the motion of the gentleman from Nez Perce and object to the adoption of this proposition of the gentleman from Alturas.

Mr. REID. I don't wish to cut off debate and I ask unanimous consent that that motion may be debatable. I didn't make it for the purpose of cutting off debate, but in order that it may lay upon the table if hereafter we find the privilege is abused. The gentleman can at any time interpose a motion and I will vote with him.

The CHAIR. The matter may be proceeded with then.

Mr. MAYHEW. I move it be laid on the table to be taken up tomorrow evening.

The CHAIR. Does the gentleman from Nez Perce accept the amendment?

Mr. BATTEN. I do not wish to debate the motion offered by the gentleman from Nez Perce, but give in a few words my reasons for introducing this amendment to the rule. I have done it at the request of a number of the members of the convention whose business is pressing and requires their attention at home. If the gentlemen will notice the rule, it will still give them an opportunity to speak twice on a subject, and probably fifteen minutes at each time. Now if an argument has been well considered before being made, it can be condensed into fifteen minutes. I disclaim any desire whatever of choking off members or limiting them. I, for one, would be much pleased and highly edified to listen to some of the eloquent and persuasive arguments we will have here upon the various subjects up for discussion; but at the same time we are here under great disadvantages; we are here all, or most of us at a sacrifice, pressing business calling us home. Now, why not require one and all to condense our arguments into short speeches, or to reduce what we have to say to something that is simply argumentative and not a mere lot of gush and twaddle and such as that, and it is only in this spirit I offer the rule, but it is liberal in its scope. If there are any gentlemen here who desire to use this as a nursery for political bottle-washers or desire to ventilate some high moral ideas, let them hire a hall and we will all go and listen to them. (Laughter and Applause.)

Mr. BEATTY. It is largely out of consideration for my friend from Alturas that I oppose his motion, for I know how often and what great flights he takes into the empyrean when he gets into a discussion even of a proposition, and I don't want to see him cut off from debate. If debate is cut off in this way we will be deprived of listening to my friend's eloquence. I have

heard him often in the past and know how eloquent he can become. And, Mr. Chairman, this strikes further; it will affect even the chairmen of the committees upon whose shoulders devolve often explanations of the measures which are introduced, and would cut off the chairman from thus framing the proper explanation. Now I think as is suggested by the distinguished member from Nez Perce, (Mr. REID,) that this matter better lay over for a few days and see whether we are all disposed here to make orators of ourselves and bore the other members with long speeches. For one, I don't propose to do so, but I don't think it is time to cut off debate, and I do especially put in a plea for my friend from Alturas.

Mr. MORGAN. I rise to a point of order. This motion is not debatable under the rule.

The CHAIR. The chair sustains the point of order.

(Question! Question!)

The CHAIR. It is moved and seconded that Rule 11 of the standing rules of this convention be amended as contained in the resolution offered by the gentleman from Alturas, (Mr. BATTEN). Pending the motion of the gentleman from Alturas, the motion is made that the same lie upon the table. (Vote). The noes have it.

Mr. SHOUP. I move to amend the motion by striking out the word "fifteen" and inserting the word "ten." (Seconded.)

Mr. REID. I move to amend that and insert "five" as the limit of the speeches.

Mr. MAYHEW. I move that the amendment to the amendment be declared out of order.

The CHAIR. The amendment to the rules is offered that the word "fifteen" be stricken out and "ten" inserted. To that amendment is offered the amendment to strike out "fifteen" and insert "five." All those in favor of the second amendment. (Vote.) The noes have it.

The question now recurs upon the adoption of the amendment of the gentleman from Custer, to strike out

the word "fifteen" and insert "ten." (Vote.) The ayes seem to have it. (Division.)

The CHAIR. Division is called for. (Rising vote shows ayes 28, nays 25.)

Mr. MAYHEW. I want the ayes and nays, Mr. President.

The CHAIR. The question now recurs upon the adoption of the original resolution as amended. Upon that the gentleman from Shoshone calls for the ayes and nays.

Mr. MORGAN. I move that the resolution be referred to the committee on Rules. We are spending too much time on this thing. (Seconded.)

The CHAIR. It has been moved and seconded that the resolution now before the convention be referred to the committee on Rules. (Vote.) The noes have it. The question now recurs upon the original resolution as amended. All in favor of the motion say aye; contrary, no. (Vote.) The ayes seem to have it. The resolution of the gentleman from Alturas is adopted.

Mr. MAYHEW. Mr. President, I called for the ayes and nays. It is a right, I believe, when it is supported, and it was supported.

The CHAIR. The gentleman is correct, but after that call another motion was offered, which I put, and as I understand it, the call for ayes and nays was not renewed.

Mr. MAYHEW. I didn't have time between the putting of the motions by the chair. (Laughter.)

Mr. REID. Mr. President, I rise to a point of order. After the gentleman moved to refer it to the committee on Rules, the matter stood to vote upon the original motion as put, subject to whatever had been done and attached to that, as I understand, was a call for the ayes and nays as a second.

The CHAIR. The reason why the matter was disregarded was because it had passed out of the mind of the chair with regard to the call for ayes and nays. If there is no objection, the call will now be ordered.

A MEMBER. I object.

Mr. REID. Mr. President, I make a point of order, if the gentleman is entitled to it and subject to the objection. It was a matter of right he had, and the gentleman, I maintain, under the rules cannot be cut off by mistake or oversight.

A MEMBER. I rise to a point of order.

The CHAIR. If the objection is made, I will have to sustain the point of order made, namely, that the gentleman from Shoshone is entitled to his call.

A MEMBER. Point of order must be taken by appeal from the ruling of the chair.

The CHAIR. The chair has seen fit to reverse its ruling. The secretary will call the roll.

Mr. BEATTY. Are we voting now upon the fifteen or ten minute rule?

The CHAIR. We are voting now upon the adoption of the resolution as amended, substituting ten minutes for fifteen minutes, as it was originally.

ROLL CALL. Ayes: Ainslie, Allen, Anderson, Andrews, Batten, Beatty, Brigham, Campbell, Cavanah, Chaney, Clark, Coston, Hagan, Hammell, Hampton, Harkness, Harris, Hayes, Hogan, Howe, Lewis, Maxey, Melder, Myer, Moss, Parker, Pefley, Pierce, Pritchard, Savidge, Sinnott, Shoup, Standrod, Steunenberg, Taylor, Whitton, Woods, Mr. President,—38.

Nays: Armstrong, Bevan, Crutcher, Gray, Hasbrouck, Heyburn, Jewell, King, Kinport, Lamoreaux, Lemp, Mayhew, Morgan, Pinkham, Poe, Reid, Salisbury, Sweet.—18.

Mr. AINSLIE. I ask leave to change my vote from no to aye before the vote is announced, Mr. President.

The CHAIR. It is granted.

The CHAIR. The resolution is adopted.

Mr. AINSLIE. I give notice on tomorrow at the opening of this convention, I will move to reconsider the vote by which this motion was adopted.

SPECIAL FINANCE COMMITTEE.

Mr. SWEET. I desire to make a motion for the appointment of a special committee of three, namely, a committee on Finance, it being the business of this committee to provide, if possible, for the necessary expenses of conducting the affairs of this convention, and further, to pay for items of per diem and mileage, and I ask in making this appointment to waive the usual courtesy, and upon the passage of the motion, place upon that committee men who have made a success of raising money generally, as well for themselves as others. (Seconded).

The CHAIR. It is moved and seconded that a special committee of three on Finance be appointed. (Carried).

Mr. REID. I move the convention resolve itself into a committee of the Whole and proceed with the orders of the day.

The CHAIR. The chair will appoint as that committee, McConnell of Latah, Mr. Harkness of Oneida, and Mr. Lemp of Ada county.

Mr. MAYHEW. I move we take a recess until 2 o'clock. (Seconded). (Vote.) Motion is lost.

Mr. REID. I now make the motion that the convention resolve itself into a committee of the Whole for the purpose of proceeding with the order of the day. (Seconded). Carried.

The CHAIR. Will the gentleman from Shoshone, Mr. Mayhew, take the chair?

ARTICLE I., SECTION 7.

COMMITTEE OF THE WHOLE.

Mr. MAYHEW in the chair.

Mr. REID. Mr. Chairman, when the committee adjourned on its last sitting, there was under consideration Section 7 on the right of trial by jury. The gentleman from Shoshone (Mr. CLAGGETT,) gave notice that when we reached the last line, he would ask that

the same principle involved in the first line control, and therefore this should be applied to criminal cases, only that he would make the majority larger—three-fourths. This first substitute offered by the gentleman from Shoshone, (Mr. HEYBURN,) provoked considerable discussion and is liable to provoke more. When we reach the other, apply this principle to criminal cases, this is likely to produce more discussion. Principally in more speaking by members of the legal profession. Now in order to save time and that this may be disposed of before it comes into the convention, and save time here, I move that Section 7 be referred to the committee on Judiciary. (Seconded).

Mr. SWEET. Mr. Chairman, I am opposed to that motion. I believe in this convention adopting every section in the Bill of Rights and dispose of it as it comes to it and be done with it. (Applause). And in all probability, from the little experience I have had in the Judiciary committee, we are no more likely to agree there than we do here. But I believe in taking it up and settling it right now.

Mr. REID. Mr. President, one other reason I will give for moving to send it there. It is usual and you will find it in most constitutions, to make a declaration in the Bill of Rights—that is the way it is—that is the title of this report, "Declaration of Rights." Here we have not only a declaration of rights in the first line, but we have also a statement of fundamental law announced in the Bill of Rights which properly belongs in that article which is denominated "Judiciary Department." Now in order that it may save the time—that is the main idea, to save the time of the committee—they can recommend back what usually goes in this article, Bill of Rights, and also what part shall be cut out and put in the Judiciary Department proper, and they can agree to it there in the Judiciay committee; at least, we will not come into the convention with a much longer discussion than we had the other day. But all the gentlemen that want to discuss this are lawyers—we have

fifteen or twenty of them—and all the lawyers have endeavored to come in there and appear before the committee, and any laymen will be heard afterwards there, so in order to save the time of the convention on the discussion, all these matters upon recall to that committee come back, and when it comes back, it will hardly be discussed again after they agree on the report. This is the reason I make the motion.

Mr. SHOUP. Mr. Chairman, if this motion prevails, and this section is referred to the Judiciary committee, it will have a contrary effect from what the gentleman intimates it will have of saving time. The Judiciary committee have not yet reported the matter assigned to them, and I do not believe they are any nearer reporting now than they were three or four days ago, and I think we had better decide the matter that first arises in the convention before anything else is referred to it.

Mr. MORGAN. I rise to a point of order. The motion of the gentleman from Nez Perce is not in order. I think we cannot refer the article from this committee to another committee.

The CHAIR. The motion is to report back to the convention with the recommendation that it be referred to the committee on Judiciary.

Mr. REID. Yes; that is the purport of it.

Mr. CLAGGETT. Mr. Chairman. I hope the motion which has been made by the gentleman from Nez Perce will not prevail. All these things in the end have got to come before and be settled by this convention. And this matter with regard to the preservation of the trial by jury, with or without any limits whatever, is a matter that properly belongs in the Bill of Rights. It has nothing whatever to do with the Judiciary committee or its duties and constitutes no portion of the Judiciary Department of the government. And I heartily agree with what has been said by the gentleman from Custer, Mr. Shoup, that if it ever goes back in the Judiciary committee, it will be paralyzed as we are paralyzing

almost every proposition, on account of having too many lawyers on that committee. (Laughter and applause).

The CHAIR. Gentlemen will keep order. This thing of applause in convention does not go down very well. Are you ready for the question? (Question! Question!). The question is that when this committee rise, it report Section 7 back to the convention and recommend that it be referred to the committee on Judiciary. (Vote). The motion is lost. What is the pleasure of the committee? I understand that when the committee of the House adjourned the other day, there was a motion pending to substitute, I believe it was Mr. Clark. Will you read the amendment?

SECRETARY reads: "To amend Section 7 by striking out all after the word 'inviolate' in the first line."

Mr. MORGAN. I offer the following substitute for the amendment: To amend Section 7 by inserting after the word "but" in the first line, the following words: "the legislature may provide that."

The CHAIR. It is moved and seconded that the substitute for the original amendment of Section 7 be adopted.

Mr. MORGAN. The section will read if this amendment is adopted as follows: "Section 7. The right of trial by jury shall remain inviolate, but the legislature may provide that in civil cases three-fourths of the jury may render a verdict." Mr. Chairman, this is an innovation—it is an experiment. If we put it into the fundamental law of this state, we put it in a position where it cannot be changed until we have a new constitutional convention. If you permit the legislature to pass a law making this change in the law of this territory, if it wears well, the people will retain it; if it does not wear well, they can repeal it. If it is put into the organic law so that it must be—so that three-fourths of the jury may give in all cases a verdict—then we can give it validity until we get a new constitution. I am opposed to very radical changes in the laws. It was said here

when this matter was under discussion the other day that the legal profession were conservative. Mr. Chairman, I believe they ought to be conservative. I believe it is right to be conservative, and I believe it is necessary that we should all be conservative in this convention in order to preserve the rights of the people. The gentleman will understand that I am not opposed to this provision; I am in favor of adopting it, but adopt it in such a manner that if it does not work well, we can get rid of it, but if we put it in the constitution, we must keep it there. It cannot be changed. We will have all the benefits of this change if we permit the legislature to enact it. And therefore I am in favor of this amendment.

Mr. BEATTY. I would like to know just how the section will read with that amendment. As I understand it, it will limit the legislature to making it exactly nine.

The CHAIR. Does the gentleman desire it read?

Mr. BEATTY. Yes, Sir.

SECRETARY reads: "The right of trial by jury shall remain inviolate; but the legislature may provide that in civil actions three-fourths of the jury may render a verdict."

Mr. BEATTY. Mr. Chairman, I would like to ask the mover of this last amendment if in his opinion it will require the legislature to make any change, to make it exactly nine.

Mr. MORGAN. I think so.

Mr. BEATTY. I prefer it in some different shape; they might want to make it ten.

Mr. MORGAN. Inserting it in the constitution as it is would confine it to nine, and I did not desire to change it.

Mr. SHOUP. I hope the amendment will not prevail. There has been a great deal of discussion on this question, and if the motion is now put, we will be cut off from answering some of the arguments that the gentlemen made yesterday or the day before. Now I propose

and I think this should be in the constitution so that the legislature cannot change it every two years one way or the other, just as they see fit. We have tried the other system for at least twenty-five years. In all probability we will have the opportunity to amend this constitution in the next twenty-five years. But I am willing to try it for at least ten or fifteen years. I hope the amendment will not prevail. (Question).

Mr. CLAGGETT. Mr. Chairman, I hope the convention will stand by the report, so far as it is reported on this subject, of the committee on Bill of Rights. So far as the application of this theory of the verdict of nine out of twelve is concerned, in civil cases, it is no longer an experiment. It was an experiment twenty-five years ago when it was first adopted in a neighboring state. It has since then been adopted by the empire state of the Pacific coast, California. It has been in force for nearly fifteen years and has worked in the right direction. For that reason——

Mr. REID. May I interrupt the gentleman? I want to ask him if it was not adopted in '79 in the California constitution?

In California it was, but in Nevada it was adopted in '65.[1] They never had an opportunity in California[2] until '79 to pass upon the question, for they had no convention for the revision of their constitution. As soon as the people got an opportunity to have a chance at this thing by revising their constitution, they put it in, and as stated upon yesterday, it is now in and reported in the Montana[3] constitution and in the Dakota[4] constitution, so that it is no longer an experiment as applied to civil cases. On the question of its application to criminal cases, it would be an experiment, and I, for one, would object to putting into the constitution a provision of this kind with regard to criminal cases, but I

1—Art. 1, Sec. 3, Nevada Const. 1864.
2—Art. 1, Sec. 7, Cal. Const. 1879.
3—Art. 3, Sec. 23, Montana Const. 1889.
4—Art. 6, Sec. 6, South Dakota Const. 1889.

do propose when this matter is disposed of, to offer an amendment allowing the legislature to apply it even in criminal cases short of capital offenses.

Mr. HEYBURN. Mr. Chairman, some gentlemen seem to have a great deal of confidence in their theories and in experiments. I believe sometimes it is wise to try experiments, and I believe in a man having a reasonable amount of confidence in his theories, but still it would seem to me that a conservative course would dictate that we should not go further than proposed by the gentleman from Bingham county, (Judge MORGAN); that we should not go further than to allow the legislature to make this provision if in their wisdom they see fit. If the legislature is called upon to act in this matter, the question will have been before the people and they will come up to the hall of legislation advised in a measure of the sentiment of the people. This convention, of course, is a representative body and presumed to voice the sentiment of the people in a general way, but not upon these particular matters, especially matters which are radical changes upon a system that has prevailed in the territory. It has never been deemed of sufficient importance by the people of this territory heretofore, speaking through their legislature, to attempt to change this matter or to express any sentiment with regard to it. And it is fair to presume that the matter has not been very seriously considered by the great mass of the people, so that, if we empower the legislature, which will express the wishes of the people, to do this thng, the people will be free to exercise their own will in the matter. If we tie them down by an arbitrary provision in the constitution, that will prevent the legislature from expressing the will of the people, even though it may be found to be different from the sentiment they have heard expressed by this convention, we will have done the people an injustice. The system is too old to be lightly changed. I am not opposed to putting it within the power of the people to change it, but I am opposed to a body that was selected here with-

out any particular reference to this matter, taking it in their hands to speak for the whole people on this subject. Very much has been said about its application in our neighboring states—in the state of Nevada. I think if I have not read the times wrongly in Nevada that it is not a very safe precedent for us to follow in matters of this kind. The change that was made at the time of the adoption of the constitution in that state was not made in response to any demand of the people, but as the gentleman expressed it on the day before yesterday when discussing this matter, there had been a difficulty in securing verdicts in the courts of that state, and it was to obviate that difficulty. Well, sometimes it is difficult to secure a verdict because there are conscientious men on the jury who do not believe that a verdict should be rendered as a majority believe it should. I do not propose to reopen the discussion of that feature of this matter, because the substitute that is offered by the gentleman from Bingham will obviate the objection of the gentleman of Shoshone county, as he urged it—that was suggested by him, and leave it where it belongs, right with the people. Leave the people to do as they see fit, and not tie the matter up so that neither the people nor the legislature can express their wish, which may be different from that of this convention.

Mr. GRAY. I am rather inclined to think, Mr. Chairman, that it would be better policy for us to adopt this amendment. As has been said here and argued at length, it is a radical change. In our system of juries, and even if it is now in this convention brought fairly to the views of each, still if our legislators when they meet would be advised by their constituency of their desire to have this enactment passed, it would be easy enough to have it done, and as has been said here, then when we try it, we can within a reasonable time, should it prove not to be as expected or as some expect, should it not prove to be a desirable method of practice, we certainly can do away with it; but as has been said by

the mover of this amendment, if we get it in here and it does not prove to be a desirable change, we are here bound by it until we can have another constitution or an amendment to this, and we can all see how hard it would be, should it not prove to be what is expected by some, to get rid of it; and if it is desirable, we want to keep it, and it is easy enough to keep it then, for it is or in no sense can be a political question, and if once tried and proved desirable, I know we could keep it by a legislative enactment.

Mr. SHOUP. I have listened very quietly to the gentlemen offering amendments to the Bill of Rights. I have made no strenuous objection to it so far because I believe that the amendments that have already been adopted are of very little importance. I do not consider that they have added any strength to the section or that they have taken anything from it. Yet I believe the gentlemen offered them in good faith, believing that they are necessary. I do not believe they felt like the venerable lady that went out after the British soldier with a broom, who said she only wanted the pleasure of showing whch side she was on—she had not expected to do any good or any harm. I don't think they offered them with any such object. Now, the gentleman from Nez Perce, Mr. Reid, when he offered his first amendment to this section, displayed great diplomatic skill, for I believe that the majority of the members of this convention believe that Mr. Reid was friendly to the section taken as a whole, but merely wished to make some amendment that perhaps would make it a little more practical or sound a little better, but would not vitally affect the whole amendment. But it did destroy all the utility there was in the amendment. It took the very life-blood out of it, for we all know that the wrongs we are trying to correct by this amendment could never be corrected if the gentleman's amendment prevailed. But the amendment of the gentleman from Shoshone placed the question squarely before the convention. There can be no question as to its intention

and purpose to annihilate the entire section. Now the gentlemen have come to the conclusion that their amendment is going to be voted down and they come in now with another amendment to say, "Why, we don't know just how this section is going to work. Perhaps we had better leave it to the legislature; let them change it around one way or another as they see fit; or perhaps have a majority two years and then three-fourths the next two years, or something of that kind." Now, I don't think there is any danger in incorporating this section in the constitution just as it is embodied by the committee. The committee gave this section, with but one exception, more attention than any other section in the entire report and they were unanimous in reporting it to the convention as it now appears. The committee does not represent that the report is by any means perfect, for we shall offer an amendment or two ourselves before we are through, but we do represent and believe that it is as nearly perfect as any section will be that will probably be adopted by this convention.

Now as regards this question of leaving it to the legislature. Is it probable that we will have a legislature in this territory for the next twenty years that will be superior to this body? Have we had a legislature yet in this territory that could in any way compare with it? The territory has never been represented as it is represented here today, and the reason why this should be in our constitution is so plain that I believe every business man upon this floor, notwithstanding what Judge Claggett said yesterday—that the majority of the lawyers themselves will vote for it and vote down this amendment. The gentleman made a great many allusions to things past—seemed to have a great deal of veneration for the old landmarks. Why, gentlemen, it would not surprise me to see them before this convention adjourns, defend the torture rack of the Spanish Inquisition. Now they have called our attention to this, that it has been in vogue in England a long time and that it has done so much good there. Is that any reas-

on why we should accept it without challenge? For let us remember that all the time this jury system has been in force in England, Parliament has had the damnable power of taking a man's life and confiscating his estate without accusation or trial. Gentlemen, it does not necesarily follow that because a thing is English that it is not susceptible of reform or amendment.

Now the allusions the gentlemen have made have been almost entirely to criminal matters. The committee did not propose to make any changes as regards criminal matters. They only referred it to civil matters entirely, or to business matters I care nothing for all these platitudes at all; they are not speaking to the question, but I do not believe in the whole history of disputation we have heard or read of such lengthy and eloquent arguments being made that so little referred to the question under discussion. Let us suppose a case. Let us bring it right down to a business proposition. We will suppose that for some reason the machinery of the courts is not in operation. You have a dispute with your neighbor about a piece of property or you have an account with him of long standing and are not able to settle. You have repeatedly met and tried to settle the difficulties between you and are finally forced to come to the conclusion you can never agree. Some friend says, I would advise you to select three of your neighbors—good men—and let them select twelve of your peers and neighbors who have no business connection with you whatever and are honorable, law-abiding citizens and let these twelve men take your case into consideration; let them allow you to appear before them with counsel and witnesses. They will consider all that you have said and after giving the matter due consideration, then let three-fourths of them decide the case. Now, wouldn't any fair-minded or sensible business man that wanted to do what was right agree to such a proposition? But if a man was dishonest and wanted to take advantage of his neighbor, he would say, "No, sir. I want the whole twelve to decide this thing."

The gentleman yesterday said a great deal about the jury system being intended to support the weak against the strong.

The CHAIR. I desire to state to the gentleman, we will have to have some regard for the motion that prevailed this morning on the ten-minute rule.

Mr. SHOUP. Has the ten minutes expired?

The CHAIR. Yes, sir.

Mr. REID. One moment—I am glad to hear from the gentleman from Custer. I will admit those of us who addressed this convention on this question may not have the wisdom that may have incited the committee when they brought in this Bill of Rights, and we did approach it with diffidence and so expressed ourselves. I will admit further, so far as he was concerned, that my remarks may have been misapprehended, but I will not admit it to the two distinguished gentlemen who addressed the committee before him. I have never listened or read in any books on the question of the jury system, remarks that were more interesting and more to the point than especially those from the distinguished gentleman who opposed the position which we took. But I will say further, Mr. President, that any allusion we made to the origin of this system or to the jurisprudence by which it has been governed, was at least correct as a statement of history and fact. The gentleman argues this question and states that the jury system had its origin in England and forgets that even in the Dicasteria of Athens this system prevailed.

Mr. SHOUP. Allow me to correct the gentleman. I said the gentleman referred to it as being so long in vogue in England.

Mr. REID. It was in vogue in England, and not only there, but 'way back, even to the time Cadmus invented letters, almost; because in Athens we had it; we had it in the Comitia of Rome, by the Dane, through the Scandanavian the system has been improved as experience and use suggested it, thence on down, all through the nations, before the Conqueror came to Eng-

land; Edward the Third had it—in the states of Germany they had it; our American colonies inherited that great system of jurisprudence which the old world had adopted and which remained unchanged even when the people of the United States at fifteen different times amended their constitution. Today you cannot go into a federal court and try a case with a jury of less than twelve, because the hand that traced that constitution and the men who adopted it—that instrument which the people praise on every Fourth of July—says trial by jury shall remain inviolate; so you cannot try a case in the federal court with less than twelve unless you amend the constitution of the United States. The gentlemen have said here, and also asserted in the committee that when this system was established, their important cases would no longer go to the federal jury and federal courts, as they go in other states. But the system of jurisprudence in federal courts is better than it is in any state court, as I have tried by experience, and they will have to carry their important cases there, so that in this territory you will have one system of jurisprudence, but in these jury cases, when you have any juries, in the mining cases, for instance, they will have to be tried, I believe, by this very same procedure you are trying to get rid of. I say, and the gentlemen admit, that the amendment I first offered would seem to make no objectionable alteration. I take it that the members of this convention are intelligent. My original amendment was, "by consent of the parties." That was not necessary, inasmuch as the act of the legislature could have provided that, as I stated to the convention, the parties might agree to it. The gentleman's amendment just simply struck out all that and left it right where my amendment would.

I thought there was a disposition here to adopt a compromise. I think the amendment of the gentleman from Bingham properly leaves it to the legislature. We did not discuss it when we were elected to come here. We have never had any discussion of it in this territory,

as well remarked by the gentleman. Now when we go back to our constituents and when we place before them this constitution for adoption, this great question, this great principle of constitutional liberty will come up. For when you submit this constitution to them and discuss it before them, this question comes up, this innovation, this departure from the principles laid down by our fathers and preserved in the constitution of the United States. Let that issue be made when they send their representatives to the legislature; let that be made an issue in the campaign; then let them change it, and if it does not wear well, send another set of representatives and let them repeal it. But when you put it in the fundamental law, it is unalterable until you call this constitutional convention together again. I think it is by discussion and debate that we arrive at the best method of putting this matter before the people.

Mr. BEATTY. Mr. Chairman, I am in favor, if we have a constitution, of putting something in it or leave it blank. Now the amendment of the member from Bingham amounts to nothing. It simply leaves it where it would be if we had nothing upon this subject. It leaves it, in my opinion, to the legislature. My opinion is that if we leave that section entirely out, it would still be left to the legislature. In other words, the amendment amounts to this—a sort of suggestion to the legislature what they ought to do. Now I am not in favor of a constitution of that kind. I understand the aim of the constitution is that we shall say there what we mean—that we shall not drop any suggestions to the legislature what they may or ought to do, but say what they are and what they are not to do. That is my idea of the constitution. Now with that view, I ask what is the validity, of what force is the amendment proposed by the gentleman of Bingham? Simply none at all, in my opinion. If that is the sentiment of this convention, this amendment should be adopted. This amendment would be to strike the section out entirely and leave it to the legislature, for that is what it amounts to. But,

Mr. Chairman, I go further than that. I did not intend when this question came up to take any part in this debate, but my worthy friend from Shoshone intimated or insinuated that the members probably are in favor of this question. Well, I am, for one, not informed upon it, but I have an opinion and I seldom have opinions that I am afraid to express. I have the opinion that this is not exactly an innovation as has been said here. It is a matter which has been tried and successfully tried, and I am in favor of engrafting it in the constitution so that the legislatures cannot tamper with it from time to time—make it one session one thing and the next session another thing. I believe that principle has been so thoroughly tried that we are safe in adopting it. I am in favor of saying in this constitution that in civil cases the verdict of the jury shall be by nine men, or that the agreement of nine men shall constitute the verdict. Now, Mr. President, about the only argument I have so far heard against this position is simply the fact that this system has existed for a great many hundred years; that it existed in England a hundred or two hundred years ago; that we have lived and prospered under it and therefore you must never change it. Mr. President, I do not concur that because a thing is old and venerable that therefore it is right. If our forefathers lived in log cabins, that is no reason why we should not live in palatial homes; or if our ancestors a great many hundred years ago, as naturalists tell us, were monkeys, that is no reason why we should persist in being monkeys still. If we can be men, if we can improve upon the past, I am in favor of doing it, and this question has been tried; it has been found successful.

Now I know my time is short, Mr. Chairman, and I shall not go into the merits of the case, for I haven't the time, but I want to say right here, gentlemen, that this is a matter that is of more interest to the layman, to the business men of the country than it is to the lawyers. It is the lawyers who benefit by this heathen-

ish system. It is by this system that we have repeated trials and new trials, because juries often fail to agree. Now then, that is an advantage to the lawyers. It is the people who have the litigation who are benefited by this change, because you get verdicts, and as has been before remarked, the first impulse of the jury is most likely to be the right one. Now gentlemen, consider a moment that this is not a matter of interest to attorneys to have this system engrafted. I say it is a matter of special interest to the laymen, to the men who have a case in court, to the men who have to pay the attorneys' fees, who have to pay the costs of litigation; but there are many reasons I might adduce why I think this system should be engrafted. I presume my time is up.

The CHAIR. The gentleman has three minutes yet.

Mr. BEATTY. Then I desire to say in those three minutes that I do not believe this is a matter that the people will oppose. A great deal has been said here by different gentlemen that we are taking away a right of the people—a right which the people desire. If I thought, Mr. President, that the people did not want this change, and we were not satisfied it was for their interest to have this change, I would not advocate it, but I believe the people—and I believe from my conversation with them from time to time, from the expression of their opinions, they are all tired of the jury system as we have it. The jury system is a good one if properly protected, but I tell you, sir, if we allow it to degenerate as it has, if we allow justice to be delayed as it has been by the jury trials, the jury system will go down. It is the common remark of all the people that the trial by jury is an unsafe thing. Now I am convinced that it is not the lawyers who are interested in this, it is the mass of the people who want the change, and I believe nine-tenths of the people of Idaho territory will vote to engraft just such a provision as this in the constitution, and I hope, therefore, that the report of the committee upon this section will be sustained.

Mr. GRAY. We have departed considerably from the main question. The question is: Shall we allow the people, through the legislature, to recommend the passage of a law like this, or shall we engraft it where we have got to endure it, let it be good or bad. The gentleman from Alturas would seem to think that we must put it there. My idea of the constitution is not that the constitutional convention shall engraft all the laws in the constitution.

Mr. BEATTY. Let me ask you a question.

The CHAIR. Does the gentleman give way?

Mr. GRAY. Yes, sir.

Mr. BEATTY. Let me ask you, Judge Gray, what is the necessity of putting in these directions to the legislature as to what they may do? If you simply want to leave it to them, why not leave it entirely and make no reference to it?

Mr. GRAY. Within the Bill of Rights there are a dozen things that are not yet left entirely to the legislature, and the only thing we want a Bill of Rights for is a little admonishment to them. It is nothing more than that. It is contained in all constitutions and as a general thing it might just as well be left out. But the idea is, it is to give them permission and fix it as to what and how much a legislature should do; if not, then I say, let us do away with legislatures and let constitutional conventions that meet for that one purpose to do all work of that kind. I am sorry I am interfering with the measure or the section of the chairman of the committee which reported upon this bill, but I am not saying that I am opposed to the proposition at all; I am not saying I am opposed to the trial of it, for I am certainly not; but I am opposed that you shall engraft it in this constitution in such a manner that we must endure it, even after trial, and suffer under it until we can get rid of it—several years, perhaps, before we can do it. And as I say, if it is good, we can keep it; but the idea that we must enact a code of laws here—if that is what we have come for, I have certainly mis-

taken the position to which I have been called to represent the people here. We came here, I supposed, to draft a constitution; that is, to make general rules and general laws; that is, to give general directions and lay a foundation that is broad enough for legislative enactment, and when the legislative enactments are enacted from that, that they may be changed from time to time. Do not circumscribe them by this constitution that we are now attempting to frame. There is no reason, I say, Mr. Chairman—and if there is reason in this, we might just as well say how the sheriff shall serve a paper; how an attachment shall be issued, how they shall be served and how executions and judgments be enforced, and we might as well, gentlemen, not leave that to the legislature, because, as the gentleman from Custer would say, you can't get such a body of men as this. I will chance it, then, that we will get from the people sent here—I will chance it that they will enact such laws as are beneficial today. I hope the amendment will pass.

Mr. HAGAN. Mr. Chairman, I am opposed to any interference with this section, so far as I have read it, as it stands. It is a singular fact that in the arguments of the gentlemen in favor of the retention of a jury of twelve that not one single reason has yet been given by any of them why a jury should remain twelve. Not one reason has been given. The reason of the opposition to the change is only based upon the ground of its antiquity. Now let us consider this in the light of the fact that we are seeking to change a rule for some reason. There is no sacredness that hangs around or that hedges itself around a jury of twelve, any more than a jury of twenty or twenty-five. If there are reasons why a unanimous verdict of twelve should be given, let us hear them. Is there a constitutional right? Only the right of trial by jury. We have been referred to the fact of the English jury. We have no jury system as it exists in England, only in one respect, and that was the reference the gentleman unfortunately made to the practice in the United

States courts. There, sir, he says that he took his important cases; when the Judge upon the bench can do that to which he refers—instruct the jury to arise, and tell them what to decide or tell them how to find their verdict—that is not a trial by jury. We have in the United States practically kept, I say, (the gentleman is correct about it) many of the old abrogated features of the common law jury, which I do not propose, so far as I am concerned, will be contained in the constitution of this state. But no reasons have been given why the system of twelve as it has grown up around us should be retained and that the unanimous verdict should be the rule. But they argue that it is old. Coming back to the same proposition upon which the friends of this measure stand, and that is that three-fourths should render a verdict and that trial by jury should be inviolate, and we meet them on that proposition and agree with them. It would be useless to put that word in because the right of trial by jury is guaranteed by a constitution that is higher than the one which we shall make, and upon which we cannot infringe. But the reason is this: That the friends of this measure believe that we observe in our every-day practice as lawyers—and merchants and business men have no doubt observed more keenly, that it is not as has been claimed by the honorable gentlemen upon the other side, a protection of the weak; but it is used, Sir, as a measure to oppress the weak. Why, Sir, if the weak is in litigation against the strong, how usual it is for the strong one to get one man out of the twelve. But I believe that in the ordinary twelve jurymen, when you have it so that three-fourths may render a verdict, there is no man rich enough to buy one-half of an American jury. They are too numerous. And the poor man and the weak woman in the courts say, "You may oppress me by getting one, but you cannot rob me of the nine; under the present system you may rob me of one, but leave me eleven, and hang the jury and there is no trial. I am oppressed; I am in litigation, and the expenses are

heaped upon me until I wish I was out of court and give you all for which I am contending." I have seen that too often, Sir. I have seen it too often, where men save themselves in cases by being able to hang the jury by getting one man. I want that man, if he is in the business of hanging juries, to be compelled to get four, and I don't believe they can do it. I believe the ends substantially of justice will be meted out to litigants, and that is the only reason why I advocate this in civil cases. Because my observation teaches me that I ought to give this law to the people, in its organic sense, too, and not tell the people to go to the legislature and ask them. But what is the use to tell the legslature that they can do this in the future? The constitution we are making is mandatory and prohibitory. We will compel them to observe, as we do in this Bill of Rights, the inalienable rights we give them. Legislatures cannot take it away. Nor do we propose, nor do I propose, so far as I am concerned, to consent and allow legislative bodies to pass upon something I consider of such vast importance to the people that it should be engrafted in the organic law of the land.

Now the English judges have their juries; at the same time they can compel a verdict. They have a right, when a man is tried for his life or liberty, to tell them how to decide. Of course, he can't make them, but we know how they operate. We haven't it here. The judge has no right here to instruct a jury how to decide. He instructs them upon the law and lets the facts stay with them. The facts being with them, I think in civil cases that the jury should have the right—three-fourths of them—to determine between man and man the rights at issue, their property rights, the rights of every-day litigation, so that litigation can go on, if men want to litigate, and be decided. We have the course of the wheels of justice in this territory, it appears, clogged. We have the calendars over-burdened with cases, most of which are jury cases, because our very code provides we shall have trial by jury in all

law cases, and those law cases, my experience has been, can be treated more promptly, equally as successfully and equally productive of justice to the parties by having three-fourths of that jury decide the cases. I am not in love with any part of the system—the jury system; I am not in love with the system that has come down to me from hoary antiquity, that would allow a peer or a baron of England to shoot down a man and then upon a trial by his peers be secure, at the same time living under a law that would brand a starving woman for stealing a loaf of bread to give to her children. I don't believe in these old antiquities—I don't believe much in the old hoary antiquities of common law, either. I know that the right of trial by jury, for habeas corpus, was wrung from an unwilling king away back on the Plains of Runnymede. I know the kings of England have been trying ever since to thwart the will of the people as far as they can, so far as liberty under the constitution is concerned. I do not believe in this system which was a portion of that system that caused our forefathers to rebel, as is the case with a good many other landmarks hoary antiquity brought down to us. Many are the crimes under the guise of common law that were perpetrated upon a people that were helpless under the rules of its necessities. Nor is this the reason that I am against the twelve; but my only reason is that my experience has taught me that justice would be meted out more unerringly, more promptly and in a better manner in civil cases if two-thirds of the jury should decide the issues and render their verdict on that vote.

Mr. POE. When we say "The right of trial by jury shall be held inviolate," I take it that we mean something, and that is that every person whose life, liberty and property are about to be taken away from him, before that is done, he shall be entitled to a trial by jury. Now what is a trial by jury, is the question, under the constitution of the United States and the precedents that we have—is what this convention is to de-

termine. I am not like the gentleman who has just addressed you; I have a great deal of respect for the wisdom of our fathers, but I think in the consideration of this matter that we ought to give some consideration in relation to that matter, and should here consider what was intended by the framers of the constitution of the United States when they said that every person should be entitled to a trial by jury. Now, the only way we can determine that and as to what the very spirit and letter was, is to see what their practice has been under that law. We find that the jury trial is a system hoary with age. Mr. Claggett referred to the fact that at one time it was composed of 23 men; that a bare majority was all that was required to render a verdict. Now the gentleman will at once see that that was a cumbersome body and larger than was necessary, but that notwithstanding the largeness of that body it could be agreed that the majority should consist of twelve men all the time. It required twelve to make a majority of that jury as it then existed, and in the wisdom of our fathers they saw proper to do away with the surplusage of eleven, and leave to twelve intelligent men the decision of the question before the court, and therefore they adopted the number of twelve under the old common law. So it came down to you under their practice; that system of jurisprudence was adopted in the United States; the common law of England was the law of the land. We knew no other law, and under that law all of our proceedings were had. We were governed by that law, and even today, by the statute of this territory, in the absence of any legislation upon any particular question, the legislature has declared that the common law of England is today the law of the land.

Mr. HAGAN. Will the gentleman allow me to ask him a question?

Mr. POE. Yes.

Mr. HAGAN. I understood the gentleman to say that the United States statutes fixed the jury at twelve.

Mr. POE. No sir, I never said it.

Mr. HAGAN. What law then did?

Mr. POE. The law of custom and the common law, and the practice of the people under that law. We find that under the practice of every state, or nearly so, until within a few years, the rule has been that when a man demanded a jury, it was considered a right that he had to a jury trial by twelve men. I say that that was the spirit and intention of the framers of the constitution of the United States, when they said that every man whose life, liberty or property was to be interfered with or taken away from him—before that could be done he should be entitled to a trial by jury. I say that having adopted twelve as the number which constituted a jury, that therefore by custom, by long-continued acquiescence, they intended that the jury should be composed of twelve men. Now I do not desire to take up the time of this convention at any length, but I cannot conceive of any reason why the gentlemen who are in favor of this innovation, who are in favor of this change—they say they are here to represent the people, that the people are the rulers of the country, and that they are ready to bow to whatever the people may demand. Now they do not come here with any instruction. They come here simply for the purpose of framing a constitution that is republican in form, and putting the necessary safeguards around it so as to give it the proper force and effect. They come here not to make an innovation; they come here to make that kind of a constitution and no other, not to make a change; and I say if the gentlemen are sincere as to the matter, in their expression of willingness to leave this to the people, then let them simply say that the legislature shall, as this amendment directs, have the power at any time to declare that in civil cases a jury shall be a less number than twelve. We will go before the people with that slight innovation, and we will say to them: "Gentlemen, elect your men upon that issue; if you want that change made, make it when you go to the legislature; if you do not want it made, then instruct us; but we will not engraft it into

the constitution. I say it is nothing but right and it is nothing but just; if the system is good then we can retain it for a time; if it is bad we have an opportunity to change it. It will require a long time, trouble and expense to hold another constitutional convention or an election for the purpose of changing the constitution itself.

I have a great deal of regard for the wisdom of the past, notwithstanding the remarks of the gentleman to the contrary. When I behold the wisdom that has been manifested by our statesmen of the past I bow with humble reverence to that wisdom. But I am not one of those who is of the opinion that the world is growing physically weaker but mentally stronger. I find giants in the days of the past that equal anything I find in the days of the present. And I say that we should not with lightness pass over or by that wisdom that has been displayed in the past. I will wind up by saying that we should not be ashamed today of what our fathers have done, nor to tread the paths our fathers have trod.

Question.

Mr. MORGAN. I will not take the time of the convention but a few minutes. I wish to say this: That Nevada has been held up to us as having adopted this system. I have only to say that since she adopted this system she has run down until she is so weak that she cannot stand alone. She has been trying for four years to steal a large part of this territory to——

Mr. CLAGGETT. Does the gentleman claim that she has run down because of this system?

Mr. MORGAN. I don't know (Laughter), I don't know, Mr. Chairman, whether she has run down because of this system or not, but I know this, that since she has adopted this system she has run down until she has only ten thousand voters, and has been trying for four years to steal two-thirds of this territory. Now she is not able to stand alone, and has not population today sufficient to make half a state. If she were a territory

she could not be admitted. They point us to the California constitution that was adopted by the Dennis Kearney and sand-lot fools. Mr. Chairman, I don't want to follow the lead of such constitutions as those nor such men as those. They tell us there is a difference, that the laymen ought to be in favor of this. Mr. Chairman, this convention don't know any difference between the interests of laymen and the interests of lawyers; we all have interests to protect. If we submit to one innovation today, we may have another proposed tomorrow. For myself, gentlemen, I think we ought to be careful. I think we ought to be careful and not throw away the old landmarks that have come down to us. They tell us we should not keep these things because they are old. Why is it that we have this library, Sir, here in this building? Simply that we may have the crystalized genius of the past, of the greatest men the world has ever produced, before us, so that we can follow in the precedents they have laid down for us. It is safe to follow precedents that are good. I hope gentlemen, inasmuch as you have everything we want or any of us stand for in this amendment—I hope it will be adopted, to leave it to the legislature to provide that a three-fourths verdict may be received. Gentlemen, I thank you.

Mr. AINSLIE. I move thtat the committee rise, report progress and ask leave to sit again. (Seconded). Motion is put and declared lost.

Cries of "Question!"

Mr. REID. I want to give notice that I desire to call the ayes and nays in the convention on this amendment.

The CHAIR. You can give notice there, but we cannot entertain any notice here.

Mr. REID. Notice has got to be given, unless you want to be cut off.

The CHAIR. Perhaps it has, but I am no parliamentarian. (Laughter).

SECRETARY reads Morgan's amendment: "To

amend Sec. 7 by inserting after the word "but" in the first line the following words: 'the legislature may provide that,' so as to read, 'The right of trial by jury shall remain inviolate, but the legislature may provide that in civil cases three-fourths of the jury may render a verdict.' "

Cries of "Question!" (Vote.)

The CHAIR. The noes have it. (Cries of "Division!"). A division is called for. (Rising vote). Eleven in the affirmative. Those opposed rise. The motion is lost.

Mr. CLAGGETT. Mr. Chairman, I move that the committee do now take a recess until two o'clock.

The CHAIR. The motion is out of order, unless put that the committee rise.

Mr. CLAGGETT. That the committee now rise and take a recess.

The CHAIR. The house does rise if the committee goes into convention.

Mr. CLAGGETT. Any way to make it.

The CHAIR. (Vote). The ayes have it. The committee will now rise.

CONVENTION IN SESSION.

Mr. PRESIDENT in the chair.

Mr. MAYHEW. Mr. President, the committee of the Whole having had under consideration the Bill of Rights, hereby reports progress and asks leave to sit again.

The CHAIR. The motion is, shall the committee be given leave to sit again. (Vote). It is carried.

A MEMBER. I move a recess until three o'clock.

(Calls of "Two o'clock.")

A MEMBER. I move an amendment to two o'clock. (Seconded).

Mr. HARRIS. I move to amend that by making it half past two.

The CHAIR. (Vote). The chair is in doubt. All those in favor of taking a recess until half past two will rise.

The SECRETARY. Thirty-eight, Mr. President.

The CHAIR. Gentlemen, the motion prevails; the convention takes a recess until 2:30.

AFTERNOON SESSION.

Convention called to order at half past two by the president.

The CHAIR. What is the pleasure of the convention?

Mr. HARRIS. I move that the convention go into committee of the Whole for the purpose of further considering the Bill of Rights. (Seconded).

Mr. BEATTY. I suggest that the motion be extended also to any other reports that have been made, if we get through the Bill of Rights.

Mr. HAGAN. In the general order.

The CHAIR. For the purpose of considering the general orders upon the calendar. (Motion put and carried).

The CHAIR. Will the gentleman from Shoshone take the chair?

COMMITTEE OF THE WHOLE IN SESSION.

Mr. MAYHEW in the chair.

ARTICLE I., SECTION 7.

Mr. CLAGGETT. Mr. Chairman, I offer the following amendment to Section 7.

SECRETARY reads: Insert after word "verdict" in the second line of Section 7, the following: "And the legislature may provide that in all criminal actions, except for capital offenses, five-sixths of the jury may render a verdict."

Mr. BEATTY. I second the motion, Mr. Chairman.

Mr. CLAGGETT. Mr. Chairman, I do not propose to add much to what has been said in this discussion with regard to civil cases in this connection. The reason which moved the consideration of the convention by so large a vote to leave this clause with reference to a verdict of three-fourths in civil cases, I take it applies with equal if not greater force to criminal actions. Nevertheless, I would have been unwilling, inasmuch as

this matter has never been tried, although my own judgment as to how it will operate is entirely clear—I would be unwilling to incorporate in the constitution as a part of the organic law of the state a compulsory provision to this effect, and therefore in offering this amendment, I have limited it to the discretion of the legislature. And limited it also to ordinary cases of misdemeanor and felony, excluding from the operation of it, and placing it beyond the control of the legislature itself—only capital cases where the punishment is death. We all know as a matter of public history that it is upon the criminal side of our courts where the administration of the law as a rule is the most defective—where justice is most uncertain, not only as against the party charged with crime, but also in his favor very frequently. We all are aware of cases within our own knowledge where men who clearly had committed no crime whatever have been reduced to poverty by having one or more jurors drawn upon the panel which tried them, who would insist upon hanging the jury in favor of guilt, out of some personal spite either to the defendant himself or to some particular cause which he represents, or to some particular party to which he belongs or order of which he is a member. Generally, however, the difficulty arises in consequence of the hanging of the jury by one or two (scarcely ever by three) for improper motives where there has been some kind of influence bought to bear. The law, out of tenderness to liberty and life, gives to the accused double the number of peremptory challenges it gives to the prosecution. No one finds fault with that. It also gives to him the benefit of every presumption arising upon the facts of the case with reference to a reasonable doubt—not only with reference to a reasonable doubt as applied to the entire case, but with reference to reasonable doubt upon any one fact which is necessary as a link in the chain of evidence to secure conviction. And many advantages upon the introduction of evidence are given to the defendant in case of wrong

interpretation of the law by the court, resulting in judgment of acquittal. Nevertheless, although the court may have compelled a particular construction of the law (I prefer to use that term) nevertheless, when once the verdict of acquittal has been rendered, he may not again be placed in jeopardy of life or limb or liberty. I might enumerate here a dozen other advantages which the criminal or alleged criminal has, and if on top of that you give him the further advantage, if you double the number of peremptory challenges allowed to him over and above the prosecution, you give to the defendant such a series of advantages as practically to destroy the administration of justice. For that reason I think repeatedly juries will be hung by one juror or by two jurors, and then comes a second trial and an enormous expense to the treasury, the same result nearly always following the prosecution where the man placed upon trial is a prominent man or one who has a large number of friends or one who can largely influence public opinion, either through the press in or any other way. And on a third trial and a hung jury, the practice almost having the force and effect of law, is that the district attorney must enter a *nolle pros* and dismiss the prosecution, and yet, counting all these jury trials, there may not have been one atom of doubt as to the question of the man's guilt, not seldom wearing out the state by reason of these repeated trials and repeated failures. Not for the purpose of calling attention to the necessity of something of this kind being done, because that matter of necessity is known to all, and not because there is anything new in the whole matter which I shall read to the convention, because daily when you take up your public prints over all parts of the United States, you see the same thing—there is nothing new about it, but for one other purpose which I will disclose hereafter, I will read the following extract taken from the Shoshone county newspaper which takes it from a Portland, Oregon, paper. The Portland pa-

pers are giving the jury system as it now stands severe blows because justice was thwarted in the Olds case by the usual insignificant minority. The *Portland Journal of Commerce* comments as follows:

"The non-conviction of Olds for the gory murder of one of his gambling fraternity, after the most convincing evidence on the part of the prosecution, has caused many to question the motives which prevented the minority of the jury from securing justice for the foul crime. It is suggested that the system requiring unanimous verdict of the jurors be suspended for the more sensible method—the Scotch method—a majority alone being necessary to decide a trial. If this qualification were adopted, so many re-trials would not take place, corruption would not so easily influence jurors without conscience. The Olds trial has set many respectable men pondering over the laxity that exists in some branches of our municipal government, and the sooner reform sets in, the better."

I have read that extract, Mr. Chairman, not for the purpose of, as I said before, pointing out an exceptional case at all, because these cases are so common, happening so every day, and the newspapers are so filthy that our ears have become so accustomed to them that it makes no impression upon us any more. But for the purpose of calling attention to the fact which is here specified and which was omitted to be spoken of upon the debates on this question when it was up before. In Scotland where the administration of justice is as good as can be found anywhere upon the face of the earth, even in capital cases the majority of the jury decide. This idea with regard to the sanctity of the trial by jury is the old English system. They have never had it in Scotland. Scotch law still prevails as it existed at the time of the final union of Scotland with the British crown in the reign of James the First wherein the bare majority decides, but to show the sagacity of the Scotch law, they provide not only for a verdict of guilty or not guilty, but they have a third

verdict which ought to be incorporated in the statutes of every state, and that is a verdict of "not proven." If the man is shown to be innocent, he goes entirely acquitted of any moral blame; if he is guilty, he is punished; but if in consequence of checks of the law in any way or the failure to produce legal evidence, although there may be a moral certainty of his guilt, he is not allowed to go out in the community and say, "I have had this accusation swept entirely away from me," but he stands there with the stigma attached upon him. To cover a case of that kind they have another species of procedure by which in case of subsequently discovered evidence that taint may be removed upon application of the party upon whom it has been left. This is what I call the most advanced system known anywhere among civilized men in which the institution of the trial by jury has been preserved. I do not in this amendment ask to have a majority. I would be unwilling myself to do so. I wish to make haste and progress. We each wish to do it slowly, safely and securely. I don't want to stand still and do nothing; neither do I want to run too fast. I want to put it in the power of the legislature in cases non-capital to require or to provide that a verdict of five-sixths or ten-twelfths may be sufficient either to convict or to acquit.

Mr. HAGAN. While I am in favor, Sir, in civil actions of allowing three-fourths of the jury to settle questions at issue, I am not prepared to say that the liberty of a party shall be jeopardized by a vote of five-sixths or three-fourths of any jury. It is a question most serious, and I have my doubts about the power of this convention to put this in the constitution. It has never been denied under the constitution of the United States and in a capital offense or offense where the punishment is imprisonment for life, that you cannot take away from the party the unanimous verdict of the jury. And I oppose this amendment for the same reason that I am in favor of a three-fourths rule in civil cases, and I appeal to the convention for the same

reason—I appeal upon the ground of the weak against the strong. I appeal in the face of the fact that in civil cases we can protect the weak against the strong by a three-fourths verdict, but in criminal cases we cannot protect the weak against prosecution unless by unanimous verdict. Every man who is arraigned under this amendment for a crime the punishment of which is imprisonment for life, which is worse than death—five-sixths of the jury or less than the whole number can consign that man to imprisonment for life. I do not believe in a criminal case we should touch one single hair of his head, around whom the safeguards of the constitution have always been placed—that he should be convicted without a unanimous verdict of his countrymen. I draw the line when it comes to criminal prosecution. The state has so many challenges—every state gives to the defendant challenges, but he cannot be protected except by unanimous verdict. For the same reason that I am in favor unqualifiedly of a clause in this constitution allowing three-fourths in civil cases to protect the weak against the strong, for that very reason I am in favor of unanimous verdict in criminal cases. I do not propose that the prosecution against the weak, defenseless man shall be heard in any court without every safeguard which the constitution can give him being thrown around him. I do not go upon the question of antiquity or anything of that kind, but upon the broad proposition that it is the policy of the law, the policy of each jury to whom that question is submitted, that they as a jury in a body unanimously shall determine this man's guilt or innocence. Under this amendment you can consign a man to the penitentiary for life for murder in the second degree—consign him with five-sixths of the jury on any prosecution. It will apply all the way down to criminal offenses. I wish this afternoon, so far as I am concerned, to draw the line in this age of progress and intelligence, between civil and criminal cases. I do not believe in the waiver. The supreme court of the United States has decided that a

man cannot waive a jury in criminal cases even if he wishes to do it. The state of New York in the case of Cancemi v. People[1] decided he could not waive a jury in a misdemeanor, and over two years ago the Supreme Court of the United States decided in a case from Tennessee that you could not waive a jury. If you cannot waive a jury even in a misdemeanor, which I think is right, I do not believe in applying this rule to criminal cases of the country. I do not believe in trying a man for a crime unless he is protected by every safeguard the law can throw around him—every challenge, every investigation by which we can arrive at the conclusion of his guilt or innocence. We cannot arrive at it unless we claim the unanimous verdict of the jury. I am opposed to it Mr. Chairman. I am in favor of three-fourths in civil cases, but I am opposed to it in all criminal cases of whatever kind or nature.

Mr. POE. Mr. Chairman, I think it is about time that we called a halt in this matter of innovations. The gentleman advocating the three-fourths verdict in civil cases, had some precedent, true, with some states that had adopted that rule, but I defy the gentleman to point out to this convention one solitary state which had dared to go to the extent that he has asked this convention to do. Mr. Chairman, are we to jeopardize this constitution by getting something into it which no other constitution has ever dreamed or dared to do, and present it to Congress among those old common law attorneys who are wedded by education to the old-time practice which has been in vogue from time immemorial, that no man shall be deprived of his life, liberty or property without a trial by twelve of his peers? We admit that states have changed that in civil cases; we have seen proper to follow in their footsteps and make the innovation on the old principle that they have made, but now the learned member asks us to go further and to absolutely jeopardize the prob-

[1]—18 N. Y. 128.

ability and, in my opinion, I believe the possibility of the adoption of this constitution by Congress. And therefore upon policy, upon expediency I do not think it is wise for us to assume a greater knowledge than those who have gone before us have displayed. I am unalterably opposed to taking away that safeguard from any living human being, to-wit, a trial by twelve of his peers when he is accused of a crime the penalty of which will incarcerate him in a prison cell. I say, we should pause and consider well a matter of this kind which takes any safeguard away from the citizen. It is a maxim of law that it is better that ninety-nine guilty men should go unpunished than that one should suffer for a crime of which he is not guilty. Under the present safeguard of unanimous verdict of twelve men, Mr. Speaker and gentlemen, I appeal to you in your magnanimity to consider the many thousands who have suffered ignominious death upon the scaffold or who have eked out a miserable existence in the prison cell. Notwithstanding that fact, yet innocent men have suffered. Now, shall we put it within the pale of possibilities or of the reach of the court or any process of law that will make it more likely for the innocent to suffer than already exists? I think this convention will not go to that extent. And I most emphatically protest against it—upon the principle of its being wrong, and upon the further principle that it is not expedient for us to assume a greater knowledge than all the statesmen who have preceded us.

Mr. BEATTY. I shall not make a lengthy speech nor attempt to make a speech, but I have a few suggestions to make. We still hear the old cry that this is an innovation. Now if the committee will look at that amendment, it is not incorporatng anything in the constitution that is binding us; it is simply leaving it to the legislature in their wisdom of the future to make this change if it shall be deemed wise. And I think it is wise to leave that door open that the legislature may enact the law that it thinks best. Now, if it is impor-

tant to allow three-fourths of the jury in a civil case to find a verdict, I think it is equally important to have the same in criminal cases. The best of jurists say this, that the way to prevent crime is to make punishment certain. We all know that punishment is uncertain, by the practice we have had. Now all good citizens simply want the guilty punished; they do not ask anything else than that, but that much they do ask, and I think that if we have the punishment made certan, that it would restrain crime much more certainly than a severe punishment. The result of our present system is, as we all know—it is not necessary to cite examples—we all know that in half the cases criminals go unpunished simply by the jury failing to agree. Now let us make some provision by which that punishment can be certain, and I claim that the amount of crime will be greatly reduced. But there is one other suggestion and then I leave the matter. It is said that this will greatly injure the safety of the citizen. Why, gentlemen, we forget one item. Suppose this jury shall make a mistake; suppose that it is left to ten jurymen and that a mistake should be made; there is still a resort for the innocent man. That matter still is subject to the ruling of the judge; that verdict may be set aside upon proper motion if the evidence is insufficient. Now there is a bulwark that the citizen can always fall back upon, and there is little danger of the judge allowing an innocent man to be punished when the evidence shows he is innocent. The danger is not great. We are not taking away the safety of the citizen by any means in allowing the legislature to adopt such a measure as this. Of course, if the amendment of Judge Claggett was to absolutely adopt this into the constitution, it would be a different matter. I prefer it left open so that future legislatures may, if in their wisdom it is deemed best and it becomes the sense of the community, have the power to incorporate it, and that is all this provision claims. It does not provide absolute insertion of that principle in the constitution.

Mr. HAGAN. May I ask the gentleman a question before he sits down? Hasn't the Supreme Court of the United States decided you could not be limited upon a criminal case, where the accusation is for an infamous crime, to less than a unanimous verdict?

Mr. BEATTY. How is that?

Mr. HAGAN. Hasn't the Supreme Court of the United States decided that no state law can be passed where the verdict is rendered in a case where the party is charged with an infamous crime without unanimous verdict?

Mr. BEATTY. I don't remember a decision of that kind, and if there be such a decision, future legislatures will have the opportunity of examining that, and if that is the law, if there is such a decision as that, they need not enact this law; but I remember no such decision.

Mr. HAGAN. Do you know of any provision in the constitution of the United States that gives the right of trial by jury by less than unanimous verdict in any state of the Union for an infamous crime?

Mr. BEATTY. I know of no special provision in the constitution of the United States making a different rule applicable to criminal cases than civil cases, and if there is a provision which prevents anything than an unanimous verdict, then we cannot adopt the provision which my friend votes for to allow three-fourths verdict in civil cases. I know of no distinction between the two, from my recollection of the constitution now.

Mr. GRAY. I certainly fail to see the consistency of the gentleman of Alturas. He was not willing to allow the legislature to pass upon matters of property and consider what would be a correct jury in civil actions. But now he seems willing that in criminal cases,—a much more serious matter—he is willing that the legislature may have control of matters of that kind. If they know what is a competent jury in a criminal case, they certainly should be competent to know what was in a civil case. But that seems not to

be his opinion, and I say, and say emphatically that such an innovation as this I hate to go out from this convention, for I think it is unexampled in any country or any state. I never knew of such a thing and I hope we will not go to Congress with a constitution which the constitution of the United States itself would not warrant. I hope the United States will not have to come to us to learn what should be a proper law or a proper jury in a criminal action. He says we trust to judges, that we may have that resort. I say that perhaps may be better and it may not be better. It is almost taking away from the criminal that charity which is extended to him by the law of presumption of innocence. I have seen communities when a poor, unfortunate man has been indicted and brought before the court, and from the reading of the indictment five-sixths of that community would have hung him then without a bit of evidence further than reading the indictment, and I say when we let loose of one single thing in the present system, we do that. We have no right to do it under the law and, I claim it, of the United States, and I do believe it is such an innovation that I should dreadfully hate to see it go out. I am not finding fault with what was done this morning; I am in favor of trying a three-fourths jury in civil actions, but the method of geting at it, I do not approve of, as it was done by the convention this morning. I want that tried by legislative enactment, but I cannot see the consistency of saying let the legislature do it in criminal cases—which are far more important to the life and liberty of the citizen—and in civil cases we won't trust them. They say that this is a better, a nobler, and an abler body than can be got together in the legislature. If so, pass upon this important thing now,—not let them go to the legislature. I cannot see the consistency of that, Mr. Chairman, and I hope that we will consider this candidly enough and think quietly enough on it to vote it down; it is such an innovation that it is not warrantable anywhere.

Mr. REID. I desire to make one statement. Mr. Merriam, the jurist, in collecting a line of authorities on this subject, announces this statement as expressing what he has discovered in his researches, and he cites at least twenty or thirty decisions; "Such legislation," —that is, for the trial of a criminal case with less than twelve,—"is obnoxious to the familiar constitutional provision preserving the right of trial by jury inviolate.[1] That has been decided in a number of cases, among others in the case mentioned by Mr. Hagan.

Mr. CLAGGETT. I do not want our friends on the other side of this question to befog this question on legal or constitutional propositions, and they shall not do it, if I can help it. It is said that as matters now stand Congress cannot pass a law, because it is forbidden to do so by its constitution—or the constitution of the United States—which guarantees a verdict of twelve

Mr. POE. Let me ask you a question.

Mr. CLAGGETT. In a moment. But it is true that there is not another state in the Union, so far as I know, which has got this provision in it, and hence the legislature cannot provide for it; for they all contain provisions guaranteeing trial by jury as known to the common law. But our friends on the other side seem to forget that we are now proposing to acquire the local sovereignty of a state, and are not stopping in the territorial status, where the constitution of the United States is not only our national but our local constitution, and where it is not only our national but our local sovereign, and where the constitution of the United States has not only a national but a local action upon our courts, but we are proposing to wrest, as it were, from the national government the full character of local sovereignty which belongs to a state, and where it has complete and absolute control over the

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[1]—Thompson & Merriam on Juries, Sec. 10. (1882 Ed.)

whole question of juries and anything and everything which it may see fit to control that is not in conflict with the constitution of the United States. Does my friend from Kootenai County or from Ada County, or from Nez Perce County, undertake to say that the constitution of the United States undertakes to regulate the judicial systems of the states?

Mr. REID. Will the gentleman allow me?

Mr. CLAGGETT. Certainly; provided you don't take it out of my little ten minutes.

Mr. Reid. No sir; take it out of mine; I won't speak two minutes. Does the gentleman's amendment embrace any higher grade of crime than misdemeanor?

Mr. CLAGGETT. Yes sir.

Mr. REID. I will ask the gentleman if he does not know, that on account of the constitutional provision that even the nation has, the government never allows the district attorney to prefer an information without trial by jury for a crime higher than a misdemeanor, because it trenches on the right of trial by jury?

Mr. CLAGGETT. What government?

Mr. REID. The government of the United States.

Mr. CLAGGETT. Why, of course, in all matters which relate to the laws of the United States, the national constitution is the constitution for the people of the whole nation. But every power, *every power*, is lodged in the states and remains in the states, is inherent to the people of the states, except such powers as are delegated by the national constitution to the national government.

Mr. REID. And I would like to ask the gentleman if he does not know that under the decisions cited, that in states where their constitutions had the very same form you propose to engraft on ours—

Mr. CLAGGETT. I beg your pardon, sir, but I say that counsel cannot produce any such.

Mr. HAGAN. Will you allow me to ask you a question?

Mr. CLAGGETT. Yes sir, a dozen of them, if you want to.

Mr. HAGAN. Has not the Supreme Court of the United States decided over five cases to the effect that where the crime is infamous you cannot dispense with a jury trial in defiance of the constitution?

Mr. CLAGGETT. Under what law, United States law?

Mr. HAGAN. No sir, where the constitutions of the states allowed it.

Mr. CLAGGETT. No sir, it has not, and I defy counsel to produce the authorities here and read them to the convention.

Mr. HAGAN. And furthermore, has it not given us opinions to the effect that misdemeanors cannot be tried without a jury under state laws?

Mr. CLAGGETT. Whenever you come down to the question, whenever a case comes to the Supreme Court of the United States, and the question of its sovereignty is raised under a state constitution, you go back to the state constitution, and the Supreme Court will enforce the state constitution; and if you ever adopt a constitution here which provides that trial by jury as known to the common law shall remain inviolate, the Supreme Court of the United States will hold, whenever that question properly comes up, that a trial by twelve men is meant, and that a unanimous verdict must be rendered; but if our constitution provides that a verdict of ten-twelfths may be rendered, then that is as far beyond the power of the Supreme Court of the United States to interfere with as it is for the Shah of Persia to undertake to interfere with the Pope's decree.

Now then, Mr. Chairman, I want to say a few words more on this question. I will ask again; what is the difference beween misdemeanor and felony in legal practice? The only difference between the former and the latter is the greater punishment, or amount of punishment. Each is a crime, and under any constitution which provides for a unanimous verdict in crim-

inal cases, a misdemeanor is practically just as much a crime as a felony case. But in misdemeanors the punishment is small, and therefore they will dispense with juries under the laws of the United States, altogether in some cases, and do not allow a jury at all, although it is a crime,—so-known.

Now one question was raised by Mr. Gray that I think should be referred to, and that is, about those cases where very nearly the whole community is determined to convict. I have seen cases in court, at the beginning of terms of court, in which it was true, as stated by him, that whenever the list of criminal cases was reached upon the calendar, the jury that would be called into the jury box was determined apparently to convict, in spite of the evidence, and to directly reverse the old common law rule of requiring the defendant to be proved guilty beyond a reasonable doubt, and hold the defendant guilty in advance and call upon him to prove his innocence beyond a reasonable doubt. I have seen that, but how does it come? The reason of it, Mr. Chairman, is very simple; it is this, that under your requirement of a unanimous verdict, term after term and year after year goes by without any practical enforcement of the criminal law, until crime multiplies and criminals increase to such an extent that the whole people rise up, as it were, in a revolutionary movement, and then for the one or two terms that next follow that condition of things they will convict,—almost going to the point of convicting innocent men. But if you will provide a system of jury trial by which the law can be enforced under ordinary circumstances and against ordinary offenses, you will get rid entirely of this proposition, and that is, the difficulty which is suggested here. Up in my county, for instance, for the last five years we have had the most lax administration of the criminal law. Juries would not do their duty,—hang, hang, or else acquit defendant after defendant, until at the last term of court a jury was impaneled there under a revolutionary situation, fol-

lowing which it was exceedingly difficult for many men proved innocent to obtain justice at their hands. But the whole of the great evil is the direct effect of this old system of requiring a unanimous verdict. I think I can refer safely to the experience of every old legal practitioner in corroboration of this statement. It is conceded it is the result of laxity; it is considered almost impossible to enforce the law as it is, and so we have these revolutionary methods applied at last by an indignant populace by and through the action of the jury.

Another thing was suggested by my friend Judge Gray, and that is this; he opposes this clause because he says it is necessary there should be a unanimous verdict in all criminal cases for the purpose of protecting the weak. Let me ask this question at the hands of this convention, who is the weak in the execution of the criminal law? The state or the defendant? Does not every member upon this floor know that the weaker party is the state, under the restrictions, the limitations, the benefits,—the unreasonable benefits which are given to the defendant? It used to be the case in England, where the jury was summoned by the high sheriff of the county, and where the sheriff was appointed directly by the crown, and where,—as was said so ably this morning by the gentleman from Kootenai—where the judge had the power of charging the jury upon the facts as well as upon the law,—which we have done away with, and where the court not only influenced but absolutely directed the verdicts of juries,—which was true,—you see that the crown was the stronger, and all the safeguards which grew up under the common law were designed for the express purpose of mitigating this strength so that it should not be exercised tyranically. How it is under the ordinary administration of the law in the United States, on the other hand? We all know that the whole thing is reversed. We all know that our sheriff has no power except to go out and summon the men who

are drawn by law from the lists prepared by the county commissioners. We all know the defendant has every benefit from reasonable doubt. We all know he has a double advantage in impaneling the jury. We all know that when there has once been a verdict of acquittal he cannot be called in question again, no matter how wrong the verdict may be. And we all know in addition that the court has power to suspend judgment on the verdict after conviction, in order that application may be made to the governor for pardon in any case which may arise now and then, where the conviction is wrong, or where, if not wrong, the punishment is too severe, so that there is ample opportunity given before the execution of the judgment of the court for a review of the case by the governor or board of pardons. Now I ask whether all these things taken together, one and all, do not constitute too much advantage on the part of the defendant, and whether the strong arm of the state, which is stretched out and whose function is to protect the people, is not paralyzed by this system of a unanimous verdict.

Mr. BATTEN. I will ask you, why make an exception in capital cases?

Mr. CLAGGETT. Out of mere tenderness to human life, and because if the death penalty is once inflicted you can never rectify the error, but on the question of imprisonment you have the entire term of his imprisonment to correct it.

Mr. BATTEN. Don't criminals value their liberty as much as their lives?

Mr. CLAGGETT. No sir; I think my friend would prefer to go to the penitentiary to being hung. (Laughter.)

Mr. REID. I do not desire to obtrude myself upon this convention, but I want to call the attention of the convention to some facts in the history of this jury subject, which I will do briefly, and in the first place I will say that I feel some diffidence in getting up here, one of the youngest members, and seeing around me

staid old men and old lawyers; but we are making experiments in this constitution, and doing away with vital safeguards incorporated in the American constitution. The gentleman said they were making it so we could get into Congress; but you have got to frame it so it will pass the people too, and they esteem this right dearly. Does the gentleman remember that in 1787, when our fathers met in Philadelphia and framed the constitution of the United States, they left out the right of trial by jury in a civil case, and did not guard the right of trial by jury in criminal cases particularly? What was the result? An appeal could be taken to the Supreme Court on matters of law and fact,—could be brought even into the Supreme Court. What did they do? Convention after convention met; public meeting after public meeting was held; resolution after resolution was adopted, and the people cried out that this great right, which came down to them sacred and hallowed through the centuries, wrung from King John on the plains of Runnymede, and which was declared one of the reasons why they separated from the mother country, and sealed their declaration with their blood for eight long years, should be put in the fundamental law, the constitution of the land. What was the result? You see it today in your constitution among the first ten amendments adopted, two years after it was put in operation, in the sixth and the seventh article, guaranteeing to the people of this nation the right of trial by jury. What do we find further down in this connection? When we came into this convention and took our oaths, we said that we would support the constitution of the United States; and yet in this seventh amendment it shows that it preserved to the people the right of trial by jury. Under the fifth, in any case of felony or infamous crime a man should never be tried unless on presentment or indictment of a grand jury, and yet this committee have actually put in this report that even in infamous crimes men may be prosecuted on the information of

the prosecuting officer only, when the constitution, by the light of the Declaration, says it shall not be done. Gentlemen, the people value these rights. You have made one innovation, and I raise my voice in warning now. Gentlemen may say: Here, you want to make a political record." I want to make none; I intend to make none; I want no office in the gift of the people. I intend to pursue my occupation as an ordinary citizen; as an ordinary citizen I value these rights, and I intend to raise my voice against it.

When you go to Congress—and you have had warning, as the gentlemen know—you go there with values of property far less than any other state went into the Union; you go there with a population perhaps less than any others have gone in; you go there in an attitude of supplication, but now when you go asking in that way, with an innovation that I believe strikes at the very foundation of the constitution, will it be strange if they refuse you admission? Gentlemen, follow the paths of your fathers; they trod them successfully. The constitution they framed is the heritage of our American Nation. We are glad it is ours, we rejoice in it, we enjoy its liberty; we should be chary of changing it in the interest of untried experiments, and not strike this liberty down that has been preserved and transmitted to us by our revolutionary forefathers.

Question, Question.

The CHAIR. Gentlemen, you have heard the question proposed. Mr. Claggett, the gentleman from Shoshone, proposes the following amendment. (Secretary reads) "Insert after the word 'verdict' in the second line of Section 7, the following: 'and the legislature may provide that in all criminal actions, except for capital offenses, five-sixths of the jury may render a verdict.'" (Vote). The noes seem to have it—the noes have it.

Mr. CLAGGETT. Mr. Chairman, I offer the following amendment. After the word "verdict," in the second line of Section 7, I move to add: "and the legis-

lature may provide that in all criminal actions, except where the punishment is death or may extend to imprisonment for life, five-sixths of the jury may render a verdict." (Seconded).

Mr. CLAGGETT. I offer the amendment for the purpose of meeting the objection, which had in my judgment considerable force, that was made—although I do not think it was in order—by the gentleman from Kootenai. Under our statute, on an indictment for murder—and probably the statute will never be changed; it will in all probability remain the same—under such an indictment the defendant may be convicted of murder in the first degree, the punishment of which is death; or murder in the second degree, the punishment of which is imprisonment in the territorial prison not less than ten years, and may extend to life; or manslaughter. In other words, the amendment that I offer now excludes all those higher and graver offenses from the operation of the amendment, and confines it to cases of misdemeanor and ordinary felonies, which are not punishable by death or imprisonment for life. I presume this vote that has just been taken has been influenced to some extent by views with regard to the question as to whether the constitution of the United States has any bearing upon this question. It certainly has not. But if I had time, I could read here to show, as I said before——

The CHAIR. The chair is sorry to say that we have not; we cannot violate the rules.

Mr. CLAGGETT. I do not understand that I am violating any rule, however.

The CHAIR. No, only that the time cannot be extended.

Mr. CLAGGETT. No, sir, and I do not intend to ask it. As I said before the constitution of the United States is the organic law of the nation in a national capacity, and these amendments to the federal constitution which have been referred to here are mere limitations upon the powers to be exercised by Congress, but

every power which is not specifically delegated to Congress by the national constitution, or which in the national constitution is not specifically prohibited to the states, is reserved to the states respectively or to the people, by the language of that instrument itself. There is in the constitution of the United States no prohibition against a state having any such legislation as this, but there is a prohibition against Congress passing any law—not for the states but for the nation—enabling the government to do away with trial by jury; and it is utterly impossible for Congress to pass a law today, that in any federal court, or in any matter arising under the constitution and laws of the United States, less than a unanimous verdict may be allowed, in any action at law where the amount in controversy amounts to as much as twenty dollars. Nevertheless, this morning we went ahead and prescribed the other rule here. I offer that amendment without further remarks.

Mr. HEYBURN. Mr. Chairman, without taking up the time of this convention, I just simply want to suggest a word of warning to this convention, and that is, if we consider one crime after another, it will take a week to dispose of this section with this kind of amendments that have been offered. I suppose the next bite will be to except those crimes the punishment for which is ten years' imprisonment, then those for five years, and so on down. For one, I propose to oppose any measure that takes away the right of a unanimous verdict in defense of a man's liberty for any crime or misdemeanor whatever. I believe if the fight is lost in this convention it will be carried out into the public field by their vote this fall, and be carried further into the Congress of the United States, where it will come before a body of men three-fourths of whom have been distinguished members in constitutional conventions of their states, over periods extending for the last fifty years, and who have heard and considered these questions; and when these conservative, able, wise men of the country dally with this question, will

they recognize a constitution where a new people, yet untried in the science of government themselves, demand such an innovation as this upon the doctrines they have considered and passed upon before half of us were born? So I say, if we are going to take it up, bite by bite, crime after crime, we will exhaust the whole afternoon. I, for one, propose to vote against any innovation on the unanimous verdict in criminal cases.

Mr. HAGAN. I would like to inquire if this new amendment has been tried in Nevada?

A MEMBER. I would like to ask the gentleman who proposed this amendment, if he said the Congress of the United States could provide for the conviction of offenses less than felonies by the verdict of a less number than twelve.

Mr. CLAGGETT. What is the question?

MEMBER. Did I understand you to say that the Congress of the United States—that it was within the province of the Congress of the United States to provide for the punishment of persons convicted of any crime against the laws of the United States by the verdict of a less number than twelve?

Mr. CLAGGETT. I have expressly stated that under the constitution of the United States, the limit of the authority of Congress, that they cannot do it; nor can they do it in civil actions where the amount in controversy amounts to more than twenty dollars.

Mr. AINSLIE. Does not the constitution of the United States provide for the number constituting it?

Mr. CLAGGETT. No, sir, it does not, but it has been decided repeatedly, in the absence of a statute or constitution which says it may be less than twelve, that where trial by jury is not definitely mentioned, it means twelve unless it says something else.

Mr. AINSLIE. As I understand it, the common law of England has never been adopted by the Congress of the United States, but the understanding has been that trial by jury under the constitution of the United

States comprehends the common law doctrine of a trial by jury. Now if that is the meaning of the constitution, the law-makers and law-givers who have presided over the inception of the laws of this nation for a century have not seen proper to adopt any amendment or legislation looking to convicting persons by a jury of less than twelve, or five-sixths, as proposed by the gentleman here; and that is a very worthy example for us minor statesmen to imitate. That is, I adhere to the doctrine that where a man's liberty is at stake he shall be tried by a jury of twelve and entitled to every reasonable doubt, and therefore should not be convicted except by a unanimous verdict of the twelve. You do away with the whole doctrine of reasonable doubt if you reduce the number capable of finding a verdict to less than twelve, and every law writer in all our American jurisprudence anywhere in our own country, and forget that the party is entitled to the benefit of every reasonable doubt; and what a reasonable doubt is, is specifically set forth by the law writers. Now I am opposed to this doctrine; I am in favor of the report of this committee, but I took no part in this debate on the question of civil actions. I believe a verdict of the jury by three-fourths of their number in civil cases proper, but I would not have gone so far. I was more in favor of trying the amendment of the gentleman from Bingham in leaving that experiment to the legislature, and not perpetuating what they call an experiment by placing it in the constitution and making it perpetual. Now, sir, the gentleman from Alturas, with a zeal that is probably unequalled by any member in this body, seems to use the same argument upon the one side of the question in civil actions, and tries to take up that on the opposite side when it comes to criminal proceedings. I jotted down a remark or two that he made in advocating the right of three-fourths of a jury to find a verdict in criminal cases, and in placing it within the province of the legislature to say as to whether that shall be done

or not. He said he was not in favor of dropping hints to the legislature how they should do, but he says that we must say positively that the legislature must do so and so—say what the legislature must do and what they must not do. That is, in civil cases, when the matter of dollars and cents is involved, he was in favor of not allowing the legislature to have anything to do about it, but put it in the constitution that three-fourths of a jury were capable of finding a verdict. That is, that you cannot trust the legislature when it comes to dollars and cents, but when it comes to the question of a man's liberty, you may do so. Now, as an *argumentum ad hominem,* if his position was good in the other case where it comes to civil proceedings, this position is sound in criminal proceedings. But I do not pursue the course of this argument further. I say it is legitimate in civil proceedings that a jury of three-fourths should find a verdict. I believe it will facilitate litigation and dispatch many suits a great deal quicker than by having a unanimous verdict. But when we come to the life and liberty of the citizen, whether it means imprisonment in the county jail or ninety and nine years in the penitentiary, I say we should pause and be governed to a large extent by the experience of those who have gone before us. Take the ablest men in the country, such men as we have in Congress today, such men as Judge Edmunds of Vermont, one of the ablest lawyers of the United States in that body, and you will find that they have never yet undertaken to advocate the doctrine that five-sixths of a jury should find a verdict in a criminal case. Therefore I oppose the motion made by the gentleman from Shoshone, and I hope this body will not adopt it. I must say, as stated by one or two gentlemen already, and by the gentleman from Shoshone, Mr. Heyburn, that we have innovations enough in here now to make it a little risky for this constitution to run the gauntlet of Congress, and if we attempt to change the whole jury system in regard to criminal proceedings, I say, gentlemen, that you will

find that constitution laid upon the table of the senators and representatives until it meets the approbation of the next session of Congress.

Cries of "Question!" (Vote).

The CHAIR. The noes seem to have it; the noes have it.

Mr. CLAGGETT. Mr. Chairman, I offer the following amendment: Add after the word "verdict," in the second line of Section 7, "and the legislature may provide that in all cases of misdemeanor, five-sixths of the jury may render a verdict." (Seconded).

Mr. CLAGGETT. I simply offer that. I have not debated these questions after the first general proposition, and simply wish to suggest in connection with this, that I am trying to save the counties expense, as well as to secure a better administration of the law. In these minor offenses, in police courts and in justices' courts, juries hung by one or two men cause the counties a great deal of expense. I do not apprehend that any gentleman here will seek to invoke the ancient practice in the protection of a man who is charged with stealing a few dollars' worth of property of any kind whatever.

Cries of "Question." (Vote).

The CHAIR. The noes seem to have it.

Cries of "Division." Rising vote shows ayes 31, nays 21.

The CHAIR. The motion prevails.

Mr. CLAGGETT. I move the adoption of the section, Mr. Chairman. (Seconded).

Mr. GRAY. I would like to have it read now as amended.

SECRETARY reads: The right of trial by jury shall remain inviolate; but in civil actions three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanor five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony by the consent of both parties, expressed in open court,

and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court.

Cries of "Question!" (Vote).

The CHAIR. The ayes seem to have it; the ayes have it.

SECTION 8.

The question is now upon the consideration of Section 8. The clerk will please read it.

The CLERK reads Section 8 as reported.

Mr. REID. I offer the following amendment: In Section 8, line 2, strike out the following: "or information by the public prosecutor." (Seconded).

Mr. REID. In the section it says: "No person shall be held to answer for a criminal offense." That includes all degrees of murder. When we were sworn in we took an oath to support the constitution of the United States. Article 5 says: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentation or indictment of a grand jury, except in cases arising in the land or naval forces," etc., etc. Now, here a public prosecutor may prefer information against a man for murder or felony; in other words, it is a plain, open, direct violation of the constitution of the United States. It can only apply to misdemeanors. I would be opposed to informations even for misdemeanors. It provides elsewhere in the Bill of Rights, no man shall be put to answer except on a warrant duly issued upon an affidavit as to the charge, and so on, or indictment of his neighbors, the grand jury. Here is another innovation. This as it stands now is a plain violation of the United States constitution as clear as it can be, but even if you limit it to misdemeanors, I am opposed to it then. I am opposed to any one man having it in his power to prefer informations and prosecutions against his fellow

citizens for any crime. We have often heard that the courts are open. When you want to prosecute a man, go up, file your affidavit, meet him in open court, confront him with your witnesses. If he is held or bound over, then let his neighbors, *pro corpore comitatus,* as it used to be called in the ancient law, meet in grand jury assembled and there consider whether or not he should be indicted. After they have considered it, let him be put upon his trial, if they find a true bill; but I am opposed to lodging in the hands of a prosecutor this power to use their malice or prejudice or any other motive that might actuate them in the prosecution of their fellow citizens.

Mr. GRAY. I don't think that we exactly understand the point of this amendment. "No person shall be held for a criminal offense unless on presentment or indictment of a grand jury or information of a public prosecutor."

Mr. REID. I understand that language to mean, if the gentleman will pardon me, that a man may be held to answer by an information filed by a district attorney.

Mr. GRAY. That is, if the district attorney knows of the offense, he goes before a magistrate?

Mr. REID. No, sir, that is not what this intends. If he goes before a magistrate, he does not file an information; he files an affidavit and warrant issues direct. This is intended to act as necessary evidence in misdemeanors—file informations and try a man on it. Instead of an indictment or presentment, he simply files an information and you try him upon that. It will become——

Mr. GRAY. Or, that is when he knows the crime is committed.

Mr. MORGAN. Oh, no; it is——

Mr. GRAY. Held for a criminal offense—he is not being punished.

Mr. MORGAN. They can try it.

Mr. GRAY. Well, I don't know what they mean.

That is what I want—simply to study out what they mean.

Mr. AINSLIE. I would suggest to make that more definite—that the first line be amended to read, "held to answer."

The CHAIR. The amendment now before the committee is to strike out this portion of the section "or on information by the public prosecutor." Do you desire to make an amendment to that amendment?

Mr. AINSLIE. No, sir; it doesn't come in there.

The CHAIR. Any further remarks upon the amendment?

Mr. STANDROD. As a member of the committee on the Bill of Rights, I desire to say that this matter was discussed among that committee and it was submitted to a great many members of this convention coming from different parts of the country. We thought it was better that this clause in this section should be placed there. In many of the counties of this territory, there is but little crime committed. In the county from which I come, there are perhaps one or two criminal actions during the year, and I believe for the last two years there has only been one criminal prosecution in the county upon the indictment of the grand jury. There is sometimes a case that a slight felony has been committed in the county—not a heinous offense—not an offense of any great moment, yet it requires, in order to prosecute the criminal that he should be presented by indictment, and in order to do that, it will require, before that matter can be brought before a court and tried, an expenditure, in order to obtain the grand jury to indict him, of at least five or six hundred and from that to a thousand dollars. All this talk about this section being unconstitutional is bosh, and gentlemen here say that this committee dared to come here and confront this convention with a section of this kind directly in contravention of the constitution of the United States, and are attempting to bring before this convention an innovation that was never heard of

before. I say this is not true. This clause has been adopted by several states of this Union. The constitution of Illinois provides that the grand jury system may be absolutely abolished,[1] and in California, that great state, where the survival of the fittest is a maxim that has been put into practical use, instead of theory, they have adopted this plan and the prosecutions of this state have been successful and they are conducted under a section of this kind. And when he talks about its unconstitutionality, I desire to ask the gentleman if the section that he read applies to criminal prosecutions brought under the laws of a state?

Mr. REID. Yes, sir, "No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land and naval forces or in the militia," and so on. You have put it in your constitution, but why did you add that "land and naval forces," when the United States clause is just the same; that follows. I admit that a public prosecutor could lodge an information on a misdemeanor, but you have criminal offenses, which includes the whole law—all of the criminal law.

Mr. STANDROD. That is a matter no longer in debate among lawyers. It is so thoroughly expounded by the decisions of the courts where this matter has gone up, and by the Supreme Court of the United States, that it no longer remains in doubt, and that was thoroughly considered before this clause was adopted by the committee. All this talk about giving the public prosecutor so much power—I want to ask the gentleman if it is not the experience, as I believe, of the majority of attorneys in this convention, that most generally the grand jury is governed by the directions or requests of the district attorney when he submits cases to them? It is very rarely the case that when he desires a person prosecuted the grand jury will refuse; indeed, most

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[1] Sec. 8, Art. 1, Ill. Const. of 1870.

generally they are governed by his advice upon the law and facts that pertain to the law. And furthermore——

Mr. REID. Will the gentleman allow me to interrupt him a moment?

Mr. STANDROD. Yes, sir.

Mr. REID. Allow me to read the clause from the California constitution. "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law."[1] That is, he cannot lodge an information until he has been committed by indictment or indicted by a grand jury.

Mr. STANDROD. That is not to be tried at all; it is to be committed. Furthermore, this clause does not abolish the grand jury system. If the district attorney of the county or the district should get to play too high a hand, if he should undertake to prosecute men where there was no evidence against them, and for the mere purpose of prosecuting them, most assuredly the judge of that district under this section has control of all that matter. He can at any time he thinks the district attorney is not performing his duty, call a grand jury under this section, and it is very likely the grand jury would be called once a year, or once in two years, as it became necessary. But I believe this will save the money of the counties of this territory, hundreds and hundreds of dollars a year in the prosecution of such crimes as horse stealing and cattle stealing and things of that nature that require to be presented by indictment. I believe there is no innovation in it that will be disastrous to the laws of this territory or to the enforcement of them, or whereby any party will be injured. And, coming from the section of country I do, and having seen this matter tested, I believe that it

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1—Art. 1, Sec. 8, Cal. Const. 1879.

will save to my county alone hundreds of dollars a year. I trust this convention will adopt the section as it has been reported by this committee.

Mr. CLAGGETT. I offer the following amendment, by adding after the word "prosecutor" the words "after a commitment by a magistrate." (Seconded).

The CHAIR. Does the gentleman accept the amendment?

Mr. REID. No sir, I do not accept it.

Mr. CLAGGETT. I think, Mr. Chairman and gentlemen of the convention, the amendment will obviate any possible objection to the adoption of the section as it now stands, so far as this clause is concerned. We are getting back to the same old proposition that the constitution of the United States, the limit upon congressional power, is to be taken and construed as the limitation upon state power, which is a proposition I utterly deny, and upon which I say the gentleman cannot find any text-book on the constitution giving judicial authority to that effect. I throw that out broadly as an axiom, and I would like to see my friend Reid or anybody else produce an authority to sustain that proposition they advocate. I know that in Michigan they have abolished grand juries altogether. If the constitution of the United States secured grand juries in all cases in the states, how were they able to abolish it, and send people to the gallows and penitentiary for years without it? I did not know until it was stated by the gentleman from Cassia, Mr. Standrod, that Illinois had made any change in it.

Mr. HAGAN. It has not; it was a mistake.

Mr. CLAGGETT. What is that, Illinois has not?

Mr. HAGAN. Illinois has not.

Mr. CLAGGETT. I understand now that it has, that Illinois has made a change in it, authorized a change to be made by the action of the district attorney, as stated by the gentleman. I had no knowledge of that before. The section as it now stands with the amendment which I have offered, is substantially the system

that prevails in the state of Wisconsin, where they have reached in my judgment the true rule in regard to the matter. There, as also in California, they do not abolish the grand jury altogether. They leave the grand jury system in existence, and allow the district attorney after commitment to prepare his presentments on all those cases which are sent in preparatory to the sitting of the court, and he has plenty of time to prepare his indictments in advance on all cases where the magistrate has bound anybody over to appear before a grand jury. But in cases where the district has a good district attorney, the expense of the grand jury system, which is great, is dispensed with. But wherever for any reason the district attorney does not perform his duty under the law, the grand jury system is retained and the judge may by special order at any time call a grand jury, and that is the substance of the provision as reported here. It will save thousands of dollars every year to the counties of this territory, and nobody can be injured by the insertion of this amendment. The committing magistrate has already passed upon the question. There is a presumption that there is probable cause, or rather, it has been adjudicated that there is probable cause for holding the party over, and that is all the grand jury is entitled to do, to say that there is probable cause to believe the man is guilty, and after the committing magistrate has passed upon it, there is no reason why the district attorney should not draw up the presentment and present it to the court without the intervention of a grand jury.

Mr. REID. The only objection I see to that, Mr. President, we don't need it until after the magistrate has bound him over. My short experience in the territory has been that with most magistrates it seems that the dictum of the district attorney is the end of the law. In other words, he will direct this magistrate, file his information or keep his prosecution before the magistrate and have the man bound over; that is what he wants. But if the man has been bound over to the

grand jury, his neighbors can come in. Just consider how many bills are thrown out, go and examine the court records, and you will find that two thirds of the bills presented are returned not true bills. Yet you will allow one man, who dictates to the magistrate what he wants in regard to the prosecution of the accused, to have him bound over. This may be all right with a district attorney where a lawyer on the other side happens to be defending him. But I say, stick to the old rules. The courts are open to any man's affidavit. If you want to make a charge against a neighbor, walk up like a man and swear out and have a warrant issued and bring him before a grand jury. The gentleman says it costs so much; but cheap justice don't sometimes pay; under such rules as are just it does cost something. If there are few cases for the grand jury, then it is not going to cost much. If there are a great many cases it is going to cost a good deal even for the public prosecutor to prosecute them. My friend throws out a challenge—he heard me call for time to show authorities, and I can show authorities that you have trenched upon the criminal jurisdiction—or that the courts of the United States in their jurisdiction do not allow district attorneys to file an information, only in cases of misdemeanors; they stick to the old rules more in their courts, and that is the reason lawyers like to try cases in those courts.

Mr. SWEET. I think the time has come to draw the line on the gentleman from Nez Perce. I think he is reflecting upon the justices of the peace in Idaho. (Laughter). He said that in his short experience in practicing law in this territory he has found that justices of the peace are not to be relied upon. Now I want——

Mr. REID. I want my friend to state my language correctly.

Mr. SWEET. Just a moment. I want to know if the gentleman from Nez Perce has practiced law in any

country where he could tell a justice of the peace what the law is. (Laughter).

Mr. REID. I want him to state me correctly, and I will stand by the record as made by the reporters. I did not say they are not reliable; I said I had found that the dictum of the district attorney was with them the end of the law, and I think my brother, if he recalls his experience, will say the same thing. And I have found no difference between them here and in the east, and therefore I want to take that power from those fellows that can use that dictum in that way.

Mr. SWEET. Well, I will further remark that while a great many indictments or informations are thrown out by the grand jury as not being true bills, is it not also true that about as many indictments that are handed in by the grand jury are also thrown out? It will average, I think, without any question, that nine out of ten indictments that are found are quashed.

Mr. GRAY. I don't think there will be a great deal of danger from a prosecuting officer under a salary. I don't complain that we are taking a long time in all these arguments, because I like to hear them, but I do hate to have our constitution get in such a fix that Congress in considering it will have to have such an argument every day as we are having. I think we are putting too much in this all the time; we are trying all the time to lay the foundation too wide, to leave nothing for the legislature. I would conclude, when we get through here, from the way we have commenced on our first bill, that we will not need a legislature again for twenty years. (Laughter). It rather seems that way to me—that we are going to do it all in this convention, and I want as much of this marked out as can easily be done.

Mr. HAGAN. I would like to say this, Mr. Chairman. I do think that the gentlemen from Latah and Nez Perce leave the justices of the peace in an awkward position. I would like to say that my opinion is that there is not any of them to be relied upon. I don't

wish to have these gentlemen dodge the question, if they pretend a justice of the peace knows how to file an information. If the gentleman from Nez Perce understands that I announced that doctrine that none of them can be relied on, I have no amendment to make. If Mr. Sweet's criticism goes to the effect that some of them can, I want to amend; that's all. I don't want the convention to offend the gentleman from Ada any more. (Cries of "Question").

SECRETARY. The amendment is, to add after the words "public prosecutor," the words "after a commitment by a magistrate." (Vote).

The CHAIR. The ayes seem to have it. (Division called for). Rising vote shows ayes 34, nays 18.

The CHAIR. The amendment is adopted. This disposes of the amendment of the gentleman from Nez Perce to strike out those words, is my understanding.

Mr. REID. No sir.

The CHAIR. Then the question is upon the motion to strike out.

SECRETARY reads: The amendment offered by Mr. Reid is to strike out in Section 8, line 2, the following: "or information of the public prosecutor." Mr. Claggett moved to amend by adding the words, after the word "prosecutor," after a commitment by a magistrate."

Mr. REID. Now, as I understand it, and in order that we may vote intelligently, a vote for that now is to the effect that after a man is bound over for murder by a magistrate, on information of the public prosecutor he may be tried.

Mr. CLAGGETT. I understand the motion to be now to strike out the clause as amended.

Mr. REID. I say that your amendment, as applied to criminal offenses, means that after a man is bound over for murder, on the information of the prosecuting officer he can be tried.

Mr. CLAGGETT. In other words a vote in the

negative is to leave that power to the prosecuting attorney.

Mr. BEATTY. I don't understand very well back here, gentlemen. If you strike out those words, "or information of the public prosecutor," then leave it so that an indictment can only be found after he is bound over, or, if Mr. Claggett's amendment is adopted, then a party cannot come before a grand jury and have an indictment found—he must first be committed by a magistrate?

Mr. CLAGGETT. Oh, no.

Mr. BEATTY. We have now adopted the amendment which Mr. Claggett offered. Now is it proposed to strike out the words "or information of the public prosecutor?"

The CHAIR. Yes, that is the motion.

Mr. BEATTY. So that it will then read in this way: "No person shall be held for a criminal offense, unless on presentment or indictment of a grand jury, after a commitment by a magistrate."

Mr. CLAGGETT. "Or information of the public prosecutor."

Mr. REID. "After a commitment by a magistrate" is the new amendment.

The CHAIR. The question is now before the committee to strike out the words "or on information of the public prosecutor." Are you ready for the question? (Vote. Division called for). Rising vote shows ayes 21, nays 33.

The CHAIR. The motion is lost.

Mr. CLAGGETT. Mr. Chairman, I move to strike out the words in line 4, "in the army or navy." We can't have an army or navy under the constitution of the United States.

Mr. AINSLIE. The word "or" should be stricken out.

Mr. CLAGGETT. Leave it in the motion.

The CHAIR. The motion is to strike out the words

"in the army or navy or." (Vote). The motion is carried.

Mr. MORGAN. I am afraid in the adoption of this amendment hastily we will get this section so that it reads badly, and it seems to me that it reads badly now. It says no person shall be held for a criminal offense. I presume that is not what is meant. The correction I wish made is: "No person shall be held to answer for a criminal offense." I offer this amendment in order to correct that. This would prevent a criminal being held after he was tried and convicted, it occurs to me; I only suggest it should be done in a certain way. I will make this amendment to read, to insert after the word "held" the words "for trial" in the first line.

Mr. AINSLIE. My opinion is that the word should be "answer," instead of "trial."

Mr. MORGAN. I had it first "answer," but I believe "be held for trial" is a better term. It is rather uncertain, the meaning of the clause, if you say "shall be held to answer," although those are the old words in all the constitutions. What he is held for really is for trial. (Seconded. Vote).

The CHAIR. The ayes have it, the amendment is adopted. Are there other amendments to section 8?

Mr. BEATTY. I call for the reading of the section as amended.

SECRETARY reads: No person shall be held for trial for a criminal offense, unless on the presentment or indictment of a grand jury or information of the public prosecutor after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by the probate courts or by the justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; *Provided,* That a grand jury may be summoned upon the order of the judge of the district court in the manner provided by law.

Mr. BEATTY. I move the adoption of this section as now read.

Mr. HAGAN. I desire to move an amendment, Mr. Chairman.

SECRETARY reads: After the word "held" in the first line, add "to answer for a capital or otherwise infamous crime." (Seconded).

Mr. HAGAN. I have merely put that in, because we are getting at this now in a strange manner. This section is attempted to be a copy of Article 5 of the constitution of the United States; it says: "No person shall be held for trial for a criminal offense, unless on the presentment, etc., or information of the public prosecutor." The words suggested are better. The constitution of the United States provides that he shall never be held to answer for a capital or otherwise infamous crime. Of course they may present an information for misdemeanors, but if the attempt is made to copy that from the constitution of the United States, there is a very material variance, if you compare the United States constitution with this Section 8.

Mr. GRAY. I really do not understand this, Mr. Chairman. It seems a person cannot be held to answer for a criminal offense described to be an infamous crime unless on the presentment or indictment of the grand jury or information of the public prosecutor after commitment by a magistrate.

The CHAIR. That matter is disposed of.

Mr. GRAY. Well, I don't understand it. You had better send an interpreter along with this clause when you get through with it—somebody that knows more about it than I do. I can't understand it now. Information of the public prosecutor after examination by a magistrate. He is held on the commitment of the magistrate, and now can he not be held for lesser offenses than those mentioned in the amendment of the gentleman from Shoshone?

Mr. HAGAN. I don't come from Shoshone. (Laughter).

Mr. GRAY. Well, excuse me; I am glad you don't. It seems to me that this is something that ought to be

allowed for. Under our law you can indict or hold for a misdemeanor, or for anything that is triable. They are to be held for any criminal offense, except such offenses as therein enumerated. Really, I don't understand it.

Mr. CLAGGETT. Mr. Chairman, the section as it was originally, in the respect to which I have called attention, and as it has been amended also—for the amendment does not touch it—is not intended, I think, by the convention to be adopted. The way we have it now; no person shall be held for trial for a criminal offense, unless on presentment or indictment or information, after commitment. That excludes, the way it is now, all petty cases in justices' courts, where the parties are held without presentment, indictment or commitment; in other words, all cases of petty larceny in probate courts and justices' courts. The whole matter can be covered by one amendment, which I will suggest to my friend from Kootenai. I therefore move as an amendment to his amendment, that the words "a criminal offense" be stricken out, and the word "felony" inserted. It will then read: "No person shall be held for trial for felony, unless on presentment or indictment of a grand jury," leaving the justices' courts to proceed with their minor offenses.

Mr. HAGAN. I had stricken those words out. I will accept that, only I want that in my motion—strike those words out.

Mr. CLAGGETT. Now you have it; "capital or otherwise infamous crime."

Mr. HAGAN. Well, those are the words of the constitution of the United States.

Mr. CLAGGETT. Well, I suggested a term better than the words "infamous crime." That term covers felony, perjury and such, but "felony" covers all capital cases, and all other cases except misdemeanors.

Mr. HAGAN. Well, I will accept that amendment.

Mr. SWEET. I would like to ask the gentleman

from Shoshone if in his amendment it reads "shall be held for trial" or "held for answer."

Mr. CLAGGETT. That has been adopted; "held for trial for felony."

Mr. SWEET. Well, that was "held for answer" before.

Mr. CLAGGETT. Well, I don't care anything about that. I think the words are synonymous, "trial" or "answer."

Mr. SWEET. I think Mr. Hagan's amendment was to the effect that he should be held to answer. It occurs to me that it is best to draw the line between being held to answer and being held for trial. A man might answer and still be held for trial.

Mr. HAGAN. Yes, and our statutes go to the extent that he may not answer before taking it before the courts whether he may or may not be held for trial, but he is held to answer that charge.

Mr. CLAGGETT. Well, I thought that was disposed of.

Mr. HAGAN. No, my motion strikes that out, and the other word too.

The CHAIR. You have heard the amendment proposed by the gentleman from Kootenai; are you ready for the question?

Mr. MORGAN. Let me ask the gentleman who offers this amendment how it will read with the balance of the section, which will then read: "No person shall be held to answer for a felony except in——"

Mr. HAGAN. "for any capital offense or otherwise infamous crime."

Mr. MORGAN. Well, I understood the gentleman from Shoshone's amendment——

The CHAIR. That was accepted.

Mr. CLAGGETT. Yes.

Mr. MORGAN. "Held to answer for a felony?"

Mr. HAGAN. Yes, any felony.

Mr. MORGAN. Then we will have it in the following words—it reads as follows: "No person shall be

held to answer for a felony, except in cases cognizable by the probate or justice courts."

Mr. HAGAN. "unless on presentment or indictment."

The CHAIR. "presentment or indictment."

Mr. MORGAN. Yes, but I read it to show the connection—I left out those words: "No person shall be held to answer for a felony, except in cases of impeachment, and cases cognizable by the probate and justice courts."

Mr. REID. I would like the secretary to read the section as amended, showing the amendment as offered by Mr. Hagan.

The CHAIR. The clerk will read the amendment.

SECRETARY reads: After the word "held" in the first line, insert "to answer for a capital or otherwise infamous crime." The amendment of Mr. Claggett is, to strike out the words "capital or otherwise infamous crime," and insert the words "a felony," so that it will read, "answer for a felony."

Cries of "Question." The amendment is put to a vote and adopted.

The CHAIR. Are there any further amendments to the section? It is moved and seconded that Section 8 as amended be adopted.

Mr. MORGAN. I would like to inquire if our rules are such that the committee on Revision can change the language of this section. If that committee cannot do it, I think we had better not amend these sections; we had better strike them out or adopt them as they are, because we will get them all mixed up, in my opinion; the language will be bad.

The CHAIR. The chair understands that the committee on Revision is simply to change the phraseology, so as to put the sections in grammatical form, but not to change the sense.

Mr. MORGAN. If they are allowed to put it in grammatical form, I think it will do.

The CHAIR. The question now recurs on the

adoption of the section as amended; what is the pleasure of the committee?

Mr. BEATTY. I move its adoption. (Seconded).

A MEMBER. I ask for the reading of the section as it stands.

SECRETARY reads: No person shall be held for trial to answer for a felony——

Mr. HAGAN. That was stricken out.

SECRETARY. Well, that is the way it reads according to the secretary's notes. Mr. Morgan sent up this amendment, to add the words "for trial," which was adopted, and Mr. Hagan had an amendment to add after the word "held," "to answer for a capital or otherwise infamous crime," amended by Mr. Claggett by changing the words "capital or otherwise infamous crime" to "felony," which leaves it to read, with the amendment of Mr. Claggett as accepted by Mr. Hagan, "to answer for a felony," with Mr. Morgan's amendment adopted prior to that, adding the words "for trial," which makes it read: "No person shall be held for trial to answer for a felony."

Mr. CLAGGETT. After the first amendment that was made the second amendment became incorporated with the other, and dispensed with the one I offered.

Mr. MORGAN. The motion of the gentleman from Kootenai would have been out of order, because the amendment had already been adopted to insert the words "for trial." Of course that amendment should have been voted down.

The CHAIR. Well, you didn't claim the gentleman was out of order. You can offer as many amendments as you please, but it would simply change the sense of the article. I think the gentleman can understand it right. The clerk will read it now.

SECRETARY reads: No person shall be held for trial to answer for a felony, unless on presentment or indictment of a grand jury or information of the public prosecutor, after commitment by a magistrate, except in cases of impeachment, in cases cognizable by

probate courts, by justices of the peace, and in cases arising in the——

Mr. HAGAN. I embraced in my motion the words "for trial" to be stricken out.

The CHAIR. It does not so appear in your minutes you sent up here.

Mr. HAGAN. No sir, but I incorporate it now. The amendment was to strike out the words "capital offense or otherwise infamous crime," and that strikes out the word "trial."

The CHAIR. The chair don't understand it in that way.

Mr. HAGAN. If the rule allows, I propose to put it in that language.

Mr. BEATTY. I move to strike out the words "to answer."

Mr. SWEET. I think I can explain it, Mr. Chairman; Judge Morgan's amendment "be held for trial" was adopted. A motion was then made to adopt the section as amended, and then Mr. Hagan moved this amendment.

Mr. REID. It will then read: "No person shall be held to answer for a felony unless upon presentment," etc.

The CHAIR. That is correct. Now there is another amendment by Mr. Beatty.

Mr. BEATTY. I withdraw that; that was to cut out one of those phrases, and you have stricken out "for trial" already by amendment.

The CHAIR. The question is now upon the adoption of the section.

Mr. AINSLIE. Do I understand that the motion of Judge Beatty is to insert after the word——

Mr. BEATTY. No, my amendment was withdrawn.

Mr. BATTEN. I desire to offer a substitute which I think embodies most of these amendments, and will be a revision of the section without the amendments.

SECRETARY reads: Section 8. No person shall be held to answer for any felony or criminal offense of any

grade, unless on the presentment or indictment of a grand jury or information of the public prosecutor after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; *Provided,* That a grand jury may be summoned upon the order of the judge of the district court in the manner provided by law.

Mr. CLAGGETT. That brings us right back to the old proposition where the difficulty arose—"or any criminal offense"—and the effect of it, if that was adopted by the convention, would be, that you could not try a man nor hold a man for any little petty larceny or anything of that kind cognizable by justices of the peace until he had first been presented by the grand jury or had been indicted.

The CHAIR. We are getting these amendments in so frequently, I imagine the clerk cannot copy them in order to make his record. I think the chair will have to cut off amendments pretty soon.

Mr. SHOUP. I will move to strike out the entire section. (Seconded).

The CHAIR. The motion before the committee is to strike out the entire section. (Vote). The motion is lost.

Mr. MORGAN. I second the adoption of Mr. Batten's substitute.

Mr. STANDROD. Will the secretary please read the first sentence of the substitute.

SECRETARY reads: Section 8. No person shall be held to answer for any felony or criminal offense of any grade, unless on the presentment or indictment of a grand jury.

Mr. GRAY. That is what I have been fighting about a good while. You had the words stricken out, and now put them back in. These offenses—felony and those criminal offenses, won't ever get into probate or justices' courts. That is one thing I shall never

understand about this, information of the public prosecutor; I don't believe anybody else will, and it certainly would not under our practice be known; but that has been passed upon, and I am not going to say anything about it. Certainly criminal offenses should be stricken out of that section.

Mr. BATTEN. Criminal offenses, properly cognizable by the probate courts, under the reservation of the section are still provided for, and so with justices of the peace. A criminal offense that will be outside of the jurisdiction of the probate courts or justices of the peace would be reached by the section. I think practice falling within that jurisdiction will still fall under the jurisdiction of the probate court.

Mr. GRAY. The trouble is in both courts. Relative to just misdemeanors, they are indictable under our present law, and all criminal offenses unless presented; it will throw out all misdemeanors, and they have got to be presented by indictment. It will shut out the probate and justice courts entirely.

Mr. CLAGGETT. The subordinate portion of the section covers that. I made the same suggestion my friend does: "after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts, by justices of the peace, and those arising in the militia." They are excepted in the section.

The CHAIR. The question is now upon the adoption of the substitute for Section 8. (Vote). The ayes seem to have it—the ayes have it. The substitute is adopted for Section 8. What is the further pleasure of the committee?

Section 9.

SECRETARY reads Section 9 as reported.

Mr. HEYBURN. I desire to send up an amendment.

SECRETARY reads: Amend Section 9 by striking out all after the word "liberty" in the second line, and

insert: "provided, that no person shall be free to violate the law of decency or morality." (Seconded).

Mr. HEYBURN. The object in presenting that amendment is this: The latter portion of this section simply establishes a rule of evidence. It is not the province of this constitution to do that thing—to establish a rule of evidence. The courts will provide for that, under the acts of the legislature. The part sought to be inserted is to get at the class of publications that are sometimes indulged in which are not conducive to good morals; and it is rather sweeping language to say that "every person may freely speak, write and publish on all subjects" whatsoever he will. There should be some reservation; there should be some way of holding a man who publishes immoral or indecent publications in the state.

Mr. PRITCHARD. It appears to me that the gentleman is very much mistaken in regard to the province of this convention. It seems to me that they are able to do almost anything—have the right to do almost anything.

Mr. HAGAN. I offer a substitute for the amendment.

SECRETARY reads: Strike out all after the word "liberty" in the second line.

Mr. HAGAN. The rest, I think, belongs to the legislature and and not to the constitution. It does not belong to the Bill of Rights, and I think after the word "liberty" this section should all be stricken out. It is almost virtually the same as Mr. Heyburn's amendment. In my opinion his amendment leaves the language a little chaotic. I would rather have it all stricken out.

The CHAIR. The question is on the adoption of the substitute. (Vote). The ayes seem to have it—the ayes have it. All after the word "liberty" is stricken out of the section. The question is now upon its adoption as amended.

Mr. CLAGGETT. I move its adoption. (Seconded.) Carried: Section 9 adopted.

SECTION 10.

The secretary reads section 10; it is moved and seconded that it be adopted. Carried.

SECTION 11.

The secretary reads section 11; it is moved and seconded that it be adopted. Carried.

SECTION 12.

The secretary reads section 12; it is moved and seconded that it be adopted. Carried.

SECTION 13.

The secretary reads section 13.

Mr. HEYBURN. I desire to offer on amendment.

SECRETARY reads: Strike out all after the word "himself" in the sixth line. (Seconded.)

Mr. SHOUP. I desire to offer an amendment.

The CHAIR. Wait, gentlemen. It is moved and seconded to strike out all that portion of the section after the word "himself" in the sixth line.

Mr. HEYBURN. Mr. Chairman, the object of striking this out is, it is not properly a part of the constitution. It simply provides a method of executing this section; "the legislature may provide for" etc. That belongs to the legislature; it is not a proper provision for the constitution.

Mr. CLAGGETT. I think we had better pass it for a minute or two at least, to get the views of the committee that reported this and explain the object of it. It strikes me that it is a very valuable provision. I presume there is some provision in here with regard to a party being protected at all events by the process of the common law, which will no doubt be adopted by the side of the rules of the common law. It is one of those rules that a party defendant is entitled to have the

witnesses against him produced in person, and this would make a change in that rule, in order to cover cases where witnesses for the prosecution or for the defendant are sick, expected to die, or where they are going to leave the country and cannot be got, that their testimony may be preserved and may be used in the shape of depositions.

The CHAIR. Does this provision go to the extent that a deposition may be taken on the part of the prosecution?

Mr. CLAGGETT. (reading) "The legislature may provide for the taking, in the presence of the party accused and his counsel of depositions of witnesses in criminal cases, other than in cases of misdemeanor or treason, where there is reason to believe that the witnesses" etc. "at the trial." I don't think we ought to rush over it hastily. I don't know—I would like to hear from the committee.

Mr. STANDROD. Mr. Chairman, the object of this section is, not to conflict with the constitutional right that a defendant may have in a criminal prosecution, that we hear urged all the time in the courts under the statute we now have. Permit me to say that it is nothing new, inasmuch as almost all the states provide for the taking of depositions conditionally, and this is intended, in a case where the party is held for trial, and one witness, a very important witness, either for the defendant or for the prosecution, might be lost by continued delay, and the people or the defendant might be deprived of his testimony on that account. There might be an instance where a man was charged with a capital offense, where his defense depended upon one witness, and this section is intended to provide for the taking of the evidence of that witness. It is the practice now under our statutes to do that conditionally, and it is no innovation or new practice. That is the reason this section so provided; that is the object of it. It sometimes occurs that a party will be permitted to go unpunished on account of the absence or death of one witness,—the main witness in the case.

I want to say here that there is no objection to it at all. As a matter of course, unless in case of his inability, sickness, death, or something of that kind, it is best to produce the witness at the trial, and as a matter of course he would be produced if possible; this is only in instances where it is impossible. It is everyday practice, done frequently all over the country, where depositions are taken conditionally in the presence of him and his counsel.

Mr. MORGAN. Not for the prosecution, Mr. Standrod?

Mr. STANDROD. I think so. I know some instances where depositions have been read, where they were taken in the presence of the defendant and his counsel,—have been read on the trial against him. I think our statute provides that a deposition may be taken by the prosecution.

Mr. CLAGGETT. I will offer an amendment to the amendment, that the words "or other cause" be stricken out, in the line next to the last. This authorizes a deposition to be taken for any reason, or lack of reason, in criminal cases. I don't think it should go that far. Then it will read; when there is reason to believe that the witness from inability will not attend at the trial, or be able to attend.

The CHAIR. Do I understand that you offer that as an amendment to the amendment?

Mr. CLAGGETT. Yes.

The CHAIR. Hand it to the clerk.

Mr. CLAGGETT. I will withdraw the amendment until I can write it.

Mr. HEYBURN. I desire to suggest this. I agree with the gentleman, (Mr. STANDROD,) that this is a general and proper provision. Nearly all the states at one time or other have enacted a provision for the preservation of testimony, and it is right there should be such a provision. This only provides to give the legislature the right to enact such a provision. The legislature has that power now and hereafter under any con-

dition of affairs, unless it is specifically taken from them, and for that reason it seems to me that this would only be a suggestion to the legislature that the legislature may do this, but it having the inherent power to do it in any event, it is useless to put it in the constitution, and necessarily place it open to this criticism, that after this, where there is reason to believe that a witness, from inability or other cause,—it may be because it was a wet day and he didn't want to come,—that in that case a man should go to trial without being confronted by this witness, or confronted by him on paper, when he is under all law entitled to be confronted by his accuser or the witness face to face; so that it is a violation of that principle, as it stands now, that the defendant or other accused is entitled to take advantage of. Now the legislature is left under its inherent power to provide for that thing. They will provide for it undoubtedly, and will say under just what circumstances this testimony of this witness may be used, but we cannot go into details sufficiently in the constitution to provide for these little things, and say that in case of inability to procure the attendance of a witness because he is beyond seas, and all those details usual in such cases,—the constitution I say, cannot go into these details, so we had better leave it to a field where they can, and that is the legislature; they will make provision such as is usual in such cases to preserve testimony in cases of this kind. I think the whole thing can be stricken out, because it is invading the legislative domain first, and second, because in its present form it is objectionable.

Mr. HAGAN. I agree with the gentleman from Shoshone that it belongs to the code of laws to be passed by the legislature. They have authority to pass that, as he says; it is their duty to pass it, and it is not the province of the constitutional convention to put it in the constitution. It is a part of the code of statutes of the state, and I am therefore in favor of the amendment.

Mr. MORGAN. I call the attention of the gentleman from Shoshone and of the convention to the fact that those words are left out which are usually inserted in constitutions, "to be confronted with the witnesses against him." As I understand it, under constitutions as they ordinarily read, no deposition can be taken in criminal prosecutions in favor of the prosecution. It provides in our statute, and various other statutes provide, that the defendant may have the testimony of a witness taken by deposition, but I do not think there is any provision provided which gives the state power to take a deposition against the defendant, for the reason that nearly all constitutions have this clause, that the defendant shall have the right to be confronted by the witnesses against him. Those words are left out of this clause, and intentionally, in order that the legislature may provide, or that the constitution itself here may provide that the depositions of witnesses may be taken in criminal cases on the part of the state. I desire this convention to understand this thing perfectly. It is a departure, as I understand it, from the ordinary law in that regard. I do not think other constitutions allow taking depositions on the part of the state against the defendant.

Mr. HEYBURN. Would it not be competent for the legislature to enact a provision for taking depositions against the defendant, in the absence of any power conferred upon it by the constitution, if there was no prohibition?

Mr. MORGAN. Yes, but not if those words were in the constitution; "have the right to be confronted by the witnesses against him." This would prevent the passage of a law of that kind, as I understand it, and those words are left out.

Mr. HEYBURN. I would not care about their being left out, if there is no question that they have this power.

Mr. MORGAN. Yes, the legislature will have the power. And I desire to say in explanation that that is

a departure from ordinary constitutions, but I think it is a good one.

Mr. STANDROD. The object in drawing this part of the section was intended to avoid any controversy, when these matters come up in court, as they do every day. There are some attorneys that never understand the difference between the delegation of power by the constitution of the United States to the national legislature, and by the constitution of a state to a state legislature. In order to settle this question, and have it settled in the constitution, is the reason why this section was drawn. It seems to me it is very necessary, and will very frequently arise in our criminal practice, so as to enable either side to produce their witnesses and have their testimony submitted to the jury. It was intended to avoid this discussion as to the constitutional right of being confronted by their witnesses.

Mr. HAGAN. Do I understand the committee claim the right of the state to take depositions in a criminal case?

Mr. STANDROD. I have not examined that, but I think the state has just as much right as the defendant has.

Mr. HAGAN. Why, that is prohibited by the constitution of the United States. How is a man going to be confronted by his witnesses when he is in jail? Are you going to hold him against his will and take depositions all over the country? Unqualifiedly, you can't do it. If the object is to take depositions for the defendant, I say, as the gentleman from Shoshone's amendment says, strike that out and allow the legislature to provide the machinery for it. It will take more than this to provide for that machinery. But as to taking depositions on the part of the state, of course I utterly oppose that.

Mr. GRAY. As I have been saying before, I am opposed to so much being put in this article that we are called upon to meet. We see the effect of our labors right now,—right at the door. Now I say that this is

really the province of the legislature. For conscience' sake let us,—as the legislative committee have made provision for the creation of a legislature, let us leave them a little something to do, and I think it would be much better to leave these matters, which are really matters of detail, of practice, to the legislature. I think the amendment should be adopted and that portion stricken out.

Cries of "Question." (Vote.)

The CHAIR. The ayes have it; it is carried.

Mr. SHOUP. I move to amend by inserting after the word "himself" the words "nor be deprived of life, liberty or property without due process of law."

Mr. HEYBURN. I ask to have the section read as amended,—that portion of it.

SECRETARY reads: No person shall be twice put in jeopardy for the same offence; nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

Mr. SWEET. I would like to call the attention of Mr. Shoup to the next section, whether or not the taking of property is not covered by that section.

Mr. SHOUP. The committee proposes to offer a substitute for the next section.

Mr. GRAY. I understand that to be a purely constitutional provision of the United States. I don't suppose it will do any hurt; I don't see any particular good of it.

Mr. HEYBURN. It seems to me the first section in the Declaration of Rights,—section 1, covers that point exactly; because it is a declaration of rights, and says; "All men are by nature free and equal and have certain inalienable rights, among which are enjoying and defending life and liberty, acquiring, possessing and protecting property, pursuing happiness and securing safety." That covers all these propositions.

Mr. MORGAN. Mr. Chairman, the amendment offered by the gentleman from Custer is the same as the

words that are inserted in nearly all constitutions at this very place, and it is in the constitution of California at this place;[1] "nor to be deprived of life, liberty or property without due process of law." I think it is proper. (Vote and carried.)

The CHAIR. What is the further pleasure of the committee?

Mr. CLAGGETT. I move the adoption of the section as amended. (Seconded.) Vote and carried.

SECTION 14.

The secretary reads section 14, as reported to the committee.

Mr. HAGAN. I have an amendment.

SECRETARY reads: Strike out all that part of Section 14 which reads as follows: "Private property shall not be taken for private use, unless by consent of the owner, except for private ways of necessity and for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes." Also, strike out the words "or private" in line 5 of Secetion 14.

Mr. HAGAN. Now, Mr. Chairman this is, in this country a very important provision. The idea is certainly new,—to allow private property to be taken for private use. I do not know any state in the Union that has any such provision, that private property,—my property, shall be taken for the benefit of my neighbor against my will, confiscated or even forfeited. It is something unusual, uncalled for, to put into a constitution. The application of the doctrine of eminent domain itself is a harsh measure, even for public uses. Now so far as water rights are concerned, there is a report of the committee here upon the table now which makes the use of water a public use. That is very proper, when it comes up in its order, but the idea of allowing private property to be used, to be condemned,

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1—Art. 1, Sec. 13, Cal. Const. 1879.

to be bought, to be sold at the instance of a private proprietor adjoining me, or anywhere near me, is in my opinion wrong and should not be tolerated, especially as it is with us in a mining country. Any gentleman here that is from a mining country knows the force and effect of that provision; where private property can be taken for private use, for agricultural, mining, milling, domestic or sanitary purposes; they know how the mining interests of this country would be damaged by it and embarrassed in every regard. California attempted to pass a law of that kind, and it was recently held unconstitutional by their supreme court.[1] We have the same statute now in this territory,[2] and copied from the California statute which was held unconstitutional. It has been obviated in two states, I believe by making the use of the waters of the country a public use under the supervision of the state, where it should be, and therefore obviate the necessity of this statute. Outside of that question, I know of no class of property that should be subject to private use or private confiscation. The land proprietor or mine owner, of owner of a mill, has no right to run his ditches and tunnels through my works and destroy them against my will, or even at any price, because he can never fully compensate me for my property or my work. I speak of this coming from a mining country, protesting that no such law should exist, either in the organic or in the statutory law—with which we have no dealings now —that private property should in no instance in this country be subject to the will or dominion of another party who seeks to confiscate it. I say I have a right to hold my land, to hold my mine or my works against the adjoining proprietor, though he give me millions of dollars for it; that I should not be compelled to sell my property to him in such a manner, nor should I be com-

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1—See Consolidated Channel Co. v. Central Pac. R. Co., 57 Cal. 269.

2—Subd. 4, Sec. 5210, Rev. Stat. 1887 (Same Sec. and Subd. in Rev. Codes.)

pelled to stand idle and see my property or my work destroyed. That is all important in a country like this, and I think that statute is wrong; it should not go either into the constitution or upon the statute books.

Mr. MORGAN. To the honorable gentleman who was last upon the floor, I would say this, that in the part of the country where we live it is necessary to provide for irrigating lands. It is impossible to do it unless we provide some means of getting across the land of the proprietor above you. How shall we do it? It is certainly an innovation, it is something we have not had in the constitutions heretofore. It is true that California attempted to do this by a law, and so have we, by putting a law upon the statute book, but this law has been held to be unconstitutional in California, because the constitution did not provide for it. Now we desire to provide for it in our constitution so that we can do it. I do not think our statute is good for anything unless we have something in the constitution supporting it, and this clause is inserted in the constitution so that we may provide by law for taking the ditches of persons who hold lands below across the lands of proprietors above. Where the streams have but little fall, it will be seen with a moment's thought, that if a man gets high up on a stream and takes up 160 or 640 acres of land, as he may do under the desert act, that those acres of land must remain forever unimproved below that section, unless there is a provision in the law permitting a person or persons living below to cut a ditch across his land. If they can provide for it in any other way, I am perfectly willing they should do so; I am not very tenacious about that. It is not a public use where a man desires to take his ditch across the land of another for his own advantage, —that is not public use, it is a private use, and we think it must be provided for in the constitution. If it is not done, it is impossible to cultivate and improve the arid lands of this part of the territory.

Mr. STANDROD. I have prepared an amendment

and sent it to the secretary, and I offer this as a substitute.

The CHAIR. The chair cannot entertain this unless the attention of the chair is called to the fact——

Mr. STANDROD. I am now calling the attention of the chair to the amendment.

The CHAIR. What is the matter before the house?

SECRETARY. It is on the amendment of Mr. Hagan.

Mr. REID. What is that?

(The secretary reads Hagan's amendment, as above given.)

The CHAIR. There is an amendment sent up here to Sec. 14 of the Bill of Rights; I think you will have to take a vote on this. There is another amendment, sent up by another person,—I don't know who offered it, that private property shall not be taken or damaged, for public or private use, unless by consent of the owner.

Mr. PARKER. I have submitted my substitute with the idea of preserving the individual rights of every citizen of this territory. In Sec. 1 of this Declaration of Rights which you have now adopted, I find that "all men are by nature free and equal and have certain inalienable rights, among which are enjoying and defending life and liberty, acquiring, possessing and protecting property, pursuing happiness and securing safety." Now in this Sec. 1 you give us, the individuals of this community, the right to acquire and possess property, but in this Section 14, as it is drafted now, these rights are taken away. This convention, in submitting this section in its present form, is in the position of a cow which gives a bucket of good milk and then kicks it over. I only arrived here this morning, Mr. President, and have not had time to collect my ideas on the subject, but I will read to you a few extracts from a book, one of the latest authorities bearing on this subject of the rights of individual members of the community.

Mr. MORGAN. I wish to ask the gentleman a question.

Mr. PARKER. (reading) "What is a 'public use,' within the meaning of this constitutional provision? Is it anything that the legislature may please to specify? If land and water be required for a canal, the private owner must surrender his estate at the bidding of the legislature, and yet the state may have no proper authority to construct that canal. For if the work in question be not the proper creature of the sovereign authority,—if it be not necessary to the public defense, but only a matter of convenience to private business, the state is departing from its true sphere of action, and transcending its lawful authority in setting about the work." And I deny the right of this convention to place in this constitution which we are now framing any provision which shall take away, without his individual consent, what he has earned by his own labor. I claim that the individual in such an instance is not the subject of legislative authority. (continuing reading) "It is difficult to reverse the old order of sovereignty, to set up the individual man and to curb the omnipotence of the state. But nothing appears more reasonable to my own mind that a humble man in possession of a well earned estate, may call in question the right of any legislature to take away his property, either in virtue of the much abused power of eminent domain, or by way of taxation. He may of right demand that the purpose to which his property is to be devoted by the public shall be of such a character as subserves the true ends of state authority. He is not the subject of arbitrary power, nor ought he to be the victim of a majority."

I will read now one extract from Mr. Blackstone:[1] The doctrine is thus laid down: "So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even

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*—Cooley's Blackstone's Commentaries, 4th Ed. Sec. 139.

for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." I submit my substitute.

The CHAIR. The question is upon the adoption of the substitute of the gentleman from Kootenai. Mr. Standrod, do you present this as a substitute for that of Mr. Hagan?

Mr. STANDROD. Yes.

SECRETARY reads: To amend Sec. 14 by striking out all of said section to the words "private property" in line 4, and insert the following: "Private property shall not be taken or damaged except for a public use nor without just compensation therefor. The taking of private property for public or private ways of necessity, or for reservoirs, drains, flumes, ditches, pipes, dumps, tunnels, shafts or other easements, on, through or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, shall be deemed a taking for public use," continuing said section from the word "such" in line 5 to the close thereof.

The CHAIR. You have heard the reading of the

substitute offered by the gentleman from Oneida; what is the pleasure of the committee?

Mr. MORGAN. I second the substitute.

Mr. AINSLIE. I do not see that this substitute offered by the gentleman from Oneida differs materially from that incorporated in the printed bill. It endeavors to leave the impression that the taking of private property for these purposes specified, for private ways of necessity, for drains, flumes, etc., is defined so that it shall be a taking of private property for public use, instead of taking private property for private use. It is like two and two make two, instead of two and two make four. You cannot take private property for private use. You may take private property for public use by a mere declaration to that effect, but it is absurd, under that amendment, or even under this bill, to say that if I own a lot in this city, that is a lot higher than another man's lot below me, he can come in under this bill and make a reservoir in my front yard to supply his house with water; but still under the specious statement of the gentleman from Oneida it would be taking my private property for a public use, when it could not be used by anybody but the fellow that owns the lot. Under that any neighbor can be harrassed against his will. It would be a bill fraught with more litigation, with a bigger harvest for lawyers, than any section that could be incorporated in the statutes of Idaho, to say nothing of your constitution, and I know of no law or constitution in the United States where you can take private property for private use. You can't compel me to sell my property, if it isn't worth $50, even for $500, if I don't see fit, and I say it is opening a field for litigation, and unnecessary, and productive of more or less injustice against others, under the supposition that it is for a public use, when by no fair reason or logic can you make it a public use.

Mr. MORGAN. Let me ask the gentleman a question. The gentleman must certainly recognize the difficulty under which men labor under such circumstances.

If he can suggest any remedy for it let him do so, or we must allow the lands which are below others to lie idle forever.

Mr. AINSLIE. I don't propose to put the property of every citizen in Idaho Territory to the hazard of being taken for the benefit of a lot of scattering settlers who are engaged in farming. It may work a hardship in some cases, but we propose to legislate for the public good of the people of the whole territory, and not for one class of individuals.

Mr. STANDROD. I fear the gentleman from Boise does not understand what is intended by this section, or else he would not be so broad in his allegations. There is no attempt here to create litigation, or to take private property for private uses where it is unnecessary In fact the object of this section is to avoid litigation, to settle this question, that has come up in the courts, and is now continually coming up in court almost every term throughout this country,—that is, to be argued. I will read this a little more carefully: "Private property shall not be taken or damaged, except for a public use, nor without just compensation therefor. The taking of private property for public or private ways of necessity, or for reservoirs, drains, flumes, ditches, pipes, dumps, tunnels, shafts or other easements, on, through or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes, shall be deemed a taking for public use." The word "necessity" is used there as a matter of course. There would have to exist a necessity before private property could be taken at all. "Or for reservoirs, etc. —shall be deemed a taking for public use." The object of this section is to declare what a public use is, in order to settle it in the courts. It has always been contended in the courts that the taking of water for the irrigation of lands, where there are one, two or three men desiring to take it across their neighbor above them, is a private use, and consequenty cannot be done, and it has given rise to more litigation and more trouble in

trying to irrigate lands in sections of the country such as this, than anything else. Now I have contended that this convention has the power to say what a public use is. It it true that it is limited, we all agree, to these matters of necessity. This country has got to be irrigated. A man has to have his ditches and flumes in order to procure water. I do not believe there is a gentleman here but would willingly admit that there must be some law providing for this necessity. This merely defines what a public use is; that is what it is intended for, limited as a matter of course to those instances where we all say and all admit that the necessity exists.

It will prevent this question coming up hereafter, because it positively defines what a public use is,—that is the intention of it.

Mr. CLAGGETT. I will not trespass on the time of the committee long. It seems to me we are arguing a good many of these propositions from a wrong standpoint. It seems to be considered by some of the members of the convention that it is a sufficient reason why a power should not be given to the state, to point out that in some particular way that power may be abused. That is not a logical argument in the science of government. There never was a power conferred upon any government upon the face of the earth that was not subject and capable of being abused. The only thing that wise statesmanship is ever directed to is, to guard those particular instances wherein power is most likely to be abused, and to build around them bulwarks of limitation and restriction. It does not follow that because this power is conferred upon the state, that the state is going to work to scalp its inhabitants, or perpetrate frauds, or authorize men to go and take possession of other people's houses, because that won't do. This provision, as it is provided for in the substitute offered by the gentleman from Oneida is absolutely necessary, unless we want to leave the whole domain of this new state practically undeveloped; and I will ex-

plain the reason why. It appears that Congress, as I have said before, is our local sovereign, and as such local sovereign it has seen fit to provide in the mineral acts of 1866[1] and 1872 that so far as the public lands are concerned, a free right of way is given to any person to build across the public lands ditches and irrigating canals to use for mining, milling and agricultural purposes; and it also provides that in the territory private property may be taken upon just compensation being made therefor. Now when we cease to be a territory that state of things under which we are now proceeding and by means of which we are now condemning the property that is absolutely necessary to be taken for these purposes, will cease; and if we simply put in our constitution the broad proposition that private property shall not be taken except for public use, and say nothing more, why, then the legislature will be hampered, and cannot declare anything a public use except such uses as at the time the constitution was adopted were known and recognized in law as being public uses; and therefore your state government will not have the power to provide in any way, shape or form for the condemnation of rights of way for irrigating ditches, mining ditches, mining easements of any kind whatever. We get all of that, it appears, under congressional legislation, which will cease to operate upon the territory, except in the matter of the public lands; and if some other provision of this kind is not put in this constitution, it will simply be tying up the whole resources of the country. It seems to me the substitute which is offered—I have heard it read twice by the gentleman from Oneida,—covers the case. It simply goes on and provides that for those specific purposes, the building of irrigating ditches, canals, flumes, pipes, reservoirs, for agricultural or sanitary purposes, for agriculture, mining,—or whatever the provisions may be there; I don't remember them all,—that those shall

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[1]—Sec. 9, 14 U. S. Stat. at Large, 253.

be deemed and taken to be a public use. We reported here this morning,—the committee on Agriculture,—with regard to water, in which we declare that all the waters of the state which are to be distributed,—of course it has not been before the convention except by being read,—that all the waters in the state heretofore appropriated, or which may be hereafter appropriated for agricultural purposes in the way of sale, rental or distribution, may be declared a public use. It requires the action of this convention to make it a public use. It will require the action of the convention to make these other uses public uses, and therefore the absolute necessity of the incorporation in this constitution of some such provision as this suggested by the gentleman from Oneida. Now my friend from Boise seems to think that in case there is any such provision as this in the law it is going to give rise to all kinds of litigation. I would respectfully refer my friend to the fact that we have got it under our territorial statutes, and where is the litigation that has grown up in consequence of it? It was passed two years ago.[1] Condemnation may be made for the purpose merely of any necessary easement, a dump, or the location of hoisting works, or running a tunnel, and no man should be permitted to stand like a dog in a manger, simply because he happens to have possession of adjoining property, practically of small value, and put any outrageous price, $500, or hundreds of dollars of valuation, upon it, and levy blackmail upon the industries of the country. In all cases where easements are demanded for agriculture, the owner of the land should be required to give them, on the payment to him of the amount of the value which the land taken possession of amounts to. I consider this one of the most important matters we have coming before us,—the very root of our prosperity in the future.

Mr. GRAY. I fully agree with the gentleman last

1—Sec. 5210, Rev. Stat. 1887.

upon the floor, that the necessities of our country are such that it certainly requires something to be done. If we let this matter go, without mention or authority given in the constitution, which is easily covered, we may as well say good-bye, our country amounts to nothing, those that live under the head of the stream have it all, and a man standing by says; no, this is my land, you must not cross it. But while I will support the substitute, it is because I think that it in many cases may be regarded as much a public use as a public right. I can find cases where a ditch crosses a man's land and goes down and is used by twenty men, and it is regarded undoubtedly to a certain extent as a private use, but if we are taking their cases together, and it is the only way for them to get it, we then call it a public use, and I do not see any impropriety in naming it so, so that when it is used for purposes of that kind it shall be deemed a public use; and I say, under the conditions of this country, perhaps under some circumstances it may be making an innovation upon the law, it may be going further than generally required under the law and than it is allowed to go, but I say the necessities of the case require that something must be done. I think the law must yield,—even the stubbornness of the law must yield, for the necessities of a country like this. I will say positively that had there not been any law of this kind,—well, the gentleman from Shoshone said it was two years that we have had it, and I really don't know that there has been any litigation under it, or at least any more, and without it I certainly say that these desert claims cannot be cultivated. There are ditches going out all the time, and without that, a stubborn man upon the head of a stream can prevent the settlement of thousands and thousands of acres of land, and some have attempted to do it even now, although I will say that it has not been in litigation to any extent. But I do hope, for our safety and protection, and for the benefit of our country, that there will be something put in this constitution. If not, I say that these desert

claims will remain unproductive and uncultivated. I hope the motion will prevail.

Mr. HEYBURN. I desire to send up an amendment.

SECRETARY reads: Amend Sec. 14 by inserting after the word "court" in the 7th line, "under such conditions as the court shall direct," and after the word "the," where it first appears in the 7th line, insert the words "use of."

The CHAIR. I would like to state to the committee that my impression is, that where a substitute and an amendment are offered, before that section should be amended the substitute should be adopted and then amend the substitute after it is adopted.

Mr. HEYBURN. That is the idea,—all that part of it that is identical in the substitute and in the original, and I was about to send it up when the substitute went up. It may rest, however, until after the substitute is disposed of, and the amendment can then be considered.

The CHAIR. Are there any more remarks upon the substitute to the original amendment?

Mr. HAGAN. My amendment was to strike out.

The CHAIR. Your motion was to strike out, and the gentleman sent up a substitute.

Mr. STANDROD. His was an amendment to the section.

The CHAIR. Here this comes up as a substitute to the original amendment; the original amendment was to strike out all such portions of the section after certain words, and this comes as a substitute to that. Now my impression is that the gentleman has no objections to this substitute for the amendment, but if the gentleman insists upon his amendment to strike out, I think that motion should prevail first, under this rule, in the case of a substitute to an original amendment.

Mr. CLAGGETT. Rule 38 covers it. (reading) "A motion to strike out and insert shall be deemed divisible: and a motion to strike out on a division being

negatived, or a motion to insert being decided in the affirmative, shall be equivalent to agreeing to a matter in that form, but shall not preclude further amendment; provided that substitutes for pending propositions shall, for the purposes of amendment, be treated as original propositions." In other words, a motion to substitute sweeps the whole thing up and stops everything until that is disposed of.

Mr. HAGAN. Does not that bring my motion to strike out up first?

Mr. CLAGGETT. No, it says a substitute stands as an original proposition.

Mr. HAGAN. Certainly, and my motion to strike out could not then be amended.

Mr. CLAGGETT. A substitute sweeps all amendments aside, and stands as an original proposition on the whole matter,—the original section and the amendments both.

The CHAIR. The only way to do is to adopt this substitute, and then, if the committee desires, an amendment to the substitute would be in order; and I think this motion to substitute the following to the section would be proper, but this substitute does not substitute anything for the entire section.

Mr. STANDROD. Yes, it does.

The CHAIR. Then the gentleman is correct; that does away with any amendment to strike out, as I understand the rule.

Mr. HAGAN. He has proposed an original section?

The CHAIR. He proposes the substitute as an original section.

Mr. HAGAN. I would like to have it read.

Mr. REID. If that be the case, all in the world a man would have to do to defeat any amendment offered, would be to offer a substitute, and you never could get a vote.

Mr. AINSLIE. I rise to a point of order. How can a substitute be offered for a motion to strike out?

The CHAIR. When this substitute was sent up, as

a substitute to the original motion, I did not know,—didn't understand, at any rate, until it was reached. The amendment was sent up, and the substitute was sent up, without any announcement what it was until inquiry was made, and then the gentleman stated it was a substitute to the motion to strike out; now I find out it is a substitute to the original section.

Mr. REID. Rule 31 provides that (reading) "All questions, whether in committee or convention, except privileged questions, shall be put in the order in which they are made," etc. I make the point of order that the gentleman from Kootenai has a right to have his amendment voted on before the substitute is voted on.

Mr. HAGAN. That is what I claim, Mr. Chairman.

The CHAIR. The first question then would be in order,—to strike out.

Mr. CLAGGETT. Rule 31 just lays down the general proposition, but rule 38 covers all the propositions which we now have before us under the head of amendments.

The CHAIR. It says that "a motion to strike out" etc. "shall be equivalent to agreeing to a matter in that form," "provided that substitutes for pending propositions shall, for the purposes of amendment, be treated as original propositions."

Mr. REID. I make the point, Mr. President, that the rule only says this, that a motion to strike out and insert is divisible; that is, we can have a division on it, and further, if it is agreed to, it is equivalent to agreeing on the matter in that form, and then comes the substitute matter to be acted on; but rule 31 establishes the method of procedure when a number of amendments or substitutes are offered.

The CHAIR. Now the question is before the convention, as I understand it, if this is a substitute for a motion to strike, it should be in order, and I will make that decision, subject to appeal.

Mr. HAGAN. Rule 37 says no motion on new matter shall be brought in under color of amendment.

Mr. MORGAN. That is not under color of amendment, to strike out, at all. I think, Mr. Chairman, the substitute of the gentleman from Oneida is in order for this reason; if it is adopted it does away with the necessity of the motion of the gentleman from Kootenai. If we adopt this substitute it carries with it the amendments and finishes the whole thing. I think the substitute takes the place of it, where it is offered to the whole section, it carries with it the motion to amend the section; it strikes out, and inserts another section entirely. Both the motion of the gentleman from Kootenai prevails to strike out, and the motion of the gentleman from Oneida prevails to substitute.

The CHAIR. Well, his substitute would be in order then.

Mr. BATTEN. I think those two rules, 31 and 38, can be reconciled. The proposition before the committee now is an original proposition; it stands in lieu of the original section, but before it can be considered all amendments must be first disposed of, it seems to me. I think there should be some stress laid on the word "original" in that rule. It takes the place of the original section and should be last considered. All amendments that have been put in should be disposed of in order, in compliance with rule 31.

The CHAIR. That leaves the motion to strike out first in order; the question is upon the motion to strike out.

Mr. HAGAN. I have but a few words, Mr. Chairman, to say on this motion. The only argument I have heard against it is on the question of preparing to protect men in the use of water for irrigating and domestic purposes. If they have got the protection of law, without a constitutional provision, then what is the use of this? I propose to advocate at the proper time the protection of water rights. I propose to make the waters of this country a public use, and that every man shall be protected in the appropriations he has made and the appropriations of water he desires to make for the

purpose of agriculture. But I oppose, and have always opposed all my life, and as every one has opposed in every state constitution ever made that I know of, the idea of taking private property for private use. If the gentleman from Shoshone were to go before his people and tell them they could take his lands and his works for their private use, and that it was engrafted in this constitution, I do not believe he would get forty votes in his county. It would impair the value of the mines, it would embarass mining proceedings, but above all that I take the broad ground that no man has a right to force me to sell my property; I don't care if it not worth $50, I don't want to be compelled to take a million by a forced sale. Under the head of Water Rights water has been protected in Colorado, it has been protected in California, it has been protected in Nevada, but still there is no provision in the constitution allowing private property to be taken for private use. It is a doctrine that is anti-republican in every respect; it is contrary to the right to hold property, to enjoy property, or to pursue happiness. Where is the limit,—even of the agricultural ditch, as was said, for private use? Where is the limit that the landed proprietor would find for his neighbor who wanted to run over him? There should be regulation on the part of the state for irrigating purposes, as there is now, as there will always be. Did not the report this morning, under the head of irrigation, protect that? I have before me a resolution that I intend to offer at the proper time, to protect the rights of parties in the use of water; but I oppose that from the very fact that these people in the state of Idaho, as we call it, will never sanction a doctrine that will allow private property to be taken for private use. It is a doctrine that I know my people whom I represent will not endorse; they cannot endorse it,—it is suicidal. While I do not live in a farming country, and stand somewhat as a representative of the mining interests of the territory, it is my duty to speak out, and keep those people who have spent hun-

dreds of thousands of dollars from being subject, as the honorable gentleman has said here, to blackmailers, from being compelled to go and stop their work, from being run over by a new proprietor. They will hem around the available land, fence in our country by a lot of pretended mining locations, they will run works through our works, they will confiscate our water rights, and so impede and embarass work and development there. Those people will have nothing to do with a constitution that contains that provision or that language. You go before the people of a mining country and tell them that that is the case, and they will never adopt it. At the same time they will meet the agricultural men of this country on the water ditch question squarely and fairly, and give them every right and every privilege and protection. The Committee on Irrigation can protect that. The waters that are flowing in the streams throughout this territory should be and will be protected,—they must and ought to be. But if we have laws which can protect them now, without a constitution, what is the use of enlarging upon it to our detriment? I will never for one instant support a doctrine that will allow any man to take my property for his own private use,—I do not care what that property is, nor what it is for; I would not tolerate it in anybody; I would not ask the privilege of taking any man's property, if it was not worth a dollar; I would not have a right to enforce a sale upon his part, even for a million; it is not right. It is a doctrine, as the gentleman has said, that is new,—I should say it was! Why, it was for years and years that the question of eminent domain for public use was fought, and even went to the Supreme Court of the United States, where Judge Marshall limited its provisions at that time—the first decision in the United States upon the right, even the question of eminent domain. Since then, state constitutions have gone into the business of supporting railroad corporations and public corporations, until the poor men of the country are now subject to have their lands con-

fiscated, even for public use, to a great extent endangering their property. The excuse that it is for public use has gone far enough—it is time to call a halt. When you can say that landed proprietors adjoining you, or mining proprietors adjoining you, can go and take your mine, tear up your works, confiscate your other developments of whatever nature, though your property might be worth about a dollar and a half and mine worth thousands of dollars, and you could never get compensation on the cash value; but let him through your tunnel, because he has a right to take it for the development of his own mine, through your own mine, and let him run it throughout all your works. This provision says "mining and milling purposes." If a man wants to erect a mill, let him go and put up one where it does not interfere with his neighbor. I protest against the right of any man to go out in my front yard, upon my stream, or upon my mine. If he wants property, let him acquire it, not force me to sell mine, not confiscate my works, not disarrange my plans for the development of my mine. But this provision says he shall have that right—any individual whatever can go and conduct his water through my yard, and he—I see that gavel, I will quit.

The CHAIR. Yes, you have exhausted your time.

Mr. CLAGGETT. Mr. Chairman, really the question that is covered by the substitute of the gentleman from Oneida does not come up here now. So far as that question is concerned, there is no possible objection to granting the motion and voting to strike this out, because I am in favor of striking it out myself if it is to be deemed the taking of private property for private use, but I say that the public necessity must make the public use.

The CHAIR. I think you are right. (Cries of "Question!").

SECRETARY reads Hagan's amendment: Strike out all that part of Sec. 14 which reads as follows: "Private property shall not be taken for private use

unless by consent of the owner, except for private ways of necessity and for reservoirs, drains, flumes or ditches, on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes." Also strike out the words "or private" in line 5 of Sec. 14.

Mr. MORGAN. I want to ask my friend a question: Is it intended to strike out all that part which permits the taking of private property for private use?

Mr. HAGAN. Yes.

Cries of "Question." Rising vote is taken.

The CHAIR. I think the ayes seem to have it.

Division called for. Vote taken; 32 ayes, 7 nays.

The CHAIR. The motion prevails. Now read the section, Mr. Clerk, as it will read after that is stricken out.

Mr. REID. I rise to a point of order. The gentleman from Idaho county offered a substitute before Mr. Standrod's, for the whole section.

The CHAIR. I understand that, but I desire to have the section read, if you desire it.

Mr. REID. I suggested it in order to have it read. Mr. Parker sent up a substitute for the motion.

The CHAIR. (Reading): "Private property shall not be taken or damaged for public or private use, unless by consent of the owner." Do you consider that as a substitute?

Mr. REID. The gentleman offered a substitute and made a speech on it.

The CHAIR. I did not hear the speech.

Mr. STANDROD. Mr. Chairman, I believe my substitute was first offered.

The SECRETARY. Mr. Chairman, they were received at the desk in this order: Hagan's first, Standrod's second, and then this third one; I don't know where that came from.

Mr. MORGAN. I would suggest that the substitute offered by the gentleman from Idaho is in almost the exact language of the other. The only discrepancy is

one word in the first two lines of the section as it now stands, as amended. I see no reason why it should be offered. "Private property shall not be taken or damaged for public use without just compensation. That is the exact language offered in his substitute, with the exception of 'owner" in the place of "compensation."

The CHAIR. Well, we will take a vote on it. The question is now upon the adoption of the amendment offered by the gentleman from Idaho county (MR. PARKER).

Mr. CAVANAH. I would like to hear that amendment read.

SECRETARY reads Section 14: Private property shall not be taken or damaged for public or private use unless by consent of the owner.

Cries of "Question." Vote is taken.

The CHAIR. The motion is lost. The question is now upon the substitute offered by the gentleman from Oneida.

Mr. REID. Let us hear it read.

The SECRETARY again reads Mr. Standrod's substitute.

Mr. ALLEN. Now I would like to have the section as amended read in connection with that.

The CHAIR. This is a substitute for the whole of Section 14.

Mr. ALLEN. The section has been amended, and I would like to hear that read as amended.

SECRETARY reads: Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into the court for the owner, the property shall not be needlessly disturbed nor the proprietary rights of the owner divested.

The CHAIR. That is the section as amended by the motion of Mr. Hagan. Now Mr. Standrod offers a substitute for the entire section.

Mr. MORGAN. I move its adoption. (Seconded).

Mr. BEATTY. I am heartily in accord with the gentlemen here who have advocated the development of this territory, and to that end that private property shall be taken when absolutely necessary. The question with me, in regard to this substitute as read, is whether it meets that end or not. It is impossible to keep the provisions of the section in your mind from hearing it simply read there without examining it closely, but as I remember it, it first provides that private property shall not be taken for any except a public use, and then it goes on and says that certain uses shall be deemed public. Now the question with me is this: If you undertake to determine by a provision of the constitution that a certain act, which is taking private property for private use, is a public use, does it make it so? Can you by saying that this property which is actually taken—private property taken for private use—by declaring that it is a public use, change the facts? It seems to me that the members who are in favor of this proposition, in advocating that, do not reach what they desire. Now I am heartily in sympathy with the movement to make such a constitution here that our mining interests can be developed, so that one man cannot hold a dozen back from developing property by reason of the situation of it, or that a man owning a farm or ranch, so situated that another farm or ranch can command it, shall be prevented from irrigating his farm. I want the constitution made as liberal as possible, so that all the resources of the country may be developed. But as I understand the reading of this substitute, it seems to me it will fail to reach the very object that it seeks. Can you by any declaration make a thing different from what it is? You take a part of my farm to run your water ditch over; that is certainly taking private property for a private use. Now can any declarations of the legislature, or of the constitution even, or any legislative act, make that act what it is not? I cannot conceive that it does, and it seems to me that if we adopt this, you will not have

accomplished the very object you desire. If I can be convinced that the declaration placed in there will make a private act a public act which will reach the object which you desire and which I desire, then I am ready to support the substitute, for I am in sympathy with the movement that will result in the development of all portions of the territory; but, as I heard that substitute read, I don't think it meets the purpose.

Mr. SWEET. I understood Mr. Claggett to say that he was a member of the committee on Irrigation, and that this committee had made some arrangements with reference to the irrigating of these public lands. Now I think it is patent to everybody in the house that it will be utterly impossible to ever pass through this convention the doctrine included in this Bill of Rights of appropriation of private property to domestic use. I do not believe that will ever be consented to by this convention. On the other hand, every member of the convention recognizes that we must take some steps by which these public lands in the state of Idaho can be irrigated, but this clause is altogether too sweeping, and in my judgment the substitute is too. I would suggest that these members of the Irrigation committee, who have, as I understand, some arrangement by which the lands can be irrigated and not interfere with the industries and the right of property in the state, take the matter up with the object of suggesting a proposition that can reconcile these matters and save all this time.

Mr. CLAGGETT. The committee on Irrigation, Manufactures and Agriculture have simply passed upon the question with regard to the irrigation question and the use of waters. There is something else that is required in this state besides irrigation. We have an immense mining interest here that has got to be protected, and we need the incorporation of some such provision as this in the constitution for the protection of mining interests, in order that they may have mining easements upon their placer ground and condemn them when necessary. This thing concerns all parts of the terri-

tory, and not one particular line. We have the right to do that now. Congress in 1866, in the legislation called the mineral land laws, declared that the legislatures of the several territories should have the power to provide by law for the establishment of easements for drainage and other purposes upon the public lands, and also upon private lands, without compensation.[1] We have that power now, and have exercised that power under the authority given us by Congress; but if we come in here as a state we lose all of that, so far as the legislation of Congress is concerned, and have got to provide for this thing ourselves. I think so far as the substitute is concerned, that that substitute can be amended in such a way as to provide for easements upon lands for those purposes, and leave the lands alone and let the title rest in them. An easement that will carry water over a party's land, an easement to build a ditch across a man's claim, an easement to go over a man's claim when necessary—all of which would be provided by the legislature, under the safeguards there put in—and temporary possession for the purpose of sinking a shaft or running a tunnel—these things are absolutely necessary to be done, and I think the language of the substitute should be modified so as to cover any matters of this kind, to cover these matters of easement. I therefore move that the committee rise and ask leave to sit again, and that in the meantime this substitute be printed, so that we may have the matter properly before us tomorrow morning.

Mr. MORGAN. I suppose the gentleman makes the motion now and includes in the order for printing the amendment offered by Mr. Heyburn.

Mr. CLAGGETT. I make the motion now, that the committee rise, report progress, and ask leave to sit again, and recommend that the two pending amendments, the substitute of the gentleman from Oneida and of the gentleman from Shoshone, be printed, and laid

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1—Sec. 5, 14 U. S. Stat. at Large, p. 252.

upon the desks of members tomorrow morning. It is too important a matter to go over hastily.

Mr. HASBROUCK. I find among the committees that there is a committee on Mines and Mining, and that the duties of that committee are to consider and report upon all subjects pertaining to the interests of the mines and the question of the use of water in connection therewith. Perhaps if we had the report of that committee it might throw some light upon that subject. The objection is being raised that the committee on Manufactures, Agriculture and Irrigation do not cover this case. I would like to inquire whether this committee on Mines and Mining covers the case—if their report will aid us.

Mr. HEYBURN. Mr. Chairman, that suggestion came in another form from Mr. Sweet of Latah. The provision we are dealing with now is defining the right of eminent domain; it belongs right here, and does not belong to any of these committees. It is something to be declared in the Bill of Rights—the scope, right and power of eminent domain. This is the proper place to dispose of that question, and not in those committees. After that right is established here, in the Bill of Rights, the committees must conform themselves to it. It does not belong to the committee on Mining or the committee on Irrigation and Agriculture, but it belongs here.

Mr. SWEET. Was your motion to adjourn seconded?

Mr. CLAGGETT. Yes, it was.

Mr. SWEET. Then I move to amend the motion to this effect: That the question of irrigation and the use of water for mining be referred to a general session of the committee on Mining and Irrigation, to see if we can harmonize those two things.

Mr. GRAY. I call for the motion for the committee to rise.

Mr. SWEET. I ask Mr. Claggett—ask that in his motion that the committee rise, he include it in his.

Mr. CLAGGETT. Well, I had got pretty near through with the discussion of the merits; that would be almost unavoidable postponed, to get these two committees together. I presume they can get together now. If they can, and be ready to present something tomorrow, and in the meantime let us have the substitutes printed and have them before us.

Mr. SWEET. I have no objection to that.

Mr. MORGAN. I call for the question, Mr. Chairman.

Mr. CLAGGETT. I think if the chairmen of the committees on Irrigation and Mining get together——

The CHAIR. The question as amended is that the committee rise and report progress, and that the substitute, together with Mr. Heyburn's amendment, be printed. (Vote). The motion is carried.

CONVENTION IN SESSION.

Mr. CLAGGETT in the chair.

Mr. MAYHEW. Mr. President, the committee of the Whole have had under consideration the report of the committee on Preamble and Bill of Rights, and make the following report. (Handing it to the president).

SECRETARY reads: Your committee of the Whole have had under consideration the report of the committee on Preamble and Bill of Rights, have amended Sections 7, 9 and 13, have adopted Sections 10, 11, 12, and have adopted a substitute for Section 8, and ask leave to sit again, and recommend that the substitute offered by Mr. Standrod, with the pending amendments, be printed. A. E. Mayhew, chairman of the committee of the Whole.

Mr. REID. Does that cut off future debate, under the rule?

The CHAIR. Oh, no; I think not; it stands just where it was before.

Mr. REID. Under the rule all these amendments go over, and the ayes and nays may be called on each

proposition in the convention. What I want to understand is, that any proposition debated under this bill may be called up in convention and a vote had on demand.

Mr. MORGAN. It has to be had in the convention —it must be had.

Mr. REID. My understanding was that when a question was referred to the committee of the Whole, they reported no conclusion until the whole matter was gone through with; that has been the custom, as I understand. The Bill of Rights was referred to the committee of the Whole; they come to no conclusion until they finally dispose of it.

The CHAIR. They came to no conclusion upon anything.

Mr. REID. We are debating now what has been done in the convention. If this disposes of that matter finally, then I want to call for an aye and nay vote on some of these questions.

Mr. MAYHEW. This report, as I understand, merely lays upon the table until the conclusion of the consideration of the Bill of Rights.

Mr. REID. With that understanding I have no objections to interpose.

The CHAIR. That leaves nothing before the convention, and the report lies upon the table.

LEAVES OF ABSENCE.

Mr. HAMMELL. I ask unanimous consent for leave of absence after Saturday night, as I have a telegram requiring my presence in north Idaho Monday, and unless the matter is attended to a large number of men will be delayed in their work; it is imperative.

The CHAIR. If there is no objection the leave will be granted.

Mr. SHOUP. My colleague, Mr. Crook, was called away yesterday, and informed me, to ask that leave of absence be granted him until Monday next.

The CHAIR. If there is no objection it will be granted.

Mr. LEWIS. Mr. W. H. Savidge was unexpectedly called away this evening upon a telegram, and requested me to ask for leave of absence until Monday morning for him.

The CHAIR. There being no objection, it is so ordered.

JOINT MEETING OF COMMITTEES.

The CHAIR. I would like to ask, in connection with this matter that came up, as to whether the chairmen of the committees on Irrigation and Mines and Mining can get their committees in joint session about 8:00 o'clock tonight.

Mr. CRUTCHER. So far as the committee on Mines and Mining, I will try to have what members are here present at that time.

Mr. CAVANAH. The committee on Agriculture and Irrigation will meet if I can get them together, at the same time with the committee on Mines, at 8.00 o'clock this evening, in the library rooms.

The CHAIR. It is moved and seconded that the convention now adjourn until ten o'clock tomorrow morning. (Carried).

THIRTEENTH DAY.

FRIDAY, *July 19, 1889.*

CONVENTION called to order by the President at 10:00 A. M.

Prayer by Chaplain.

ROLL CALL. Present: Messrs. Ainslie, Allen, Anderson, Andrews, Armstrong, Ballentine, Batten, Beatty, Bevan, Brigham, Campbell, Cavanah, Chaney, Clark, Coston, Crutcher, Gray, Hagan, Hammell, Hampton, Hasbrouck, Hays, Heyburn, Hogan, Howe, Jewell, King, Kinport, Lamoreaux, Lemp, Lewis, Maxey, May-