*July 31st., 9: 00 o'Clock A. M.*

## TWENTY-THIRD DAY.

Convention called to order by the President.

Roll call.

Present: Ainslie, Allen, Anderson, Armstrong, Batten, Beatty, Bevan, Blake, Campbell, Cavanah, Chaney, Clark, Coston, Crutcher, Glidden, Hampton, Harris, Hasbrouck, Hays, Heyburn, Hogan, Jewell, King, Kinport, Lamoreaux, Lewis, Maxey, Mayhew, McConnell, Melder, Myer, Morgan, Moss, Parker, Pefley, Pierce, Pinkham, Pritchard, Pyeatt, Reid, Sinnott, Shoup, Underwood, Vineyard, Whitton, Wilson, Mr. President.

Absent: Andrews, Ballentine, Beane, Brigham, Crook, Gray, Hagan, Hammell, Harkness, Hendryx, Howe, Lemp, McMahon, Poe, Robbins, Salisbury, Savidge, Standrod, Steunenberg, Stull, Sweet, Taylor, Woods.

Mr. Reid in the chair.

Journal read and approved.

Presentation of petitions and memorials. None.

Reports of standing committees. None.

Reports of select committees.

### PROPOSED SECTION ON COUNTY INDEBTEDNESS.

Mr. AINSLIE. The select committee, appointed last evening to prepare a section in accordance with the order of the convention, will report that they have performed that work, and the section will be found printed and incorporated in the article on Revenue and Taxation, the committee believing it more properly belongs in that article than any other.

Mr. MAYHEW. I would inquire where is the report. I was a member of that committee.

Mr. AINSLIE. It has gone to the printer and ought to be here this morning.

Mr. MAYHEW. That single section?

Mr. AINSLIE. That single section we incorporated in the report of the committee on Taxation and Revenue, as being the proper place for it.

Final readings.

## COMMITTEE REPORTS.

The CHAIR. This is the hour set apart for the consideration of the report of the Judiciary committee.

Mr. HASBROUCK. The committee on Engrossment is ready to report.

Mr. MAYHEW. I would like to inquire if the committee on Printing is prepared to report back this morning, according to the request made yesterday, the article on Bill of Rights as amended. I demand that that report be sent in. I think it is an outrage to wait this long for that report.

The CHAIR. Can the chairman of the printing committee give any information?

Mr. ALLEN. I understand that was ready to be presented to the session of the convention this forenoon, and that they are only waiting to finish the stitching of the bill. I will ask the secretary if it has been received. The committee was told that that report should be ready.

The CHAIR. The chair will inform the convention that he is in possession of information that the calendars and report of the committee on Finance will be in the convention in a few moments; that the report of the committee on Bill of Rights is now being stitched and will be in convention at the afternoon session.

SECRETARY read the following report: Mr. President, your committee on Engrossment have carefully examined the following named articles of the constitution, namely, in relation to Education, Municipal Corporations, and Public Indebtedness and Subsidies, and find the same correctly engrossed. Hasbrouck, Chairman.

## EMPLOYMENT OF ENGROSSING CLERK.

I have the honor to report that I have engaged the services of Miss Hattie Harris as engrossing clerk. Hasbrouck.

## FINAL READINGS.

Mr. AINSLIE. Mr. President, do not these bills have to go to third reading and passage before they go to the Revision committee?

Mr. MAYHEW. I think that should be done right now.

The CHAIR. There seems to be a conflict. There are three bills now set for final reading at this hour, and also the report of the Judiciary committee. I suppose the reading will take place first.

Mr. MAYHEW. I move that we take them up now and read them. (Seconded. Vote and carried.)

The secretary proceeded to read the articles.

Mr. McCONNELL. Mr. President, I rise to ask a question for the purpose of trying to facilitate matters a little, if, after these are read, they can be reported to the committee on Revision, and will have to come back here for another reading?

The CHAIR. That will depend on the report of the committee on Revision.

Mr. McCONNELL. Well, they will have to come back anyway, I guess.

The CHAIR. As I understand it, if they make no change in the bill whatever, no transposition of words, it is adopted without another reading. But if they make a change, they will report what change they have made and call the attention of the convention to it, and then we will consider whether we shall adopt the change they have made.

Mr. McCONNELL. I think they have to be read.

Mr. SHOUP. I call your attention to Rule 54.

Mr. McCONNELL. I think it would be better for us all to put these matters ahead as fast as possible after they are reported by the Engrossing committee, so they can go to the Enrolling committee.

The CHAIR. Rule 54 states expressly when it shall be fully read, and the vote shall be on the article so amended and revised.

Mr. McCONNEL. And we want to get our Enrolling committee at work.

Mr. MAYHEW. There is another question in my mind, that that committee on Revision and Enrollment will not report that constitution back for six or eight days unless they go to work and revise what is in their hands already. We have been without a committee.

ARTICLE XII.—MUNICIPAL CORPORATIONS.—ADOPTED.

SECRETARY reads the report of the committee on Municipal Corporations as engrossed.

The CHAIR. The question is upon the adoption of the roport.

Roll call.

Ayes: Ainslie, Anderson, Allen, Armstrong, Batten, Beatty, Bevan, Blake, Campbell, Cavanah, Chaney, Clark, Coston, Glidden, Hampton, Harris, Hasbrouck, Hays, Heyburn, Howe, Kinport, Lamoreaux, Lewis, Mayhew, McConnell, Melder, Myer, Morgan, Parker, Pefley, Pierce, Pyeatt, Reid, Sinnott, Shoup, Underwood, Vineyard, Whitton, Wilson, Mr. President—40.

Nays: None.

And the article was adopted.

ARTICLE IX.—EDUCATION AND SCHOOL LANDS—ADOPTED

SECRETARY reads the report of the committee on Education, School and University Lands.

Mr. Claggett in the chair.

The CHAIR. The question is now upon the adoption of the report of the committee on Education, School and University Lands.

Moved and seconded that the report of the committee be adopted.

Roll call.

Ayes: Ainslie, Anderson, Armstrong, Batten, Beatty, Bevan, Blake, Campbell, Cavanah, Chaney, Clark, Crutcher, Glidden, Hampton, Harris, Hasbrouck, Heyburn, Hogan, Jewell, King, Kinport, Lamoreaux, Lewis, Mayhew, McConnell, Melder, Myer, Morgan, Pefley, Pierce, Pinkham, Pyeatt, Reid, Shoup, Underwood, Vineyard, Whitton, Wilson, Mr. President—39.

Nays: None.

And the article was adopted.

The CHAIR. And it is referred to the committee on Enrollment and Revision, for incorporation in the constitution.

ARTICLE VIII.—PUBLIC INDEBTEDNESS AND SUBSIDIES.

SECRETARY reads the report of the committee on Public Indebtedness and Subsidies.

SECTION 1.

Mr. AINSLIE. I ask unanimous consent to call the attention of the convention to what looks like an error in Section 1. It reads as follows: "The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, exclusive of the debt of the territory at the date of its admission as a state, exceed the sum of one and one-half per centum upon the assessed value of the taxable property in the state, except in case of war to repel an invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein, which shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability, within twenty years of the time of contracting thereof." Where is there anything about the interest? I understood it ought to be annually or semi-annually, but there is nothing there about even paying the principal. I would like to call the attention of the chairman to it.

Mr. MAYHEW. It is correctly engrossed. I don't see how you can get it in now unless it is considered that it might be done by the legislature.

Mr. AINSLIE. I would ask that by unanimous consent that special order be laid aside until two o'clock and referred to the committee on Public Indebtedness, that they may examine it. It is a very important point.

The CHAIR. There being no objection, it is so ordered. The next matter is the report of the Judiciary committee.

Mr. MAYHEW. I thought the report of the committee on Salaries of Public Officers came first.

Mr. REID. It was agreed by general consent that it should not be considered until after the report of the Judiciary committee.

The CHAIR. The chair so stated that this was set down for this time specially.

Mr. MAYHEW. But this puts the convention—we have to go from one thing to another.

### COMMITTEE CHANGE.

Mr. SHOUP. A member of the Apportionment committee, Mr. Brigham, has been granted indefinite leave of absence. I therefore move that Mr. Sweet be placed on that committee in his stead during the absence of Mr. Brigham.

The CHAIR. If there is no objection the substitution will be made, and Mr. Sweet will be placed on the committee on Apportionment in the place of Mr. Brigham.

### ARTICLE V.—JUDICIAL DEPARTMENT.

Mr. HEYBURN. I move that the convention now resolve itself into committee of the Whole to consider the report of the Judiciary committee. (Carried.)

### COMMITTEE OF THE WHOLE IN SESSION.

Mr. McConnell in the chair.

The CHAIR. Gentlemen, you have under consideration the report of the judiciary committee. The clerk will please read.

Mr. SHOUP. Mr. Chairman, I move that the report be reported back to the convention without amendment. (Seconded.)

The question was put by the chair.

("Question, question.")

Mr. MORGAN. I will ask the chairman of the committee if there are not two clauses there submitted to the committee of the Whole?

Mr. HEYBURN. It seems to me those two clauses ought to be struck out before reporting it back. And then I would have no objections to that.

Mr. MORGAN. There are two clauses—

Mr. SHOUP. I will state my object for making the motion. If this report is reported back to the convention without amendment, the question will then be in convention, shall the report of the committee be adopted, and those amendments will be in order in the convention, and it will not be necessary to go over the report twice; only to save time I make the motion.

Mr. HEYBURN. I would suggest this difficulty. Under the rule established by the convention, that no amendments are in order in the convention that were not made in committee of the Whole, we might find ourselves in difficulty, if any gentleman desires to amend any section of this bill. That is the only objection I see. Otherwise I would be in favor of discussing the matter once and for all in the convention; but if that rule is to be held in the convention after we go out of the committee, of course it would cut off all amendments.

Mr. CLAGGETT. That rule has not been adopted. Mr. Chairman, notice was given by the gentleman from Nez Perce a long time ago that he would bring up a proposition to amend the rule so that no amendments could be offered in convention except those offered in committee of the Whole, when the house resolved itself into committee of the Whole, but my recollection is it has not been brought up and no change has ever been made in the rule, and the consequence is as it now stands you may consider everything in full in the committee of the Whole, and also go over the same thing precisely, in the convention.

The CHAIR. No new matter?

Mr. CLAGGETT. Yes, that is the present condition of the rule, and the change has not been made. The gentleman from Boise is in favor of passing the proposed amendment.

Mr. MAYHEW. That is correct, Mr. Chairman,

because there were some amendments offered to one of the articles that had not been offered in committee of the Whole.

The CHAIR. The proper motion would be that the committee now rise and report the bill back.

Mr. CLAGGETT. Yes, without recommendation.

Mr. SHOUP. I think there is no doubt but what amendments can be offered in the convention if it is reported back.

The CHAIR. Well, it would be well to get the sense of the committee of the Whole as to what would be the course pursued in the convention.

Mr. CLAGGETT. If the motion of the gentleman from Custer prevails, we simply go out of committee of the Whole into convention, and there consider the bill for the first time in convention. And the proceedings in the committee of the Whole are nugatory; in other words, no proceedings at all.

Mr. AINSLIE. Before that motion is put I will ask whether, under the rules, it does not require a suspension of the rules. The rules require these proceedings to be read section by section in the committee, and subject to amendment by section. I think it would require a suspension of the rules. I have no objection to the change.

Mr. REID. I will ask the gentleman if it is not simply to cut off debate and save time.

Mr. SHOUP. That is it. .... ....

Mr. REID. Then I move that we suspend the rule, or do it by unanimous consent. I ask unanimous consent, that we accept the proposition of the gentleman from Custer, to report it back as in convention, and then proceed with the amendments as if it had been considered, and offer any amendments you choose.

The CHAIR. If there is no objection it will be so ordered. The question is now that the committee rise and report it back to the convention without amendments. (Vote and carried.)

CONVENTION IN SESSION.

The President in the chair.

Mr. McCONNELL. Mr. President, your committee of the Whole, having under consideration the report of the Judiciary committee, begs leave to report the same back to the convention without recommendation.

The CHAIR. If there is no objection, the report of the committee of the Whole will be received and lie on the table. What is your pleasure gentlemen, with regard to the pending measure?

Mr. MAYHEW. I move it be taken up and considered.

The CHAIR. It is moved and seconded that the report of the Judiciary committee be taken up in convention and considered. (Carried.)

The CHAIR. I will ask Mr. McConnell to please take the chair.

Mr. McConnell in the chair.

ARTICLE V.—JUDICIAL DEPARTMENT.

SECRETARY reads Section 1.

Mr. HEYBURN. Mr. President, I move that Section 1 be adopted.

The question is put by the chair.

Mr. MORGAN. Before the section is adopted, I call the attention of the chairman of the committee to the reading of the first two lines, "the distinctions between actions at law and suits in equity and the forms of all actions and suits, are hereby prohibited; and there shall be in this state but one form of action for the enforcement or protection of private rights, etc."

Mr. REID. There ought to be the word "such" in there, and which was left out.

Mr. MORGAN. But the word in law heretofore has been "abolish" instead of "prohibited."

Mr. HEYBURN. I think "abolished" is the better word.

Mr. MORGAN. Yes, I move to amend by striking

out the word "prohibited" and insert the word "abolished."

Mr. HEYBURN. I will accept the amendment.

The CHAIR. There being no objections to the amendment, it will be so ordered.

Mr. REID. Well, they do not exist now, and we use the word "prohibited" on that very account. They don't exist under territorial law, and abolishment of them would imply that they do exist. The clause as taken from the New York constitution,[1] and embodied in that reads as follows: "Distinctions between actions at law and suits in equity, and the forms of all *such* actions"—the word "such" ought to be in there, it was omitted by the printer or the copyists—"and suits, are hereby abolished." You understand, there is a distinction between the actions as well as the forms of them. The reason I put in the word "prohibited" is that they do not exist, and it prohibits them existing hereafter. They put in the word "abolished" in New York, because they existed.

Mr. MORGAN. There should be a comma after the word "distinctions"; "The distinctions, between actions at law and suits in equity, and the forms of all such actions and suits, are hereby prohibited." The way it reads, you would prohibit the forms of actions and suits.

Mr. REID. Those particular actions; that is, common law actions. There shall be one action, which shall be a civil action.

Mr. MAYHEW. That is not the point the gentleman is making.

Mr. MORGAN. No, there should be a comma after that word.

Mr. REID. I ask general consent that the word "such" be inserted after the word "all" in the second line.

---

1—Taken from the Code, not the Constitution. See Sec. 3339, Bliss's N. Y. Code Civ. Proc.

The CHAIR. If there is no objection it will be so ordered.

Mr. CLAGGETT. I wish to call the attention of Mr. Reid to the fact that the words "in form" ought to be inserted after the word "distinctions" in the first line, because you prohibit *all* distinctions between actions at law and suits in equity. That is not intended to be done; you cannot do that very well. "Distinctions *in form.*" Now, the second phrase, "and the forms of all such actions and suits are hereby prohibited."

Mr. REID. I copied it literally from the New York Code; but I have no objections to it if the chairman of the committee accepts it.

Mr. HEYBURN. It looks to me, that to insert that would be to repeat it in the second part of that sentence, to read: "Distinctions in forms of all such actions and suits."

Mr. MAYHEW. Yes, it says here, "there shall be in this state."

Mr. CLAGGETT. The point I make about the matter is this: it may be that probably any court construing it would hold the construction put on it here; but the point I make is, that on the plain letter of the language it is a prohibition of the substance of all distinction between actions at law and suits in equity as it now stands, and that is not intended; it is simply intended to reach a distinction in the forms of actions; whereas, as it is now, the distinctions "between actions at law, and suits in equity are hereby prohibited;" also any distinctions in the forms of actions and suits are prohibited.

Mr. AINSLIE. It seems to me these sections, which are *verbatim et literatim* from the constitution of New York, are proper, and in order to have the guidance of the decisions of the court of appeals and the highest courts of New York, we had better adopt their language.

Mr. CLAGGETT. Yes, I am not very particular about it.

Mr. AINSLIE. It might produce confusion in the decisions of the supreme court.

Mr. CLAGGETT. I will withdraw the amendment.

The CHAIR. The question is upon the adoption of the section as amended. (Put to vote and carried.)

## SECTION 2.

Section 2 read, and it is moved and seconded that it be adopted. Put to vote and carried.

## SECTION 3.

Section 3 read, and it is moved and seconded that it be adopted. Put to vote and carried.

## SECTION 4.

Section 4 was read.

Mr. WILSON. I ask unanimous consent that the word "impeachment" be inserted instead of "impeaching"; so it will read, "shall have the power of impeachment."

Mr. MAYHEW. Well, this is correct the way it is.

Mr. WILSON. That word is not a noun there.

The CHAIR. By unanimous consent the word "impeachment" will be inserted in place of "impeaching" in line 1.

Mr. AINSLIE. Mr. President, I don't see the necessity of improving on the language of New York lawyers. What is the object of changing these things, I don't know. That is exactly the term used in the New York constitution.[1]

Mr. MAYHEW. Why, it is plain to be seen; the gentleman wants to get a noun in there.

Mr. AINSLIE. Well, I propose to follow New York as close as I can.

Mr. WILSON. I don't propose to follow anything.

The CHAIR. Objection having been raised the question must go before the convention.

---

1—But see Sec. 1, Art. 6, New York Const., 1846.

Mr. SHOUP. The Constitution of the United States reads "sole power of impeachment."[1]

Moved and seconded that line 1, Section 4, be amended by striking out the word "impeaching" and inserting the word "impeachment."

A viva voce vote was taken, and the chair being in doubt, required a rising vote, resulting 22 yeas and 11 nays; and the amendment was adopted.

The question then recurred upon adopting the section as amended. (Carried.)

## SECTION 5.

Section 5 was read.

Mr. HEYBURN. Mr. Chairman, somewhere in the transcribing of this section the words "of estate" after "forfeiture" have been dropped out. I move that the words "of estate" be inserted after the word "forfeiture."

The CHAIR. If there is no objection the amendment will be made. The question is now upon the adoption of the section as amended. (Carried.)

## SECTION 6.

Section 6 was read.

Mr. HEYBURN. Mr. Chairman, I move the adoption of the section.

Mr. CLAGGETT. Mr. Chairman, the Judiciary committee was evenly divided upon this question as to whether they would agree on that section, and also the plan of filling the supreme bench as provided for in Section 7, and have reported two sections. I raise the point of order, for nothing else, that Section 7 should be read so that the convention may have before it the report of the committee on this question. Only one-half of the report has been read.

The CHAIR. It seems that the committee so far, instead of submitting a minority and majority report,

---

[1]—Art. 1, Sec. 1.

as the reports were really, reported two sections, which are similar in their provisions with the exception of some slight variations. It is requested that both sections be read.

Mr. HEYBURN. Mr. President, I submit that if any gentleman does not like the provisions of Section 6 he can move to substitute Section 7.

Mr. MAYHEW. I think the gentlemen have a right to have Section 7 read as a matter of information.

PROPOSED SECTION.

The secretary reads Section 7.

Mr. WILSON. I move the adoption of Section 6. (Seconded.)

Mr. WILSON. And I would say the reasons I make that motion are, that I was one of the seven who supported that view of the Judiciary committee, and there were seven who supported Section 7, who believe in appointing the judges by the governor and confirming by the senate. I am in favor of electing judges by the people. There is no argument to be made on the question one way or the other, further than that. It is a question of whether the majority of the convention is in favor of electing the judges by the people.

The CHAIR. I will ask the gentleman for the information of the convention, is that the only difference?

Mr. WILSON. That is the only difference in the two sections.

Mr. CLAGGETT. I offer as a substitute motion, Mr. Chairman, that the convention adopt Section 7 as a substitute for Section 6. (Seconded.)

Mr. HEYBURN. Mr. President, the difference between these two sections, but not apparent on its face, is this: if the motion now before the convention prevails, the judges of the supreme court will be appointed by the governor instead of being elected by the people. One-half of the Judiciary committee were in favor of their election by the people, one of which

half I was; and I am in favor of it now. I do not believe in taking from the people the power to elect their supreme judges; I do not believe in delegating it to the governor, and the council or the senate. Because I think it is so important that officers so closely in contact with the real and substantial interests of the people should be selected by the people, and not appointed by any power. I hope the motion will not prevail.

Mr. WILSON. Mr. President, it has been charged that we cannot get as good judges by direct election by the people as we can by appointment by the governor, and confirmation by the senate. I do not think that charge can be sustained. I know some sections in this country where they elect by direct vote of the people, and they have as good judges as any state in the Union. The state from whence I came (Pennsylvania) has as good a supreme court as there is. They pay them $8,000 a year, and that is my idea of it; but we cannot afford that luxury yet. In another state, where I had the honor to live six years (Michigan)—and I call every lawyer here to witness—they have as good supreme court judges in Michigan as anywhere in the United States: Thomas M. Cooley, Judge Campbell, and such men as that, are men of national reputation among the finest lawyers these United States have ever produced; and they have been elected by direct vote of the people, and I don't believe in taking from the people the privilege of selecting their judges any more than I do the governor. A governor is not always elected with reference to his fitness to select judges. I would not have the power of the executive branch of the government increased to a greater degree by giving him the power of appointing the judiciary.

Mr. HASBROUCK. I only wish to call the attention of the convention to one fact, and I would like to have the secretary read Section 18. It seems to me it is on the same subject matter.

Mr. HEYBURN. I would say to the gentleman that it is proposed by the committee to strike out Section 18.

Mr. MAYHEW. Mr. Chairman, I don't feel like to going into a lengthy discussion of this question. It is only a question as to which section we will adopt as to the method of election; whether the judges shall be elected by the people or appointed by the governor or the senate or the legislature. I am in favor of the election of the judges of the state of Idaho, and I believe that it is important and necessary in a new state (and in fact in all states) that the state and supreme judges of the state should be elected by the people. I believe that the conventions of both political parties will always put their best legal talent on the bench, and they will have an eye and a view to the nomination of the ablest lawyers in the state for that position. And I believe the people at large, of both political parties, are better judges than the governor or the legislature can be, and therefore I am in favor of it. And I will say in addition to that, Mr. President, that when you come to look at the different states who elect their judges, you will find that a large majority of the states in the Union do elect their judges. I have taken a little pains to ascertain that fact, and I find this result, that in fourteen states out of the thirty-eight the judges are appointed either by the governor, the legislature, and the senate or the council. Massachusetts, for instance, is a little different from all the rest of the states. Twenty-four states elect all their judges. Now, I take it for granted that if the twenty-four states out of the thirty-eight elect their judges, it is a good precedent, and shows that the people in the twenty-four states out of the thirty-eight have confidence in the selection of the judges by the people. Pennsylvania, New York, and a number of the largest states in the Union elect their judges by the people; and I certainly think it is the best system because it brings the question home directly to the people, and allows them to exercise their discretion and their judgment in the selection of the chief justice of the state. I am altogether in favor of that system.

Mr. BEATTY. Mr. President, the only question here I think is how we shall get the best judges. It has been said that the people shall elect these judges, as though the people desired to elect them.

Mr. MAYHEW. They do.

Mr. BEATTY. No, Mr. President, if the people were really electing these judges, it might be a different question; but we know too much about the manipulations of conventions to know that the people do not always have their voice in those matters. It is the conventions too often that elect the officers that are elected by the people at large. And so I think it would be in the selection of supreme judges. I believe it would be those who manipulate the conventions, rather than the people that would finally make the election. There is no question about the people voting all right, if you place the right man before the people for them to vote for; but it is not necessary to run over the history of political conventions; we know how they result. Now, it has been said that the states which elect by the people have the best supreme courts. I take issue with my friend upon that question. I do not think it has been the practical result. I believe that in earlier times when our judges were generally selected by some appointing power, we had better judges than we have now. We heard less of politics upon the bench than we hear of it now. Reference has been made to the state of New York. I am quite well aware that the state of New York has some very fine judges; but we do know that the state of New York supreme court has made some very strange political rulings at different times. But I am not going into the different states to balance odds and ends as to which has been proved to be the best system. Let us look at the United States system. I think no judges in the world stand as high as the United States judges from the supreme court judges down; and those are all selected by the appointing power. I think that is enough to guide us, if nothing else. But the main point I would have in urging this

seventh section instead of the sixth is, that I believe by this system we will keep politics out of the supreme court, and if there is any place in our whole system where politics should be left out of an office, it is in that of the supreme court of the state. Now, gentlemen, under this system in Section 7 it is not so likely that the governor could make appointments simply for political purposes; he stands in a position where he is subject to great criticism if he undertakes to do it; it seems to me he would be put upon honor. But there is another power behind the governor. If it is left to the governor the lawyers of the state will have an important voice in selecting the supreme judges, and we do know, as the history of the bar, that where the bar acts they do not select men simply for political purposes. I will venture that in nine times out of ten the bar selects men simply for their ability, and not for their political proclivities; and that power will be behind the governor to aid him in some respects. But there is another provision, which is important, which you may not have noticed on the first reading.

The CHAIR. Judge Beatty, you were not here yesterday, but the rule was amended to limit speeches to five minutes. I believe it was two speeches and five minutes.

Mr. BEATTY. Is my five minutes up?

The CHAIR. No, you have a quarter of a minute yet.

Mr. BEATTY. Well, I will say something in that time, but I want the interruption deducted. Under Section 6—I will not stop to read it—you will observe that of course the people elect. Now, the result of that will be this. Suppose this state is strongly republican, as we hope today, all your judges will be republican; suppose it is democratic, which we don't want it to be, all your judges will be democratic.

Mr. MAYHEW. Whom are you alluding to?

Mr. BEATTY. My friend is interrupting me and taking up my time. I will measure words with my

friend some other day when we have time to consume. I am talking now in a hurry to save my time, and the gentleman interrupts me.

The CHAIR. Time is up.

Mr. BEATTY. I only had five words more to add, and—

The CHAIR. Without unanimous consent we must confine ourselves to the rules.

Mr. BEATTY. Well, did you deduct the time that I was interrupted?

The CHAIR. No.

Mr. BEATTY. I simply want to say, gentlemen, that under that Section 7, as you discover, your supreme court cannot be all of one political party. That is all I have to add.

Mr. VINEYARD. So far as necessary that will be brought about if these judges are elected by the people, and I am against their selection. I say that that simply balances; our governor is elected two years, and he is in many instances governed by the power the governor will receive or the influence he will receive in the appointment of those judges, and it will be a political job in many cases, unless the tenure of the governor's office is a longer period than two years. I think it would be a much better system if these judges were appointed by the governor and the two houses of the legislature. I would favor that above the present system set out in Section 7. But I am in favor of electing the judges by the people. Let those conventions get up their best men and put them forward, and they will be elected, and we will have a purer judicial system in that way than if the judges were appointed by the governor and confirmed by the senate. Often these appointments depend on political jobbery and are made without reference to the ability or qualifications of the appointee; and therefore, I approve the manner of their selection as provided in Section 6.

Mr. CLAGGETT. Mr. President, this matter created a great deal of discussion in the Judiciary committee,

and finally, as appears, two reports were made of two methods of procedure. I am in favor of having these judges nominated by the governor and confirmed by the senate, because I am entirely clear in my own mind that we may thereby obtain a much better supreme court than we will by having their election made the football of political conventions. In the first place, I undertake to say that the history of the United States will show that the decadence in the character of our supreme courts of the several states began with the substitution of the elective for the appointive system. I recognize the fact that in several of the states where the elective system has been substituted it has not had this result; notably the states of Wisconsin, Michigan and Pennsylvania. But I wish the committee to bear in mind this proposition, that in those states they have practically provided such a length of term as to make the supreme court judges elected practically for life. In Pennsylvania, which was referred to by Mr. Wilson, I believe they are elected for twenty years; and so in order to get rid of the evils of the elective system after gaining it, they have been amending the constitution in that state to get half way back, at least, to the merits of the old system of nomination by the governor and confirmation by the senate, by increasing the length of term, making the election one of such tremendous importance that the whole people will be alert and in arms for the purpose of electing good men to the position. That same result can be secured without any of this trouble by the nomination of the governor and confirmation by the senate. Here we are electing men for six years. We are not giving them a term of office long enough to enlist what might be called the best interests of the community to control political conventions for nominating them; but they are elected for six years, and will be nominated at the tail end of those tickets, which are called to nominate state officers, and you will in my judgment get a very poor judiciary. Again, this provision requires they shall not all be of

the same political party. I regard that as a very serious disadvantage. You must remember that when we get in as a state we will not have the same system of appeals we have now. Now, we can go to the supreme court of the United States; but when we go in as a state we will only have a very small number of cases that can go to the supreme court of the United States. Your court of last resort will be here in all sorts of criminal cases and in all kinds of civil cases, except the small number of cases which will arise under the constitution and laws of the United States. The advantages of this system of appointment, nomination by the governor and confirmation by the senate, are so manifest to my mind, that it seems to me there ought not to be any substantial difference of opinion on it.

Mr. MAYHEW. You cannot appeal a criminal case in this territory to the United States court can you?

Mr. CLAGGETT. No, not this one, you can in some of them.

Mr. MAYHEW. Only one, and that is Utah.

Mr. CLAGGETT. But here, no matter what is the nature of the controversy, civil actions of all kinds between citizens of the territory, appeal lies directly from the judgment of the supreme court of the territory to the supreme court of the United States. And when you are admitted into the Union as a state you cannot do it. It is only in this limited number of cases provided for in the federal constitution, where one of the parties litigant is a citizen of some other state, where you can go to the supreme court of the United States, and then only where the amount in controversy is not less than $2,000; and also in cases involving construction of the laws of the United States, and several other matters not necessary to refer to here. Every lawyer knows our supreme court will have a great deal more power, and be the court of last resort in an infinitely larger number of cases, when we get to be a state than it is as we have it now as a territory; and for that reason, we ought to be very careful in a matter

of this importance. The only question is, how are we going to get the best supreme court; and I can say that the history of the country *does show* that the decadence in the character of our supreme courts began with the substitution of the electoral for the appointive system; even in the old settled and established states, where they have immense interests at stake, and where the great mass of the people take an interest in politics. How will it work here in the little new state springing up all at once, where the men are elected for only six years? I undertake to say you will find them made the football of every nominating convention, and being put at the tail end of the ticket, just as members of the legislature are, after what are called "the political offices" have been provided for by nomination. Compare the federal judiciary with the state judiciary; take the august tribunal of the supreme court of the United States, and take all your district judges and size them up with these state judges, and see what the difference is. It lies in the system of appointment over the system of election. And it furnishes a commentary and test by which we can determine this question upon its merits without any trouble whatever. And yet, in every one of these states in which these federal judges exercised their jurisdiction, there were members of the bar of a character as high and of learning as great as any you will find in the federal judiciary. And why do you not get them upon our benches as a rule? Simply because they are required to be elected by the people, and the whole question of their nomination and election is controlled by the interests of party conventions, and the haphazard result of an election.

Mr. MORGAN. I am decidedly in favor of the section that is in this bill. I think the judges of every state ought to be elected by the people. So far from our taking it out of politics to put it in the hands of a governor to nominate and the senate to confirm, we put it into politics; and there is a clause in this Section 7 which compels the governor to place politics in the

matter in such disregard that all three judges shall not be of the same political party. Then it requires him to appoint at least two judges of one political party and one of them of another. Mr. President, I deny the statement that our judiciary at the present time is not as good as it ever was in this or any other country. I believe the courts are as pure today, and presided over by as able men in this country as the courts have ever been in any country, or as they have ever been in this country. I deny the further statement that the judges of the supreme courts of the states are inferior to the judges of the federal courts of the United States. It has been but a little time since a distinguished man was appointed judge of the supreme court of the United States. I have nothing to say with reference to the qualifications of this gentleman, because I know nothing about his qualifications personally. We know that judges who are appointed to this distinguished position are usually selected on account of their great learning and judicial ability; but of this gentleman it was said that no man, not even his worst enemy, had ever accused him of being a lawyer at any time in his career; and certainly we have never heard of his abilities being eminent in any court in this country. However that may be, we trust he will make an excellent judge, and as good as the other judges who are upon the bench. One reason why those judges have distinguished themselves upon the bench is the fact that they are appointed for life, they hold their term of office for life, which I believe is a good provision generally, although if we get a poor judge we would like to get rid of him as soon as possible. I lived in the state of Illinois thirty-five years, and we elected our judges by the people, the judges of the supreme court, for six years, under precisely the same system that we propose to adopt here; and it worked well. I believe the judiciary of that state will compare favorably with the judiciary of any state in the Union. They are inveighing against the elective system. When was it discovered, let me ask, gentlemen

of the convention, that the elective system was not the best system that was ever invented for the selection of officers of the judiciary of the government, the state and the United States? When was it discovered, I say, that the elective system was bad? Under the original system as it was in England many years ago, everybody was appointed by the crown, and they were the servants of the crown; and in order to get rid of this tyranny and despotism the system of election was invented and was adopted. And we have been coming nearer and nearer universal suffrage, both in England and in this country, as the time goes by, and the nearer we get to universal suffrage, in my opinion, the better officers we shall get from the highest to the lowest in this country. And I am in favor of the election of the judges by the people.

Mr. SWEET. I desire to say one word with reference to this matter, because it is a question in which I am very deeply interested. I think instead of the judiciary becoming a football in the convention, as suggested by Judge Claggett, that in this state, if we are admitted as a state and the two political parties are contending for supremacy in the state, the supreme bench of the state, being the most important of the positions in the state, each political party will strive and struggle to present their very best men to the people for those positions. And my understanding is that where political parties are struggling for supremacy in the state, they universally select their best men for the judgeship, with a view of having men of character and ability to fill those positions to assist in pulling the rest of the ticket through; and I do not think, as a matter of political power, that any party would select for the supreme court of the state, men who could be used, or make it possible to use offices of that character as footballs in a political convention. But there is another reason why I believe in electing the judges by the people. And if, sir, it be true, that the people are not competent to select their judges; if it be true that the people are

not competent to judge of the character and fitness of those candidates; if it be true that they are not qualified to determine what is political jobbery and trickery, and place upon the bench men of the best character and ability, then the whole theory is, in itself, an utter failure. If the people are not competent to do this, then they are not competent to elect other men.

There is still another reason why I am in favor of electing the judges by the people, and that, sir, is because the people themselves desire to do so. I have not seen any expression on the part of the people that they desired to surrender this great power. It is one of their most important rights, and I believe if they could speak today, as with one voice, they would absolutely demand of this convention the right to select their own judges. They have suffered during the last three years from the very heavy hand of judicial neglect. If there has been any subject more than another upon which the people have commented, and which today inspires them in their anxiety to work for statehood, it is that they may have the right at least to select their own judges and control their own courts. They have suffered from neglect in this respct, and they desire relief, and desire to act for themselves, and not by proxy.

There is another thing, Mr. President, which will bear me out in saying, as Judge Morgan remarked, that the election of all officers by the people is not of a sentimental character. The president was first elected by the house of representatives. He is now elected by the states, but not quite by the direct suffrage of the people. That will be the next step, and it cannot come any too soon for the people, I assure you; they now demand the right to elect the president by direct ballot, and they demand the right to elect senators by direct ballot, and they demand the right to elect their chief justices and supreme judges by direct ballot; in fact, they claim the right to elect every officer that governs them by themselves; and that is a right they are going

sooner or later to have for themselves, from president to constable.

Mr. HEYBURN. Mr. President, there is another fact. We have taken great pains in our Bill of Rights to provide that the government of our state shall be divided into three separate and distinct branches: Executive, Legislative, and Judiciary; and to declare that they shall be separate, and not depend one upon another. Now, is it right, is it reasonable, to provide that they shall be separate, and not one to depend upon another, and to provide that one of these branches shall select the other? Is it not merging those two branches into one, the judicial and the executive, and allowing the executive to select the judicial? Why make the judicial branch of the government the creature of the other branch of the government? Then leave by your constitution each of these three distinct and separate branches of the government to stand alone, each one of them to guard against infringement by the other upon the rights of the people, dividing your government into three distinct branches, in order that each may be independent of the other. If you allow one branch to create another, then those two branches are one and the same thing. A judge that sits on the bench should not owe his important position to another branch of the government, or to any officer the performance of whose duties he may, under certain circumstances, be called upon to criticise. Their powers should be kept separate and distinct, and not one allowed to infringe upon another. And you can only secure that by not allowing one to create the other, because the creator will be the master of the created; and the creator should be the people in this case; the people should be the master of the created.

Mr. CLAGGETT.

Mr. SHOUP. Mr. President——

Mr. CLAGGETT. I will yield to the gentleman from Custer.

Mr. SHOUP. Mr. President, I rise with a great deal of diffidence to say anything on this question,

for it appears to be a question that has been left so far entirely to lawyers. I am not a laywer, and perhaps it will be considered out of place for me to say anything on this question. But I wish to say a word or two. My principal objection to Section 7 is that the judges shall be of different political parties. That means a minority representation. Now, I am opposed to minority representation. I believe it to be a vicious system. If a judge represents a minority, and it may be a very small minority, he does not represent the people of this territory, or a majority of the people; he represents a small faction. And if politics influences him in any way whatever, it is going to be for that very small minority. It practically ties him up. He is expected to do something for that minority as a judge, if he is elected upon a political issue. It brings politics into the court instead of keeping politics out of court. That is my principal objection to Section 7. I believe the judges should be elected.

Mr. CLAGGETT. Mr. Chairman, I simply want to add just a word to two to what has been said by me heretofore. The principle, so far as the suggestion made by the gentleman from Custer is concerned,—this question about having the judges of different political parties, cuts no figure here. We are discussing the question of the appointive as against the elective system, and if the substitute is adopted, those words "of the same political party" can be struck out after its adoption. But here is where the trouble comes in with regard to the suggestion made by my friend here, that it will destroy the co-ordinate branches of the government. I will ask you whether the government of the United States does not have three separate and distinct branches of government; the legislative, executive and judiciary; and there the president nominates and the senate confirms the judges of the supreme court and all other courts provided for by the laws of the United States. There is nothing in that. The only question is, how are we going to get the best supreme courts. That

is the only question before this committee. If the judges are nominated by the governor and confirmed by the senate, there will be no such thing as shoving the responsibility off upon the uncertain and indefinite electoral system of the country. The governor will come into the light of day; every interest in this state will hold him directly responsible for the proper exercise of his powers. The senate, which will also be a small and elected body, will be the point upon which will be focused the eyes and attention of the entire people, and I say that no governor and no senate will dare to violate the expressed will of the people in the matter of giving them the very best judiciary team, so to speak, that can be furnished throughout the limits of the state. I deny the proposition that the people care anything about the question of appointment or election. The only thing the people of this state will care about is to get the best judges; and I undertake to say that if you were to go from one office to another of every one of the great corporations existing right here in this territory today, and ask the opinion of the men who manage those concerns, that they would, without one single exception, all vote in favor of the electoral system. And why? Simply because they can control and manipulate in the background, when the public attention is not directed to them, the nominations of these various conventions, and nobody will ever know they are controlling all that until after the election and they have taken their seat upon the bench; and then you will begin to see, by running back for a period of a year or two years, where the cat was that was in the meal-bag at the time of the nomination. But whenever it comes down to the governor, he has got to act openly, in the light of day, and then whatever he does he has got to do in advance of the senate acting; that is by confirmation; and if he makes a bad appointment in any way, shape or form you will hear in time from the entire press of the territory, you will hear in time such a remonstrance against the nomination by the senate that the senate will not con-

firm in case an improper man is named for that position. I say it is in your supreme court that the poor men of this country have got to look for their protection and security. It is upon the proper administration of justice that depends the prosperity of everything; and we all know, as a matter of experience, that when it comes down to this question of the nomination of officers, and particularly of judicial officers, that the attention of the people is not directed particularly to that matter, that these other influences to which I have referred do come in and frequently influence and control and pull the wires of the convention, and the people find out to their cost what it means a year or two after.

Mr. SWEET. I think Judge Claggett's speech has demonstrated this proposition, that after all, sir, it is the people themselves upon whom we must rely. If these corporations, which the gentleman seems to fear so much, can walk into a convention and dictate the nomination of a judge, then they can walk into the office of the governor and dictate the nomination there. If you cannot rely upon the intelligence and virtue of the people to take care of these questions, then the thing is an absolute failure, because if they can dictate the nomination of a judge in the convention, they can dictate the nomination not only to the governor but to the whole senate and control it. The fact is, that the people will control this matter from justice to constable. It is a matter of power, and if they are not safe in selecting the judges, then they are not safe in selecting the governor who appoints the judges. I think it is a question that answers itself. It is a fact, I presume within the knowledge of perhaps two-thirds of this convention, because it was a little early for men of my age—but it is a well-known fact that the supreme court of the United States has been packed two or three times within the last thirty years for the purpose of carrying certain questions. And if the supreme court of the United States is subject to being packed, what have we to hope for from a state governor?

Mr. REID. Mr. Chairman, in the committee the vote upon neither one of these propositions proved to be decisive. I certainly would oppose the appointment of judges by the governor, especially since we have adopted the number of representatives and senators, and the way they are going to be apportioned. The way the matter now stands, the county I have the honor to represent will not have any voice in the confirmation of the supreme court judges at all. The convention refused to give the county a senator in this select body the gentleman talks about; the smaller counties will be left out of that select body, and the governor, run by his political party, will make his appointments, and the state gerrymandered so that a few large counties control his appointments, and those of us who happen to be from little counties won't have any voice in it at all. That is the way I look at it. I am not in favor of electing the judges by the legislature, and for this reason; we have allowed every county to have a representative, and for the further reason, I have lived under both systems. In the state of North Carolina, when they elected the judges by the people, we had a better set of judges—I mean, by the legislature—than we had when they were elected by the people; not because the people were not capable of electing the judges, but the people would never give it a thought. I will illustrate it. The hardworking, diligent lawyers, who do not take any part in politics, who sit in their offices and attend to their profession, attend closely to their business, will not go out and do the amount of rustling, if I may use that expression, necessary to get a nomination; and the consequence is that the politicians of the profession secure those nominations and are put upon the bench, and generally gentlemen who devote much of their time to politics in the law have come to neglect their law and are not as capable and able men as those who devote their entire time to the profession. Gentlemen of the profession know that. The law is a jealous mistress. A man cannot divide his time up among other things.

Politicians of the profession have never been known as the best lawyers of the profession. But I shall vote to elect the judges by the people rather than let the governor appoint them. The governor will always make his appointments, no matter how pure he is, either of his personal or party friends, or at the dictation of party friends; and he ought to do it. The president does it and he is criticised, and the nominations criticised when they are sent to the senate; and as the gentleman remarked, the supreme court of the United States has been packed to make rulings; but thank the Lord, they are getting back to the constitution now, and no matter who appoints them, whether democratic or republican. And the gentleman speaks of the federal judiciary—

Mr. BEATTY. (Interrupting) Do you say the governor will always appoint his political friends? I will ask you if the senate is not a check on his political appointments, to keep him within reasonable limits?

Mr. REID. I think not. If I was a member of the senate and of different politics from the governor, and the governor sent in a republican nomination, if he was all right, I would confirm him regardless of politics. So it would be a partisan nomination at the last. The gentleman says we can strike that part out if we adopt it. I think that was put in as sugar coating to make us take the pill. I don't believe in allowing the governor to appoint and the senate to confirm. How does the legislature come in under our system? Here every county has one member of the house. But of the two methods proposed I believe in making the people rather than the governor to appoint and this select body to confirm.

Mr. AINSLIE. Mr. President, I did not expect to say a word on this matter, and won't say more than about half a dozen. In the Judiciary committee I fought all the time for the election of judges by the people. I think the people are the proper ones to fill all the offices, even the postmaster. It was seriously contemplated in

congress some years ago by members of both sides, democrats and republicans, that the people ought to elect the postmasters throughout the United States. Now, as the people are the source of all power, they elect the governor. As the gentleman from Alturas says, talk about nominating conventions being packed by politicians, who will elect the judges! Well, they elect the governor in the same way, and the members of your state senate, and they will be just as much influenced by the political fortunes or ambitions of the individual to appoint him and confirm him, as a lot of politicians in the nominating convention. I do not see any difference except that when the people elect directly, they have a voice, each individual in the state, in the selection of the men who occupy those positions. When you appoint by the governor and confirm by the senate you do it by proxy through some irresponsible parties; nominations are sent in that have never been presented to the people for them to express an opinion as to whether they are fit persons to occupy those offices or not. And I believe in referring it right directly to the people and letting them do it directly rather than indirectly.

("Question, question.")

SUBSTITUTE FOR SECTION 6 REJECTED.

Mr. HEYBURN. I call for the yeas and nays.

Mr. CLAGGETT. Is the substitute liable to be amended, or capable of being amended, at this stage?

Mr. MAYHEW. Not until it is adopted.

Mr. CLAGGETT. I am in favor of striking those words "two of whom shall be of the same political party" out. It was not put in as a sugar-coated business at all.

The question was put by the chair upon the adoption of the substitute for Section 6.

Roll call.

Ayes: Beatty, Hampton, Harris, Hasbrouck, Maxey, Pinkham, Mr. President—7.

Nays: Ainslie, Allen, Anderson, Armstrong, Batten, Bevan,

Campbell, Chaney, Clark, Coston, Crutcher, Hays, Heyburn, Hogan, Jewell, King, Kinport, Lamoreaux, Lewis, Mayhew, McConnell, Melder, Myer, Morgan, Moss, Parker, Pierce, Pyeatt, Reid, Sinnott, Shoup, Sweet, Underwood, Vineyard, Whitton, Wilson—36.

And the substitute was lost.

The CHAIR. The question now recurs upon the adoption of Section 6.

Mr. MAYHEW. I move the adoption of Section 6.

Mr. CLAGGETT. Mr. Chairman, I offer an amendment, to strike out the words in the third line of Section 6, "the electors of the state at large as hereinafter provided," and insert the words "the legislature in joint convention assembled." (Seconded.)

Mr. Chairman, I simply want to say, in reply to the suggestions that were made here in regard to the nominating conventions, that if they could control the election, and would abuse the power of electing the judges, so they would also the governor, and by indirection we would have the same thing. I deny that proposition. If the other propositions had been adopted, the people then would have had more than one opportunity of calling a check upon the selection of an improper official. They have an opportunity of calling a check in the first place by the election itself. Then they have the opportunity of calling a check after the appointment is made by the governor; and another one of calling a check on the confirmation by the senate, which would be three checks. If we adopt the amendment, which is proposed here, to elect judges by joint convention of the legislature, it will then have two checks as against one, which would only exist in case the judges are elected directly by the people. In other words, we would have the check of the nominations being passed upon by the electoral body at large, and then we would have the second check in the legislature. We would have the first check in the election of the members of the legislature, and in the other place, we would have a second check in the election by the legislature, and that is the

reason why when you get to work on these several ways by indirection there is always a series of stages at any one of which the people have an opportunity to criticise the action of the appointing power or the fitness of the nominee.

Mr. SWEET. I don't think there is any question upon which the people are today so absolutely agreed as this, that the election of United States senators by the legislature is the most stupendous humbug in our politics, and the people of all parties and of all sections are demanding that those men in the United States senate, nine out of ten of whom stay there by virtue of their bank accounts, with no other qualifications, be removed, and that the election of the senators be referred to the people themselves. And instead of our proceeding in the same direction, we are proposing to proceed not only to elect senators by the legislature, which we are obliged to do, but also add to it the election of judges. It strikes me as an astounding proposition to be presented to ordinary men who have been taking everything away from the legislature, for fear that they are not competent and capable of doing their work.

("Question, question.")

The amendment was put by the chair. Vote and lost.

The CHAIR. The question is now upon the adoption of the section. It is moved and seconded that Section 6 be adopted.

Roll call.

Ayes: Ainslie, Allen, Anderson, Armstrong, Batten, Beatty, Bevan, Campbell, Chaney, Clark, Coston, Crutcher, Harris, Hasbrouck, Hays, Heyburn, Hogan, Jewell, King, Kinport, Lamoreaux, Lewis, Maxey, Mayhew, McConnell, Melder, Myer, Morgan, Moss, Pierce, Pinkham, Pyeatt, Reid, Shoup, Sweet, Underwood, Vineyard, Whitton, Wilson, Mr. President—40.

Nays: Hampton, Moss, Sinnott—3.

And the section was adopted.

PROPOSED SECTION 7 STRICKEN OUT.

Mr. MORGAN. I think perhaps it is necessary now

to strike out Section 7, and I move that it be stricken out. (Carried.)

### Sections 7, 8, 9, 10 and 11 Adopted.

Sections now numbered 7, 8, 9, 10 and 11 are separately read, voted upon and adopted, without debate or amendment.

### Section 12.

Section 13 (12) read, and it is moved and seconded that it be adopted.

Mr. REID. I desire to offer this amendment to that section at the end of Section 13 (12): "The legislature may provide for the rotation of judges." It does not require them to rotate, but suppose now, that hereafter we find that an abuse grows up of having a judge to reside too long in some districts and he becomes familiar with cases and litigation, and then the legislature may provide that he may rotate. Rotate them around, having a new judge to come into the district. It does not require them to do that now, but will lodge with the legislature the power to require it, and to provide for a system of rotation of judges.

Mr. MAYHEW. Do I understand the gentleman to say that the judges will become too familiar with the litigation?

Mr. REID. Take a man living in his district, and going around, new cases coming up, where there is a good deal of talk and local prejudices, and everything of that sort, it might be desirable. It is now provided that the judges shall be elected by the people and reside each in his district. Suppose he is elected from four to six years and he travels the same districts around. Necessarily in social conversation and also in going out and among the people he becomes acquainted with a great many cases before they will be tried by him. Now, if you rotate and take a judge from one district to another, you get a man who is an entirely new man and not acquainted with the litigants, knowing nothing

of local prejudices, and you might get a more impartial hearing in that way.

Mr. HEYBURN. It seems to me that would defeat the very object of allowing the people to elect their own judges. They select a judge because they want him, and this gives the legislature the power to say that some other man shall be their judge. A judge is compelled to reside in the district. By implication he is compelled to set up a home and go to the necessary expense. Then the legislature might come in and say to him "you shall abandon your home and go off into this other district, and hold court there." Then again, the people of a district where there is no mining litigation would elect a man without reference to his ability in that line, and the people in a mining camp would elect a judge without reference to his ability in ordinary litigation, commercial law, etc., and the result would be that the legislature might say to the man that we have selected in our district because of his eminent fitness to fulfil the duties of his office where there is mining litigation, that he should be taken away from us because he had become too familiar with the performance of his duties, and be sent to some agricultural county where he was not familiar with the peculiar conditions that existed there; and say to the judge who was elected by an agricultural or cattle-raising community because of his peculiar fitness to perform the duties of his office in that district, that he should come up into our mining district and undertake to perform the duties, for which he has not the slightest qualification. It seems to me you would be defeating the will of the people when you say that they have not selected the wisest judge, and you will therefore foist upon them another judge whom they have not elected. I hope the amendment will not prevail.

Mr. REID. Just one word in reply. When you come to explain more fully how this will work it will not appear so objectionable. When you come to elect a judge in the first district; or in the second, for instance,

taking Nez Perce, and Latah and Idaho counties. They are now, as the bill provides, in the second district. When we elect a man for judge we are going to elect a man in full practice, who has cases all over that district, who is acquainted with the litigants and has been acquainted with them for years, knows the people thoroughly, has his enemies and his friends, and he will have more after the election is over when it is found out who favored him and who did not, and the newspapers come to make the usual amount of fuss. Now, there is not a single district in this new state, but what will have mining litigation, irrigation litigation and agricultural litigation. A man to be a successful judge in any one of the districts has got to be a master of all those different kinds of litigation. Commencing up north it is largely mining it is true; but there will be the water question and the agricultural question; he will meet those questions up there in Kootenai county, and also in some parts of Shoshone county. Go down into our county, there are mining interests, and in the eastern part of Latah county they are opening up large mines. Idaho county is one of the richest and largest in this state in mineral products, and will have mining interests there. So a judge to be qualified for his place has got to understand all those subjects. But it does not require that the legislature shall do it now, but after awhile, when we take a lawyer who has had his own cases there and everything of that sort, if we want to rotate him, we lodge this power with the legislature so that it can be done. I don't think there is any necessity for it at present, but it might arise. A judge residing so long in a district and becoming familiar with everything, would know his case before he went on the bench; and like every other man he would naturally get his prejudices, and frequently I know it is a fact, because sometimes, where a judge has become familiar with the cases, by agreement, we continue our case, and wait for some judge to come who does not know anything about them.

Mr. MORGAN. Mr. President, I am very much opposed to the amendment offered by the gentleman from Nez Perce, for some of the reasons already stated upon this floor; and among the most important reasons, in my opinion, is the fact that it is an outrage upon the judge himself. You provide in this constitution, or you propose to provide, that he shall have only $3,000 a year. He cannot build up a home in any place in this country; you make him a nomad; he is worse than the itinerant Methodist preacher, because the preacher can certainly remain the whole of one year in a place; but you put it entirely within the power of the legislature to send this judge into another district at any time they see fit, or rather you put it in the power of the governor, for the legislature would undoubtedly, if they passed any law on the subject, put it under the direction of the governor that he might be rotated. The gentleman speaks of the judges getting prejudiced. If he gets prejudiced by reason of living in one district, he ought not to be appointed on the bench, and the best rotation for him is to rotate him out of office. He will only hold it four years anyway. If that is the kind of judge he is he ought to be sent into private life. But by this amendment you prevent a judge from building himself a home anywhere. If he does he must live away from his family, or as the gentleman from Shoshone says, abandon his home. I think it an outrage upon the judges. And the reason given by the gentleman from Shoshone, that we elect a judge on account of his particular fitness for the litigation that arises in his district, is one of the strongest reasons why the people should be able to retain him in that district the whole time that he shall continue in office.

Mr. VINEYARD. I shall have to oppose the amendment offered by my friend Reid from Nez Perce, for the very reason stated by the gentleman from Shoshone. These several districts should select their own judges; they are district offices and are elected by districts. And to engraft in this article that the legislature shall have

power to enact a law to rotate these judges in office means to rotate them out of that district, or to put them into some other district, other than the district for which they were elected by the people of the several districts. The operation of such an act as that, Mr. President, would be to defeat the very object of the people when they are electing these judges from these various districts. There is provided in this section a clause that will cure any difficulty the gentleman seeks to remedy in this, that on the application of either of the judges he may call one of the other judges to the district to hold a term of court in his district, if he is unable to preside from any cause. This article provides that the governor may call one of the other judges to carry on the business if the presiding judge cannot act. That in case a judge may become so intimate and familiar with the matter of litigation in his district that thereby he may be incapacitated and unfit from some local or other reason from trying the several causes or the several subject matters that may come up in his district, the power is given to substitute another judge. And it is another reason why no acts should be passed to rotate these judges out of their districts. It is the very reason why the judges should remain where they are elected, because of their peculiar fitness to try the character of litigation that may arise in their respective districts.

The CHAIR. The question is upon the adoption of the amendment.

The vote was taken and the amendment lost.

Mr. Claggett in the chair.

Mr. McCONNELL. Mr. President, I desire to offer an amendment to the section under consideration.

SECTION 11.

SECRETARY reads: Amend line 1, Section 12 (11), by striking out the word "five" and inserting the word "three."

Mr. McCONNELL. I move its adoption.

Mr. AINSLIE. I rise to a point of order. That has been adopted and passed.

The CHAIR. The chair will sustain the point of order.

Mr. McCONNELL. I move to reconsider the section, if I meet with a second. (Seconded.)

Mr. McCONNELL. Mr. Chairman, I understood that the amendment was to this section. I had lost sight of the fact that it had been adopted. If the record shows that it had been adopted I had lost sight of it. My object is to have this constitution go before the people in such shape that there will not be too many explanations to be made with regard to the attorneys on this floor. I do it out of consideration for the attorneys purely. Because the number of judges provided in this article is so large and the expense so great, which the people will have to bear, that I am satisfied we will have many explanations to make before we can get the people to vote for this constitution, on this very one question; and I would like to bring it up and discuss it. Of course, if the attorneys can make us see that it is to the interest of the people to have eight judges in this territory where we now have but three, I am willing to acquiesce in it, but I have not heard any argument in support of it. It has been quietly sent through, because the gentlemen on this committee were composed of the attorneys of the convention, and men on the floor like myself have a delicacy about opposing these legal gentlemen, who are trained on the rostrum. I hope the motion to reconsider will prevail.

Mr. BEATTY. I have no objection to reconsidering this section, but I raise the point of order, that we have a motion before the convention now, that should be disposed of, and the motion of the gentleman is not germane to it, which is the adoption of Section 13 (12). Let us get rid of that first.

Mr. McCONNELL. I will withdraw my motion to reconsider.

The CHAIR. The motion to reconsider is temporarily withdrawn. The question is upon the adoption of Section 13 (12). (Carried.)

Mr. McCONNELL. I now renew my motion to reconsider the vote by which Section 12 (11) was adopted. (Seconded.)

Put to vote and carried.

Mr. McCONNELL. I now offer an amendment.

SECRETARY reads: Amend line 1, Section 12 (11), by striking out the word "five" and insert the word "three."

Mr. McCONNELL. I hope this amendment will be adopted in the interest of economy. For the present, at least, I believe this article leaves it within the power of the legislature to increase the number of judges hereafter as the wants and needs of our country grow larger; they can add to the number of judges and increase the number of judicial districts. At the present time the judges manage in a kind of way to keep the work done, and under the provisions of the law now, they are far more heavily burdened than they will be if we adopt this constitution and become a state, in several particulars: first, they will not be obliged to sit as supreme judges; and secondly, there will be no rehearing of trials of cases on account of hung juries, or at least but very few. A great many cases now tried in our courts, as known to all attorneys now present, have to be tried over again, which gives additional work to the judges; but under the law which we have enacted, requiring only a certain majority of the jury to bring in a verdict, the cases to be reheard will be few in number. Consequently I think that the relief coming to the district judges in the present number of districts will be amply sufficient to enable them to perform their duties in an acceptable manner.

Mr. HEYBURN. What is the condition of the business of the district court in the county from which the gentleman comes, as to being behind or not?

Mr. McCONNELL. Well, we are now laboring

under the difficulty of having a judge who is appointed; and he has been sick and unable to perform his duties. But we hope to elect an able bodied man when we become a state.

Mr. HEYBURN. I will ask the gentleman if the judge did not hold his last term of court, and the one before, the full time appointed by law?

Mr. McCONNELL. That may be.

Mr. HEYBURN. I will ask the gentleman what is the condition of the court calendar in Shoshone county?

Mr. McCONNELL. I don't yield. I think the arguments I produce will be sustained by the gentlemen on the floor, who have to pay the taxes and don't have to go into these courts as attorneys, and will probably never be judges. You will make by this a saving, as will be seen, of two judges, at a salary of $3,000 as proposed; that will save on the judges alone $6,000. We will save two district attorneys at the proposed salary of $3,000 a year, or $6,000; we will also save two clerks of the district court—

Mr. WILSON. We don't have any district court clerks.

Mr. McCONNELL. Well, we will save $12,000 a year. And I think the judges will have plenty of time to do the work, and I believe they can do it. I certainly don't think it is a good plan now to increase our number of judges by making a supreme court and increasing the number of district judges by two. It is too much. If I had been on the floor I would have opposed the supreme judge section entirely, and allowed five judges and had three district judges to act as supreme judges. But as that section has been adopted without objection, I seriously object now to having five district judges.

Mr. HEYBURN. Mr. President, my object in asking questions of the gentleman was to see whether he knew anything about the facts relating to this matter, or whether he was simply going on buncombe. It is easy enough to get up on the floor and claim to be acting in the interest of economy. We are here to form an

intelligent state government, and give the people a government sufficient for their needs, and to do it at as reasonable expense as we can, and if we cannot afford to do it, then we are not fit for statehood; that is all. If we cannot afford to adopt a government on a fair basis, then we had better stay in a condition in which the United States government or some other foreign country will pay our expenses. I asked the gentleman whether or not the business of his own county was conducted by the courts as prescribed by law as to the length of time, etc. He did not know. Well, I do. There is not a sufficient provision now in the county from which the gentleman comes to dispose of the business of its courts. There is not sufficient provision in the county from which I come to dispose of the business of the court; and it has been growing and growing until every calendar is larger than the one before, of undisposed business, and it will remain that way. Who is interested in this? The attorneys? The people who bring these suits are the ones interested; it is their interests, which are being litigated, not the attorneys' interests. The attorneys are not the parties interested in having those cases disposed of; it does not make any difference to them whether they drag their slow lengths along through the years or not. It is for the people who bring them. The attorneys do not go out on the street and compel men to come into court. The people come in voluntarily, it is their rights which are involved. A man comes in and says, "A certain party is claiming something, and I want you to go into court and protect my rights." And the attorney goes in if he is employed to do it. Then who is interested if these courts cannot dispose of the business before them? The litigants. And the litigants come from the body of the people. I don't suppose there are half a dozen gentlemen on this floor that are not now or that have not been recently engaged in litigation, directly or indirectly. It is of no interest to the attorneys whether there are five judges or a dozen judges, except in the interest of their

clients. They are interested in having enough courts to dispose of the business. It is one of the strongest arguments in favor of statehood and against territorial government that we have no adequate judiciary system; that the courts are provided by the government under the territorial law and are insufficient to dispose of the business that naturally comes before them—that comes from the people, not from the attorneys. We have three judges now. There isn't a district in this territory that is not months and months behind in its business. You will, it is true, relieve these judges of some of their business by relieving them from sitting on the supreme court about six weeks in the winter time. The litigation in this territory is increasing very rapidly, as we are in population and wealth and importance, and it will continue to increase. And it is wise on our part to provide a sufficient government for all of the interests, both judicial, executive and legislative, and every other branch of it. You should cut these judges down to three, the gentleman says, because it will save $12,000 in the salaries—$6,000 in their salaries and $6,000 for salaries of district attorneys. It will not do anything of the kind. It is absolutely impossible to get three judges to perform the judicial duties of this territory for any such salary. They are receiving more than that now. And you propose with the growing interests and growing litigation of this territory, or of the state, to impose additional duties upon those men, and cut their salaries down, when one of the reasons now why we do not have a more satisfactory court is because the salaries are insufficient and always have been. And you will not get district attorneys, if you defeat this measure and divide this state into three districts; you will find nobody who will accept the office, unless he is a fool, for $3,000 a year, when now you are paying three or four times that much.

Mr. McCONNELL. It devolves on me to make a little explanation in regard to the condition of business in the courts of our county. I can only speak for our

county. It is a notorious fact that the reason why the business in our county is behind is on account of the dilatory proceedings of the attorneys in not attending upon court. Our calendar might have been cleared and I think it was cleared up at the last session of our court in our county. There are some cases where the juries fail to agree that have got to be tried over again; there wasn't time to do that, and under the provision of the law as enacted here there will be no more of those cases. It is a notorious fact that attorneys are there from day to day, and the judges call up these cases, and they are not ready, they ask for another day for this or that purpose; but if there was some provision of the law to require attorneys to come into court with their cases when they are called, this question of delay would be done away with, and the witnesses could go home, and the juries attend to their business, and a large portion of the expense be curtailed. It has been suggested to me that four judges would be better than three, and I am willing to accept that amendment to my amendment. But I do think five is out of reason at the present time.

Mr. CLAGGETT. I offer the amendment to the amendment to strike out "three" and insert "four."

Mr. WILSON. I desire to say a word or two on the amendment of the gentleman from Latah. If his amendment is adopted you will have seven counties in this district, two terms in each county, fourteen terms in this judicial district. If the other section providing for district attorneys shall be adopted, one judge and one district attorney must do the business of seven counties, two terms of court a year in each. I say, as an attorney, that I believe everybody will admit it is a physical impossibility for that to be done. It is not done now, and never has been done in Idaho territory. In this county the courts are behind; in Alturas county they are behind, and so far as I know they are behind in every county in this district. If the provision for district attorneys for each district is adopted, which of course must be considered in connection with this amendment

in order to make it intelligible, then there is a saving of more than enough to pay the additional salaries of five district judges; over $15,000, more than enough. There is a question for us to consider. I say if we provide for five district judges and five district attorneys for the state, and abolish the office of district attorney for each county, which I am willing to do, then we will save $15,000 in the plan as now in force in this territory; and that is something for you to consider. If you do not do that, and if you provide for four judges or three district judges--

Mr. REID. I propose when I get the floor to show that the present judiciary system of this territory now costs the territory $59,970, and if they adopt everything proposed by the Judiciary committee it will only cost $39,000; nearly $20,000 difference.

Mr. WILSON. That is $5,000 more than I stated.

Mr. McCONNELL. How does the gentleman know what the expenses are? If you have a district attorney in each district court it will be necessary to have deputies, or make some provision for a man to act in his place when he is absent.

Mr. REID. That is paid by the office.

Mr. McCONNELL. There will be prisoners brought in that will have to have an examination.

Mr. REID. Expenses for that are paid by the office.

Mr. McCONNELL. That is an expense.

Mr. REID. It does not come out of the taxpayers.

Mr. WILSON. If there is one district attorney for each judicial district (and five are provided for), then one district attorney can discharge the duties of his district, because there will not be more than four counties in any one district; and it is possible, in my opinion, for him to discharge the duties of that office. But if you increase the number of counties in the districts it will not be possible for him to discharge the duties of the office. Now, if this plan is adopted, as shown by Mr. Reid (and those are not speculative figures, but actual figures taken from the records in the different

counties of the territory), we will save not $15,000, but $20,000 in this system. But now, in the interest of economy I insist we adopt this system. If not, I insist that we go back to the old system of one county attorney for each county, and not innovate upon the legislative act in that regard. I am willing that we shall make that innovation, that much, in order that we save $20,000 and give the people of the state a good judiciary system. Those are the facts and figures before you. There is a plan to save $20,000 in our legal system, and I call upon every lawyer upon this floor to bear witness if we cannot make a system to save the state $20,000. The question is which will you do?

Mr. REID. I would like to make a statement with reference to the cost. I don't care to annoy the convention with any political or buncombe talk about this matter; I don't charge that any other gentleman is making it. But I have taken pains to look the matter up, and I would like to make a statement as to the finances of it. The great objection, as intimated by the governor in his proclamation, will be the cost of state government, as compared with territorial government. He properly estimates that we pay now for the expense of the territorial government about $75,000 a year. That is what we taxpayers pay; the United States government pays the balance, which I think all amounts to $103,000. That is in accordance with the report of the comptroller, and it is in accordance with the statement made by the governor in his proclamation, and itemized by him, so there is no theory about it. It is just about $75,000, possibly $73,000 and something. Reports laid on your tables this morning by the committee on Finance, virtually say that our state government will cost a grand total of $140,163. That is, that your state government is going to cost $65,661 more than the territorial government. Now, when you go before the people how will you meet it? Well, we have a system, which, if you will adopt it, includes district attorneys, whereby we will save about $110,000; so if you deduct the increased cost

for state government of $65,000, from the $110,000 (it will be more than that, it will be nearly $120,000, but I will put it at $110,000 in order to be conservative, then you will have nearly $45,000 cheaper government in county and state under state government than you have under the present territorial government. Now, let us see what this judicial system is costing now. We have three judges who get $3,600 each, a total of $10,800. It is true, the national government contributes to its support. We have a prosecuting attorney that prosecutes for the government that costs us about $6,000. That is the limit of his fees, and we will put it at the limit. Then you have district attorneys in each county which costs the round sum of $36,600; and clerks of the courts, which you pay out of your taxes now; so that the present judicial system of this territory costs the people of the United States and of the territory the round sum of $79,970. Now, suppose you adopt this system of three supreme court judges at $9,000, and of five judges at $15,000; five district attorneys at $15,000; that makes a total of $39,000; taking $39,000 from $59,970, you have about $20,000 in favor of the present system. Now, the judiciary will cost the taxpayers more than it does now, because the United States government pays it; but when you foot up the aggregate you will find your county and state expenses will be $40,000 or $50,000 less than the territorial expense is now, if you adopt the two systems proposed. Estimating sheriffs' salaries at $36,000; clerks of the district courts, who are ex-officio auditors, $13,600 (and I have one-half of the counties here, and have averaged them, I could not get them exactly, but have enough to be fairly exact, and have kept on the conservative side); probate judges about $10,000 or $12,000; district attorneys about $36,000; superintendents of public instruction about $9,000, and county assessors about $9,000; making a total of $110,000 to $115,000, which you are going to get rid of in the way of salaries. How are you going to pay them? In fees. That is, the persons having busi-

ness with those offices will pay them, and it won't come out of our taxes. Your county taxes will be lessened, but your state tax increased. My friend makes a strike at lawyers, but I am talking about this as a business proposition, and I wish he would too. He says lawyers don't come into court prepared. Well, I know he does not; he had a case in court, and his lawyers came in and asked for time to amend the pleadings. He was one of those litigants, and I suppose when his attorneys saw his pleadings needed amendment, they must be given time, and so did the man opposed to him require time; both sides wanted time. I have always found that when the clients wanted the cases tried the lawyers are willing to try them. Whenever it is to your interest to try the case your lawyer will try it; when it is not, he wants to continue it. Lawyers are generally ready when their clients are. I know in the north part of the state we need two district courts; Shoshone and Kootenai counties require the attention, as these gentlemen know, of one judge the whole year round. The other three counties will require the attention of another judge, and especially will this be the case, when in the course of time we get into the Union. We are going to have railroads up there, and that will create mining litigation in the western part of Latah county, and the chairman is familiar with the mining resources developed there. In Idaho county, as soon as it begins to get railroad facilities, a great many mines are going to be worked there that are not worked now; and that will give rise to litigation, and it will keep a judge busy traveling those three counties all the year round to hold court and attend to the business there. I don't know how it is in the south; you gentlemen living down here know whether you need it or not.

I do not yield to any man in a desire for economy; I have fought for it all along, not for a record, but because I belived it was right, and in going before the people we can assure them of our purpose to be economical, and at the same time give them all the facilities

for justice that they have a right to expect if they adopt the constitution. Now, is it right? You have got to have a district up there. If you have but three judges and put those five large counties together, you will require a man to do that which is physically impossible for him to do. Is it economy for the taxpayers and the litigants, who have to go to court, to have the calendar so crowded they cannot have their cases heard? Is it economy to the county to pay jurors for that length of time and put off the trials of criminals? I believe a large part of the court's time is consumed in the trial of criminal cases. Cheap justice is generally injustice. I had rather have the state government pay for it than for us to continue this system. What is the prime evil now? It is that you cannot get your cases tried, that justice is not properly administered, and all that sort of thing. I don't mean to charge anybody with corruption or lack of integrity, but there is a defect in our system. Didn't we all express our indignation when the provision was cut from the bill to give us one more justice here? If we needed four then, won't we need five when we enter statehood with these rapidly developing resources? If so, let us have them. If we don't need them, strike that out, and strike out all of this bill pertaining to lawyers, and put in farmers, and put in men who, if they do not, ought to pay taxes, for the lawyer pays as much taxes as anybody else. It is a plain business proposition, like all the other business propositions brought before us. If the courts are crowded, if the administration of justice is delayed; if costs are piled up; if county scrip is issued and counties run in debt and litigants denied the right to have their rights determined, let us inaugurate the machinery that will give ample means to have their controversis determined.

Mr. PARKER. I support the amendment. I think three judges will be enough for this territory. In my own county we have a heavy calendar, but we have had no congestion in court for three years. In Shoshone county my recollection is that the late judge there was

an imbecile, and a condition of that kind in the court is owing to his negligence of the business on the bench. In Oneida county also we saw a state of things that was unusual. I allude to the indictment of a lot of Mormon citizens for perjury. If you do away with your efforts to make criminals out of law-abiding citizens, you can easily reduce the calendars in those counties to such limits that three judges will be enough. I shall vote for the amendment.

Mr. CLAGGETT. I offered the amendment to that amendment that the number of district judges be limited to four instead of five—not *limited,* but reduced from five to four. This matter was up in the Judiciary committee and fully considered, and at the last stage of these proceedings we had agreed upon four judges. I don't know what caused the committee to change its ideas afterwards and raise the number from four to five.

Mr. REID. It was acted on in the committee.

Mr. CLAGGETT. It may be, but I was not present. My reason for advocating this is because I believe four judges can do the work of the territory or of the state under this changed system. I think two judges down here south of the Salmon River range can do the work, and I think it will take two in the north to do the work; for although we have only five counties there, as against thirteen counties down here, those five counties furnish a great deal more litigation that these counties down here. As stated by Mr. Reid, if we can make a saving of $20,000 over the present system, I don't see any reason why we should not increase that saving to $26,000 if we can do it. Bear one thing in mind, that when we get to be a state we are going to have a United States court, in which a very large proportion of the mining litigation will be determined, which will relieve the district courts to that extent. Our district judges will also be relieved from supreme court duty, and that also will enable the district judges to attend to the business in their districts to much better advantage. For that reason I believe four men can do the work. One thing,

however, that ought to be considered about this view of it—it is not a question only of the district judges being able to do the work; it is a question of expense and convenience to the litigants also. We must bear in mind this proposition, that if we save a few dollars to the taxpayers, but increase the expenses very largely to the private litigant, it operates as a tax after all upon the community. To illustrate, suppose we have in north Idaho only one judge. That judge has the power of issuing all writs quo warranto and mandamus, and if he resides two hundred miles away from where the litigation is commenced, the result of it is that whoever had to go to the judge at chambers to get any particular order would be frozen out on account of the expense in reaching the judge in vacation. So that you must have judges enough to have them within reasonable striking distance of the litigants; and for that reason it requires two men in north Idaho. The whole question is, will it require more than two south of the Salmon River range? If it will, then I shall vote against the amendment I have offered myself, and in favor of the five. That is a question about which I have not the necessary information.

Mr. WILSON. I admire the gentleman's theory of economy. Economy is all right for Idaho territory, but does not relieve us down here from the system under which we are suffering now. There are five counties in the north and thirteen in the south. By this report it is required that there be two terms of court in each county in each year. Now, to say that two judges in south Idaho shall attend to thirteen counties and that northern Idaho shall have two judges, is so manifestly unjust that I don't think the convention would adopt it. I would not draw the line on the Salmon River mountains on any issue that comes before the people of Idaho; but we must draw it on this. It is so manifestly unfair and unjust that I did not think anybody in the state of Idaho would consent to four judges, if two go to the north. If we could get half the time of the two judges

in the north there might be some reason for it. The people of north Idaho will be well provided for; the people of south Idaho will be left under the same condition as now, which has caused the people to cry out for statehood louder than anything else that has engaged their attention. It would not relieve the people of south Idaho one bit, and again I say these judges and district attorneys will be paid out of the state treasury. The people in southern Idaho will pay taxes to replenish that depleted treasury according to the assessment on their property. I have no doubt that much more than half of the assessed valuation of property in the territory is south of the Salmon River mountains; and therefore it would be plainly a manifest injustice that the people here should be compelled to pay this expense for a perfect system in north Idaho when they are compelled, notwithstanding the increased taxation, to have an imperfect judiciary system in southern Idaho. It is a fact beyond dispute, and needs no argument—it states itself, that if two judges in northern Idaho are necessary, three are necessary in southern Idaho. We had far better go back to the old system of three judges, and the people will cry out from that ridiculous system quick enough. If you are going to reduce it at all, let us apportion it. But I am not in favor of any reduction at all. I think the gentleman will concede we ought to have no reduction, if the people here cannot get along with two, and I think every man on this floor will bear me out in saying that we canot get along with two.

Mr. CHANEY. I move we take a recess until two o'clock. (Seconded. Carried.)

## AFTERNOON SESSION.

The CHAIR. The question before the convention is the consideration of the amendment offered by the gentleman from Latah to Section 12 (11) to strike out the word "five" and insert the word "three."

I beg pardon, gentlemen, there is a special order at this hour.

COMMITTEE REPORT—ENGROSSMENT.

Mr. HASBROUCK. The committee on Engrossment wishes to report.

SECRETARY reads: Mr. President, your committee on Engrossed Articles of the constitution have the honor to report that they have carefully examined the articles in relation to Livestock and Executive Department, and find them correctly engrossed. Hasbrouck, Chairman.

The CHAIR. The question is now upon the final reading of the articles reported by the committee on Engrossment.

Mr. VINEYARD. Is this the hour for its consideration?

The CHAIR. The secretary can inform us.

The SECRETARY. Yes, two o'clock. The article on Executive Department, and the article on Livestock were set for two o'clock.

Mr. HEYBURN. And also the report of the committee on Public Indebtedness, which was laid over this morning.

ARTICLE VIII.— PUBLIC INDEBTEDNESS—ADOPTED.

Mr. BATTEN. The committee on Public Indebtedness reported.

SECTION 1.

SECRETARY reads: Your committee on Public Indebtedness, to which was specially referred for correction Section 1 of the article on Public Indebtedness, beg leave to report the same back and recommend that it be amended as follows: "Amend Section 1 by inserting in the same after the word 'liability' in line 7, the following: "as it falls due; and also for the payment and discharge of the principal of such debt or liability." Batten, Chairman.

The CHAIR. The question was pending this morning on the final reading of this article. It was referred

back temporarily to the committee on Public Indebtedness to make such change as it might suggest.

Moved and seconded that the same be adopted.

Mr. BATTEN. I desire to say that the original draft appeared as the correction now makes it read, and that cures the objection made by the gentleman.

The CHAIR. The amendment will be inserted as adopted, without there is objection. As we are proceeding to read this on special order, I presume the proper thing to do would be to have it read now, and placed upon its final reading. If there is no objection the secretary will read it finally for adoption. The chair finds that this is not the engrossed bill; and the question now is whether we shall refer it back without engrossment, and refer it to the committee on Revision.

Mr. HEYBURN. I move we consider it now as if it were engrossed, and refer it to the committee on Revision. (Seconded. Carried).

Mr. AINSLIE. I move that the rules be suspended and that the article be considered as read, and voted on without further reading at the present time.

The CHAIR. It was read and voted on all through this morning. It is now moved and seconded that the rules be suspended and the article be considered as read. (Carried).

Roll call on adoption of article.

Yeas: Ainslie, Allen, Anderson, Armstrong, Batten, Beatty, Bevan, Cavanah, Chaney, Clark, Coston, Crutcher, Glidden, Harris, Hasbrouck, Hays, Heyburn, Hogan, Jewell, King, Lamoreaux, Lewis, Maxey, McConnell, Melder, Myer, Morgan, Moss, Parker, Pefley, Pinkham, Pyeatt, Reid, Shoup, Sweet, Vineyard, Whitton, Wilson, Mr. President—39.

Nays: None.

The CHAIR. The article is adopted and referred to the committee on Enrollment and Revision for incorporation in the constitution.

ARTICLE IV.— EXECUTIVE DEPARTMENT—ADOPTED.

SECRETARY reads No. 5, the report of the committee on Executive Department.

Mr. AINSLIE. I make the same motion in regard to that; it was read yesterday, Mr. Chairman, and in order to save time I move that the rules be suspended and the further reading of the article be dispensed with, and it be placed on its final passage.

Mr. HEYBURN. I would like to ask whether or not there has been inserted in that bill after the words "of public instruction" the words "commissioner of Labor and Immigration." The convention yesterday determined upon that officer.

The CHAIR. That was in the report of the committee on Labor, and this is the report on Executive Department.

The question was then put by the chair on suspending the rules. (Carried.)

Roll call on motion to adopt the article.

Yeas: Ainslie, Allen, Anderson, Armstrong, Batten, Beatty, Bevan, Blake, Campbell, Cavanah, Chaney, Clark, Coston, Crutcher, Glidden, Hampton, Harris, Hasbrouck, Hays, Heyburn, Hogan, Jewell, King, Kinport, Lamoreaux, Lewis, Maxey, McConnell, Melder, Myer, Morgan, Moss, Parker, Pefley, Pierce, Pinkham, Pyeatt, Reid, Shoup, Sweet, Underwood, Vineyard, Whitton, Wilson, Mr. President—45.

Nays: None.

And the article was adopted.

## ARTICLE XVI.—LIVESTOCK.—ADOPTED.

The SECRETARY. The report of the committee on Livestock is the next one for this hour.

### SECTION 1.

Section 1 was read.

Moved and seconded that the report of the committee on Livestock be adopted, and that the article be adopted as read.

Roll call.

Yeas: Ainslie, Allen, Anderson, Armstrong, Batten, Beatty, Bevan, Blake, Campbell, Cavanah, Chaney, Clark, Coston, Crutcher, Glidden, Gray, Hampton, Harris, Hasbrouck, Hays, Heyburn, Hogan, Jewell, King, Kinport, Lewis, Maxey, McConnell, Melder, Myer, Morgan, Moss, Parker, Pefley, Pierce, Pink-

ham, Pyeatt, Reid, Shoup, Sweet, Underwood, Whitton, Vineyard, Wilson, Mr. President—45.

Nays: None.

And the article was adopted.

## COMMITTEE WORK.

Mr. HASBROUCK. Mr. President, your committee on Engrossment has not had time to examine the reports fixed for consideration at 3, 3:30 and 4 o'clock P. M., and unless the members composing that committee can withdraw from the convention to consider the same I ask for further time. And I will suggest that further time be granted, for the reason that two members who are associated with me are members of the Judiciary committee, whose report is now being considered, and if the convention will allow, I would ask until tomorrow morning at 9 o'clock to report the three articles I have mentioned: first, State Government, Public Institutions, Buildings and Grounds; Public and Private Corporations; and the report of the committee on Labor.

The CHAIR. Is there any objection to granting leave?

Mr. McCONNELL. Couldn't we grant leave until this evening at eight o'clock

The CHAIR. Is there any objection? If there is no objection leave will be granted.

Mr. CLARK. Mr. President, the committee on Printing have considered the matter of printing, and find that all is in the hands of the printers and will be finished early today. There remains, if we complete our work by Saturday night, the question of accounts; and the printers would like to have their accounts fully approved on Saturday, and the committee ought to have some time to revise it. If it is in order, I would like to move that the remaining committees which have not reported be instructed to report at nine o'clock tomorrow morning. That will then require every minute's time to enable the printers to present them to the con-

vention, and to the committee on Revision. (Seconded.)

Mr. AINSLIE. The committee on Schedule have matters that cannot be reported at that time.

The CHAIR. Does the gentleman except the committee on Schedule?

Mr. CLARK. I think they had better be instructed to bring in their report tomorrow morning if they can.

Mr. SWEET. This motion requires the committee to report, and if they are not ready to report, I suppose they must report that they are not ready.

The question was put by the chair. (Carried.)

Mr. SHOUP. That being the case, I wish to announce that there will be a meeting of the Apportionment committee in the council chamber immediately after adjournment this afternoon.

Mr. BEATTY. Mr. President, as the chair will observe, there is a great deal of work being referred to the committee on Revision and Enrollment, and there is no clerk for that committee. I am not sure that I am right about that but I understand that the work as reported by the committee on Engrossment will have to be rewritten after the committee on Enrollment shall have done their work. I suppose if any change is made in the way of grammatical errors, it will have to be reported to the body, and then the work will have to be rewritten. Now, there is no clerk for that committee, and it has been suggested to me that we had better have authority to employ a clerk, so that when we are ready the clerk may at once get to work. I will ask, therefore, that the committee on Enrollment and Revision be authorized to employ a clerk, provided we can get one by paying him out of our own pockets, and that he will accept the same terms as the other. There is a great deal of work before the committe, as much as we will be able to get through with.

Motion seconded. Put to vote and carried.

## ARTICLE V., SECTION 11.—JUDICIARY.

The CHAIR. The pending order of business is the further consideration of the report of the committee

on Judiciary.

Mr. Sweet in the chair.

Mr. MORGAN. Mr. President, just before noon recess I listened to statements of gentlemen with reference to the necessity of judges in different parts of the territory. One gentleman suggests that if you don't indict the Mormons we can save considerable judicial labor in that direction. We might carry out that suggestion and decline to indict the people that are stealing horses throughout the country and save a good deal of work in the courts. And so on with all the other crimes being committed, which I regard as about all of the same grade. The gentleman from Shoshone said, and I presume very properly too, that it is necessary (and I believe they all agree to the proposition that it is necessary), that they have two judges in the northern part of the territory, where they have only five counties. Now, I shall insist, at least so far as I am able to do so, and shall ask the concurrence and assistance of members from the southern part of the territory, that if only four judges are allowed, they shall take at least three of the counties, which are termed southern counties, in to the northern district. It is a fact which most of us here are well aware of, that not one-half of the business in Alturas county—I think I am correct in stating that, and if I am not, there are gentlemen here who can correct me—has been done at any term of court in that county in the last three or four years; not one-half of it. It is true, Alturas county is divided, but we have the same territory, and the judge who holds court there must try those same cases; that is, he must go to Elmore and Logan counties and try those cases. In my own district I know that the judge has not been able this last year to do one-half the business that was before the court during this time. As I said before the Judiciary committee, in the county of Cassia, where we held the term last spring, we tried two or three cases, and started in on a water case and tried it half way through, and it came time for the court to

adjourn, and we were obliged to adjourn with the case half tried; it took us a week or eight days to try to the middle of that case, and then the court adjourned to one day before the sitting of the court in the fall, in order that he might take up that case, and not lose all that labor. It is a fact further, gentlemen, that there is not a county to my certain knowledge, because I have been with the judge in each of the counties excepting the county of Bear Lake, during this spring —there is not a single county but what he has cases in that have been tried, and he now has them under advisement, and some of them have been under advisement at least ten months of this time. Now, it would not be correct for me to state that that is the fault of the judge altogether, because I don't believe it is; he has had more work than he can do; and this goes to such an extent that when yesterday and day before yesterday I with some other attorneys argued some cases before Judge Berry, one case in particular, which had already been submitted to him and argued ten months ago, the judge had forgotten we had ever made the argument and requested us to argue it again.

Mr. BEATTY. Is that the fault of the judge or the attorneys?

Mr. MORGAN. It may have been the fault of the attorneys, but this state of things is intolerable; and let me state, it is not the fault of the attorneys: the atorneys are not dilatory in these matters. It is to the interest of the attorneys to push the business through and get rid of it. I have been a practising attorney for thirty-three years, and I think I know what the interest of an attorney is. We want to try these cases through and have them determined. I would rather a judge would decide wrong, and decide against me, than to take a case under advisement and keep it six or eight or ten months. And I believe every attorney will agree with me. I would rather go to the supreme court for the correction of it. We want these matters decided and determined, and the

judges must have time to properly consider and determine them. It is ruinous, absolutely ruinous to men who have cases for trial in these courts, if they are obliged to wait six, eight and ten months, and as some of these cases I know of have been on the calendar for eighteen months, and been ready for trial all the time. Sometimes the subject of the litigation becomes valueless during that time; men lose large amounts of money. They cannot stand that sort of thing, and these cases should be determined. It is well known to every man, who has had any practice in the mining camps of this country, that there is a kind of human pirates that live in every camp; they follow from one camp to another for the purpose of jumping claims and getting up pretended claims to the title of a mine that becomes valuable. If those men can keep those questions in litigation for months or a year, you must buy them out to get rid of them and that is all they want. It is an outrage to a poor man or to any man who owns a mine to be placed in that position; but if the case can come up and be tried in three months or six months, those pirates cannot succeed in robbing their fellowmen in that way. Therefore, in my opinion it is impossible for two judges to do the work in these thirteen southern counties. We cannot expect that litigation will decrease in the future so much that they will be able to do it; it will increase in certain counties, and in certain other counties it will decrease. That is the case the world over. At one time a mining camp is on top, and there is a great deal of litigation from it; another time it is down, and then there is very little litigation. And so it is with the litigation in all other counties. The litigation in these thirteen counties is certainly large. We have at least three-fifths of the litigation of this territory in these thirteen counties. The result will be, we must have three judges, and the northern counties two, or they must take a certain share of the southern counties into their district, and leave us ten to their eight.

Mr. HASBROUCK. Mr. President, I am opposed to this amendment, and I shall favor the section as it comes from the committee; and for this reason: I represent, or help to represent Washington county, and I wish to make this statement. The court last fall in Washington county, for some reason that I am not able to explain, held no term. The result was that we had a number of criminals or persons who were held for examination in our county jail, and as they were kept there six months, Washington county was put to an expense of at least $1,500. I got that from the officials who know. That would have paid the salary of one of the judges for half a year. Besides the other fact, that some of those parties who were held to answer, as it afterward turned out, should not have been held, and were discharged without a trial. It is manifestly unfair that northern Idaho should have two of the four judges; so manifestly unfair, that I don't suppose anyone in this convention will have the courage to maintain the proposition. If we have but two judges in such a large extent of territory, it will be found many times that persons will be confined in the county jails longer than they should be, and the expense devolving upon the county to support them during that time, would more than pay the extra salary we will have to pay to the judges. It may appear on its face that we are increasing the expenses, and that the state government will be more expensive than that of the territory, but it is only on its face, as has been shown by Mr. Reid by figures that cannot be disputed. I make these remarks not as a practising attorney, but as a private citizen.

Mr. McCONNELL. Mr. Chairman, there isn't any proposition for northern Idaho to have any two or any number of these judges. The law says the state shall be divided into three judicial districts.

The CHAIR. I understood you accepted the amendment of the gentleman from Shoshone.

Mr. McCONNELL. Yes, I will.

Br. MORGAN. Yes, and the gentleman in his address, after proposing four judges, stated that they must have two of them in the north.

The CHAIR. The question is upon the amendment offered by the gentleman from Latah.

Mr. CLAGGETT. I wish to withdraw the amendment I made this morning. From conversation with gentlemen in the southern part of the territory I know that they need three judges, and I know that we need two up north.

The CHAIR. The question is then upon the amendment of Mr. McConnell that the word "five" be stricken out and the word "three" inserted.

A viva voce vote was taken, and the chair announced that the amendment was lost. Thereupon a division was called for, and upon the rising vote the result was: Yeas 9, nays 29.

The CHAIR. It is now moved and seconded—

Mr. BATTEN. Isn't there an amendment of Judge Claggett's?

Mr. CLAGGETT. I withdrew that.

Mr. BATTEN. Well, I seconded that, and I will offer it as an independent motion.

Mr. McCONNELL. I second it.

Mr. BATTEN. I have all along maintained in accordance with my honest convictions that four judges will amply discharge the duties of the district judges in the new state. You all remember there was a celebrated individual who became historical, who served in the national convention, and whose name was Philander Greene; and his immortal expression was, "What are we here for, if not for the offices?" Now, if the principle is to establish as many offices as possible, let us carry it out on the Philander Greene principle, and make it ten or twelve judges. I honestly believe we ought to pause a little and consider what we are doing. I confess I am arraying myself against the older members of the bar, and do it with extreme reluctance, but I do honestly believe that when we rid the judges

of their appellate jurisdiction, when we consider what Judge Claggett said about these men with the large claims, the litigation that now finds its way into our territorial courts, which will then find its way into the United States district court; and when we consider how sparsely settled many of the counties are, I honestly believe four judges can well and faithfully and efficiently discharge all the duties they may be called upon to discharge. I realize the great difficulty is this, that owing to the peculiar condition of things, the fact that there is an almost impassible or a difficult range of mountains that divides us in twain, we cannot adjust this matter nicely. It seems to me that the north should have a separate district of itself, and must be considered separate and distinct from the south; and in considering these two sections entirely separate from each other, we are confronted with the dilemma, that in the north and northeasterly strip, which is separated from the south by this almost impassible barrier of mountains, there are but five counties, and in the south thirteen. Now, the argument has taken this drift, which seems to run all the way through, that if we were differently situated geographically, if this barrier of mountains did not hinder us in the solution of this question, then four judges would be sufficient. I think we can do with four anyway. I don't think we should raise this barrier of mountains as a sort of obstacle in the way. I dislike to take the stand against older and riper minds of the bar, but I maintained this in the Judiciary committee, and to be consistent and in accordance with my honest convictions I think that four judges can amply fulfil all the duties there are. There are three or four counties that have this excess of business. As to Alturas county, much can be said in explanation of the condition of things that prevail there. Last year we had no term of court at all, and I know very well that some of us lawyers, if we will be honest and candid with ourselves, must admit that some blame attaches to us. I have seen how easy it was for

lawyers upon some frivolous pretext or excuse to get a little indulgence in the way of continuing cases, and I think we can rightfully charge ourselves with a good deal of the blame. I honestly believe four judges will be sufficient, and I think if we go before the people with explanations, we go before them handicapped, and the first thing they will say it that we have been getting along with three judges, all-told, including appellate and district judges; and now by this bill you have three appellate judges and five district judges—you have offices without number. Then the burden devolves upon us all to make them understand the thing. And the moment we have to start in on a long laborious explanation, that moment we are seriously handicapped in presenting this constitution to the people. So that I do think that we should adopt the amendment reducing the number of judges to four.

Mr. McCONNELL. I call for the yeas and nays.

Mr. WILSON. I should be perfectly willing to have four judges if they could be apportioned properly. But before I vote for four I want to know how they are to be apportioned. Gentlemen in northern Idaho say they must have two judges. In behalf of the people of southern Idaho, I say that we cannot possibly get along with two. If they can take one in that district with five counties up there, I would be willing to take two down here; but I maintain you cannot apportion them so that some counties in northern Idaho will be in the same district with southern Idaho, because you would have an imperfect district. For example, if Nez Perce and Idaho counties belong to a district which has three counties in southern Idaho, say Washington, Ada and Owyhee, then if a litigant in Ada county wants to get an injunction or preliminary order he must go wherever the judge happens to be sitting, which might be in Idaho county. Then the litigant and his attorney would have to go 1,200 or 1,500 miles by rail, 200 miles on the back of a mule or 200 miles on snowshoes probably to get his injunction. And that is something

which he could not possibly do. I submit, and I think the attorneys will bear me out, that these preliminary orders will be called for more and more as the years go by; they are called for more and more every day. Today we have a large irrigating ditch in the capital, Boise City now. From $100,000 to $150,000 will be expended in the building of that ditch. Our statutes provide that in acquiring the right of way under our act of eminent domain, appraisers may be appointed by the district judge. Last winter I had a bill introduced in the legislature covering that point so that the district judge in chambers can appoint the appraisers and the damages be paid into court and the enterprise go on. Now, if the judge was in northern Idaho while this enterprise was going on, it would necessitate this showing being made, and the litigant and his attorney going into northern Idaho to get the order for appointing appraisers to assess the damages, that they might be paid into court and the enterprise go on. In other words, it would probably cost him $1,000 to get this order. This barrier is insurmountable; and therefore I shall contend that the question is either three or five judges. There is no intermediate point. Four doesn't remedy it; I would rather have it three than four. Four is only $3,000 cheaper than five, but four is $100,000 worse than five. If two district judges are given to the counties of northern Idaho, southern Idaho should have four, which is unjust. The valuation as shown by our assessment of the taxable property in southern Idaho is $16,431,799. The taxable property of the five northern counties was $5,192,948. In other words, in southern Idaho, south of the Salmon River mountains we pay more than three times the amount of taxes they pay in northern Idaho; and it would be a manifest injustice to require the taxpayers in southern Idaho to support a judiciary system that provides two judges in northern Idaho, where they pay but one-third of the taxes. You must remember that judges' and district attorneys' salaries are paid out of the state treasury, and not by the

counties, as district attorneys have been. For those in southern Idaho I demand that we know how this apportionment is going to be made. Northern Idaho insists, both lawyers and laymen, that they must have two out of the very necessity of things. If they must have two, there is far greater reason why we must have three. Four is a compromise and I don't like compromises; they always result in something iniquitous.

Mr. REID. I would like to offer a word in explanation of a statement I made before the noon recess. The governor has called my attention to the fact that in making the statement that was published, we overlooked an item of $4,400 that the committee included. It is interest on the floating debt. So I have now a corrected statement, that the convention may vote with a full understanding as to the expense. I will read this statement. The annual expense for the state government as estimated by the committee will be $140,661. The annual expense under the territorial government now is $80,000. I mean expense to the people. I don't mean what the federal government contributes. It leaves an increase in expense of the state government over the territorial government of $60,661. Now, that includes, and this estimate is based on the idea of adopting, five judges and three judges of the supreme court, just as the committee has reported. Now, how can we get that increase down? We propose to do it by the county system. The saving in the county expense, if we adopt the system reported by the committee, on sheriffs' salaries will be $36,000; salaries of auditors and recorders $13,410; salaries of probate judges $10,260; salaries of district attorneys (county attorneys they were) $36,600; salaries of superintendents of public instruction $7,020; salaries of clerks of the district courts $6,510; making a saving over the present government of $109,800.

Mr. MORGAN. That is, what is actually paid now.

Mr. REID. Yes, I have taken the table and averaged it so that it only missed it a hundred dollars on

ten thousand. Now, deducting the increase in state government from the decrease in county government and you have the net balance of $49,139, in favor of state government, provided you adopt the system both of state government and county government, as reported by the committees. In round numbers call it $50,000. Now, we go to the people on that proposition. It is true, we have increased the judiciary. Now, I am going to support five judges. Gentlemen say that if we will adopt five judges they won't need the county attorneys, because we will have five district attorneys, and they can go along with the judges. Some of the delegates here tell me they have tried both systems, and some of them are inclined to prefer the present mode which costs $36,600. If we can make five district attorneys do that work, which will cost $15,000 on the total, it would average up the cost and save $50,000 to the state government; that is, what comes out of the pockets of the people. I am in favor of that system. And I will say to gentlemen candidly, if they adopt four judges, I am willing for the gentlemen in the northern counties, Shoshone, Kootenai and Latah, to put them together and have Nez Perce and Idaho to be added to two or three of the counties down here. I throw this out, speaking for Nez Perce county, because I don't want anything of this sort; if you want to adopt four judges, do so, and that will be determined in the next section when we come to that; but I say vote for five, because I want to get rid of these county attorneys, and I want if for this reason also; and I might as well make the point right here so we can vote on it now as well as hereafter and not have to repeat it. County attorneys cost $36,600. The average salary in the territory of the district attorneys is about $1,500 to the county. Multiplying that by eighteen, and adding to it $9,600 that Mr. Wickersham estimates will be necessary, and you will have the cost to this territory of $36,600 for county attorneys. Now, the five district attorneys will cost $15,000. Deduct that, and you have a saving

of $21,600 in the matter of district attorneys. The committee estimated that it will only take $16,000 to run the legislature, so in two years you will save almost enough by adopting this present system proposed by the judiciary committee, to run your legislature six terms, provided the sessions are only sixty days long. But suppose you go back to the county attorney system. Then you wipe out nearly all of this balance of the decrease in expense in favor of the state government that we propose to have by adopting this county system, so it leaves the thing about even. Now, in many counties this office is unsought and a great many persons in the counties are incompetent. By adopting this system of five district attorneys and paying them a salary you will get five good lawyers, and, as was stated the other day in the argument by Mr. Sweet, when these district attorneys have to prosecute in the district court, cases of murder and everything of that sort, they will have to meet the best men at the bar. Now, you had better take the system of district attorneys and district judges and do away with the county attorneys, and go to the people on that proposition. It is true we have increased the judiciary. That has been the evil here, but when you foot up the whole cost, if you adopt this system you will save $50,000 over what you are paying under the territorial government. We propose to put all the laymen, probate judges, sheriffs and others on fees; and if you adopt the system of district attorneys what have you done? If you adopt the system complete as reported by the committee you practically save $50,000. Now, what do you do by striking out one judge and one district attorney? You save $6,000. And then you want to restore county attorneys. I think, gentlemen, to make the thing satisfactory, if we adopt the whole system as reported, and then go to the people and say, "yes, we have given you five district judges, but at the same time we have given you courts that will transact your business, and while we have increased the expense in some particulars, yet upon the

whole, if you adopt this constitution, and go into the Union under it and carry out this state government as we have established it, you practically save $50,000. On the other hand, suppose you do not adopt this system; you have increased your taxes; instead of paying three and a half mills for state purposes, you will pay seven mills." Therefore I shall support the bill.

Mr. HASBROUCK. I shall still maintain my support of the section as it was reported from the committee, and I am opposed to the amendment offered by my friend from Alturas, and I will say right here that I oppose it on more than one ground that he will still have to explain. By taking off one of the judges does he still not have to explain? One judge taken off will not save us from making explanations. And I will say on behalf of my county of Washington, that I will try and explain the matter to my constituents satisfactorily.

The CHAIR. The question is upon the amendment of the gentleman from Alturas.

Mr. McCONNELL. I withdraw the demand for the yeas and nays.

The question was put by the chair upon the adoption of the amendment. Vote and lost.

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

## Section 12.

Moved that Section 13 (12) be adopted. (Carried.)

## Section 13.

Section 14 (13) was read. Moved and seconded that Section 14 (13) be adopted.

Mr. CLAGGETT. I offer the following amendment at the end of the section: "Each district judge shall have the power to appoint a master in chancery for each county in his district, and may remove him at will. Such master shall have the power to issue temporary injunctions and perform such other duties as may be

prescribed by law, but no temporary injunction or restraining order shall be issued by such master in chancery or any district court or judge thereof in any case where the possession of, or the right of title to, real property is brought in question until the party affected has had an opportunity on reasonable notice to appear and resist such issuing." (Seconded.)

Mr. CLAGGETT. There are two propositions embraced here, and that is to confer upon the district judges the power to appoint masters in chancery, who will have the power to issue temporary injunctions, and perform such other duties as may be prescribed by law; but the principal reason I offer it is to get rid of that which has constituted the greatest standing abuse in the administration of justice in all these territories of the west, and under which more devilment has been wrought, if I may use the expression, than under all others combined; and that is the power of district judges to issue ex parte, without any notice whatever, injunctions tying up the possession and use of real property, particularly mining property, throwing upon the defendant the necessity of going to a large expense to move to dissolve the injunction, and in the meantime put a stop to the entire operations that may be carried on. And I want to say right here that I have not, in the course of nearly thirty years on this Pacific coast, known of one single solitary case where an injunction has been issued ex parte without notice, where the title or possession of real estate was brought in question, that it could not have been just as well issued without creating any trouble whatever some five or ten or twelve days afterwards upon notice. In other words, in cases of this type it will simply amount to this, that no temporary restraining order can be granted until after the expiration of a week or ten days of notice.

Mr. WILSON. Does your amendment include interlocutory orders of appraisers to assess damages?

Mr. CLAGGETT. Oh no, it simply covers temporary injunctions.

Mr. WILSON. I would like to have it include something of that kind.

Mr. CLAGGETT. That can be done by amendment. And when you do get a scamp in the judge's office—and once in a while you do—it is through the abuse of these discretionary powers in the matter of issuing temporary injunctions where he works out his corruption, and in some cases we have quite a lot of judges who are cranks on the subject of power, and want it understood by everybody that they have the power of shutting down every mine, and every mill without bringing anybody into court, and they exercise that power in the most unreasonable manner.

Mr. HEYBURN. I hope the amendment will not prevail. When you do it you offer a premium to the shotgun policy of taking possession of other men's property when they have no redress. For instance, take a placer mining camp. If the court cannot issue a temporary restraining order without notice, somebody will take possession of your mine, and during the ten or twelve days in which it would be necessary to give notice he would have accomplished his object, and would not then care whether he is stopped or not. And that applies to every other mining property. When a man takes violent possession of your property, you should have an instantaneous and efficient remedy of getting him out of there before he can despoil it. No man is ever injured by a temporary injunction if he is in the right. It simply preserves the substance of the property, while the question can be determined as to who owns it, that is all. The court does not, by issuing a temporary injunction, to take one man out and put another one in, and tell him to go to work and despoil it and rob it of its substance. But he simply says "neither of you shall handle the substance of this property and waste it until the question is determined as to who owns it." And when you take that power away from the court, you have offered a premium to this class of men who go and take violent possession of a man's

property and hold it and take away the substance of it during the ten or twelve days that elapse before you can give notice and have an order issued to restrain him. The legislatures have been appealed to by the gentleman who moves this amendment for support. No legislature in any state in the Union has ever taken this power away from a judge for a single minute, and I defy the gentleman or anyone else to show me where any legislature has deprived a court or a chancelor of the right to issue these writs.

Mr. BEATTY. I would like to have that amendment read again.

The secretary rereads the proposed section as set forth above.

Mr. HEYBURN. I desire to say further, Mr. Chairman; I neglected to pay my respects to the first portion of it. I do not believe in a judge being empowered to delegate his power, the exercise of that judicial discretion with which he expects to act; I do not believe in him being empowered to delegate that to any man. When we lodge in a judge the right to grant injunctions and to exercise judicial discretion and judicial power with reference to our rights and our property, I do not believe that judge should be allowed to select in any county somebody to whom he shall transfer that power to issue those orders. I want that power to issue from the court itself, and I want the court to be responsible for the exercise of that discretion. That is another objection I have to it.

Mr. BEATTY. Mr. President, I did not design saying anything; I wanted to hear the amendment read with a view to knowing how to vote upon it. I think there is one serious objection, however, to that amendment. The question would be who would be appointed as master in chancery. A lawyer ought to act in that position. Now, no lawyer in any county would want to take that position, because he may himself have to appear before that master in chancery. The result would be, if you exclude the lawyers, some layman

would have to fill the position, and a layman could not properly fill that position. I supposed when the amendment was first offered it was with a view of having some officer ready and convenient in the absence of the judge to issue these temporary restraining orders. I live in a mining country, and have for twenty odd years, and I fear the effect of that proposition. If parties at all times must have notice before even a preliminary injunction is issued, I fear that great damage would often be done in mining cases. We know how often it occurs that men get possession of mining property and get out perhaps a hundred, or a number of tons of valuable ore, amounting to hundreds of dollars in value; and if they are to have notice of a preliminary injunction they may remove the very thing you want to prevent; they may do the very illegal act you want to prevent by this restraining order. I agree with my friend from Shoshone (MR. CLAGGETT) that sometimes restraining orders are granted injudiciously. I agree that judges sometimes overstep the bounds. I agree, as a matter of course, that it is the business of the judge, even though these temporary restraining orders are allowable under the law—it is the business of the judge to inquire carefully before granting them, and he shall not issue them to every man who comes and asks for them. It is his business to have enough of the facts before him to know he is not doing any injustice. But we propose to elect hereafter our judges from the people, and we shall not have these judges from the outside, who are in the habit of granting them recklessly; we shall have men who are accountable to the people directly, and who will be probably more careful when issuing these restraining orders; but I must say, with all due deference to my friend from Shoshone, that I prefer the law as it is; I prefer that we have the power to issue temporary restraining orders. This does not apply to you gentlemen in the farming community so much as to us in the mining communities; but I have known of hundreds of instances in my practice in

mining communities where if we did not have the power to have these temporary restraining orders, hundreds of thousands of dollars damage would be done by the removal from the dumps of mines within four or five days, of ore taken out. As has been suggested by some gentleman opposed to this amendment —I believe friend Heyburn from the north—these temporary restraining orders are not intended to put a man in a different position from what he is, but simply to hold the matter in statu quo—simply in the condition it is until a hearing can be had. If a judge has proper judicial discretion no great damage is likely to result from a temporary restraining order. If we get judges who are reckless and careless, we must get at them. You cannot make all laws right, to meet all defects in judges, lack of judgment or lack of proper qualities; you have got to trust to them; but I undertake to say if the judge knows his duty, very little damage will result from these temporary restraining orders. If you cannot secure them, great damage will result, especially in mining communities. I regret to differ from my friend from Shoshone, but I think the amendment would work us damage, and especially on that point I mentioned first; I hardly see whom you could get to act as master in chancery. It would have to be some person other than a lawyer, and only a lawyer should act upon such important matters as those.

Mr. CLAGGETT. I shall ask to have the vote divided on this question, Mr. Chairman. The master in chancery part of it may stand or fall by itself, and so may the other part of it. But I don't intend to allow my friend from Alturas, nor my colleague from Shoshone to befog the attention or minds of this committee, if I can help it, and their argument so far has had that tendency. Let us see how this thing practically works. The case which is put by my colleague is, that in case the power to issue these ex parte injunctions is taken away, parties will go to work and jump mines and take violent possession, and all that sort of thing. If you

will bear in mind from the reading of it, it only involves such cases as where the right of possession or title is brought in question. We already have a statute for mandatory injunction, where the question of title cannot be brought into question at all, relating to the manner in which this possession is obtained, and all of that power of a court of equity is still left untouched by the amendment which I offer. If a man comes in and takes possession of a piece of real estate in this territory today by force and violence, or fraud, or in the night time, or in the temporary absence of the party in possession, or by any combination thereof, the district judge is armed with the power, without inquiring into the possession of title or right of possession, to immediately put him out of possession and put the party back who was thus turned out. This amendment does not touch a case of that sort at all. It simply touches the old standing abuse where the judges are issuing restraining orders to put a stop to mines and mills, and are doing it under the guise of necessity, from which every mining camp in this country, from one end of the Pacific coast to the other has suffered, and which has given rise to a set of blackmailers who are constantly prostituting and using these powers of the court for the purpose of extorting money from those against whom they perhaps trump up a pretended title; and there isn't an old miner who cannot bring case after case in which it has been done. My friend from Alturas says it will be necessary, in order to keep miners who have gone to work and taken out hundreds of tons of ore, from removing it. Let us see. That is one of the standing abuses I am trying to get rid of. Here is a man in possession of a mining claim working it in good faith, spending his time and money in that development work. He has got ready to take out ore. On the outside is a party who has some "shingle" or pretended title, or some good title if you see fit, who quietly waits until the ore has been taken out and the man in possession has in good faith bankrupted himself in the

development; then just before the time comes around for him to obtain some return from it, the other party goes to a district judge, gets an ex parte judgment to stop him from working, and forces him into court at that particular time when he hasn't a dollar with which to defend his rights. I have seen that thing done in Shoshone county to my personal knowledge, until man after man who had an undoubted legal title was frozen out and compelled to abandon his property. It was perfectly competent at any time when this outsider desired to test the question of the right of the party in possession to go and bring his action before he had got hundreds of tons of ore hauled upon the dump. But they wait until the thing is done, until the man in possession in good faith has gone on and done this work of development, and then at the last minute they will sneak by midnight to the district judge's chambers and get one of those ex parte restraining orders. And I repeat what I have said before, that in the whole time I have lived on the Pacific coast I have never seen one instance in which a temporary restraining order was granted ex parte where it could not have been granted with equal safety to both parties five or ten days afterwards upon notice. There is no necessity for it, and it is so universal, almost universally a systematic abuse of power, that I say the power should be taken away entirely, and the man who is in possession and is working a piece of property should be entitled to the presumption, which the common law raises in his favor, that he is the owner of it, and that neither possession itself should be taken from him, nor should he be restrained or stopped in the ordinary transaction of his business until he has had a hearing in some court, at least as against those pretended charges and titles and fraudulent claims to title, which may be set up against him. That is the theory of the whole matter.

Mr. HEYBURN. Mr. President, I did not expect to say anything more on this matter. I don't want to see a mistake made; I don't want to see the eloquence

of the gentleman carry this convention away from reason, common sense and common honesty, and if I can say a word to prevent it I propose to do it. On the statutes of this territory at this time there is a provision under which these injunctions that the gentleman complains of are granted.[1] And in that same statute, following on the heels of the one I refer to is another one, which says, "If the court or judge deem it proper that the defendant or any of several defendants should be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place why the injunction should not be granted, and the defendant may in the meantime be restrained.[2]" Now, that leaves it entirely with the court. The statute provides further, that no injunction shall be granted except upon a verified complaint, and that the complaint upon its face must show such facts, sworn to by the parties, which, if proven true, would entitle them to the relief demanded. Now, those are the provisions that are carried forward in the law of this territory; and all of this talk about blackmailers is no argument. Which are you going to prefer; the man whom the other side calls a blackmailer, or the man who demands possession of your property, which is the very question you are going to determine by the law? Are you going to prefer the man—where an immense wrong is being done—who is manifestly taking possession of a piece of property for the sole and exclusive purpose of taking away that particular substance of it which he may take away in the days that it is necessary to give notice? Are you going to prevent the judge, where a case of that kind is so plain there can be no reasonable doubt in the mind of the judge, from granting this relief by saying to the party, "You shall not take away the substance of this property until you prove you are entitled to it"? Who is wronged or who is harmed by

---

1—Sec. 4288, Rev. Stat. (1887) et seq.

2—Sec. 4292, Rev. Stat. (1887).

this provision allowing the judge to grant these injunctions? Neither party can remove the property; neither party can destroy it; it remains there subject to the adjudication of the rights of the parties. Take the other horn of the dilemma. Suppose the court cannot grant the relief, and a man goes into possession of a piece of property, either by stealth or force, and takes away its substance, whether great or small—and sometimes it is very great—and he is insolvent and has no property by which you can recover a pound of it; then where is your remedy? Isn't that an immense wrong on the face of it, that ought to be guarded against. In the one case neither party can take away the property; it remains there uninjured. In the other case, the defendant has been permitted to remove it, take it away, and place it beyond the power of the plaintiff to recover it. Which is the greatest evil to provide against? I am not going to drag the mining cases of Shoshone county before this convention. I want to lay this matter before you, as a plain common principle of equity and honesty and common sense, whether or not you are going to prevent these judges, who are now invested with this power, from having the power hereafter to protect men in the enjoyment of their private property. If a man does not own the mine or mill, he ought to be stopped from working it. The gentleman says it results in stopping the working of mines and mills. If somebody else takes your mine and wants to work it, the fact that he is working it in good faith cuts no figure; that is no reason why he should be allowed to take some other mine or mill, and work it; he might as well take forcible possession of your bank and say, "Why, I am doing a very honest and graceful banking business here, I am doing it in perfect good faith." The answer is, you are taking somebody else's bank; and anybody can do it with all the suavity and grace in the world if he can take some other person's property to do it with. It is that we want to be able to prevent. There is a class of men who think if they can get into possess-

ion of another person's property, and make the other fellow do the fighting, they are all right; and they are worse than blackmailers; they are thieves.

Mr. AINSLIE. I was very sorry my friend, the gentleman from Shoshone, has introduced this bill in the Judiciary committee. We were nearly three weeks preparing this bill, which that amendment would strangle as to the writ of injunction; it would deprive the owner of property of the undisputed right, which is possessed in every civilized country, of protecting it against the marauders who are attempting to steal it and take it away from him. I can give instances of some farmers in this house, where the man would be deprived of the right of injunction and irreparable harm would result to his farm. Take a dry season like this; the man first settling on a stream takes the water out and had irrigated his orchard, garden and crops. Some other fellow comes a long time after him, eight or ten or twenty years, and finds there isn't water enough for both, and cuts a ditch from the first appropriator and takes the water away from him. Now, what shall the first appropriator do, unless he gets the water back, and how is he going to take it back? Is he going to take a shotgun, or as a law-abiding citizen will he apply to the court for a writ of injunction to prevent that man taking the water away from him? This amendment will result in bloodshed instead of law. Again, if a man is running a tunnel into a hill alongside of a mine that has been worked for years, and the title of the owners in the mine is undisputed, a jumper may come along and locate land adjoining—may not be a jumper at the time—and he runs a tunnel into the hill and strikes nothing for himself. But after he gets in a hundred feet he runs a crosscut into the vein of his neighbor, the prior discoverer of the mine, and commences to take out the richest kind of ore. How are you to stop him? You must go (you say) to a master in chancery, a deputy judge, and prefer your case to him. In the

meantime the other man has packed out a $100,000 worth of rich mineral. The law provides in every state that upon granting an injunction, before it is granted, the plaintiff shall give bond to the defendant for any damages he may sustain by reason thereof, even before a temporary restraining order is granted; and I am satisfied if this proposition had been laid before the Judiciary committee it would have been unanimously sat down upon except by the gentleman introducing it.

Mr. BEATTY. I did not intend to take part in this discussion, but having spoken once my mind is naturally brought in again. I believe it is a rule among horse-racing men that when a horse distances all others he is ruled off the track; and I almost feel that my friend from Shoshone should be ruled out here, for like these wild storms that sweep over our mountains, now he, by his eloquence and zeal sweeps everything before him. He springs on us a proposition unexpected to me, and now he says we are befogging your minds by the suggestions we have made. Now, I want to show you the proposition as made. He takes up the proposition which is an unnatural one. He takes this instance, of some man who is honestly in possession of his mine and is working it and has got out a hundred tons of ore, when some blackmailer standing off and looking on gets a restraining order. That is an unnatural case. It is not the man who is honestly in possession of a mine and is working it that is damaged; it is not when a man is working his mine properly that he is restrained; but the more usual cases are when a man is improperly working a mine. The cases where we want this injunction are like this: some party comes along who has no title or right to mine a claim, and in the absence of the true owners he works upon it; and without their knowledge, as I have known numerous instances, gets out a large amount of ore; and before you have a chance of restraining him—or would have a chance under the system the gentleman proposes—the man would get away with the ore. It is for cases of

that kind that we want this restraining order; and as I said before it cannot do any damage. I appeal to every man who knows anything about a mining camp, how often it occurs that some mine away off in some out-of-the-way place is worked by some man who has no title whatever to it, who gets the ore out. Perhaps you had barely time to hear of it and get your restraining order to prevent him from removing the ore from the mine and disposing of it. It is for cases of that kind that we want this law, and in support of it, and against the amendment, I have only to cite all the laws in the west. I believe there is not a state in the west that has not just such a provision as we are contending for, allowing judges in all cases of this kind to issue their temporary restraining orders.

There is one thing I wish to allude to that has not been yet referred to. My friend Judge Claggett says there is danger of rogues and blackmailers getting injunctions against the honest miner. Now, bear in mind this, that our statute now provides that the party getting it is liable for the costs; he first gives a bond upon a liability for the costs. Not only that, the law goes farther and says that he is liable for reasonable attorney's fees if he has the injunction unlawfully issued. So that the man against whom the restraining order is issued has all of those safeguards. He can claim from the plaintiff not only the costs and expenses, but even the attorney's fees; and more than that, bear in mind that the restraining order is only for a few days, eight or ten or fifteen, as the judge sees fit. A judicious court may make the time short, only five days perhaps; and I insist that only a little damage can be done by this system, whereas, by that amendment, if adopted, great damage would be done, and I hope this innovation will not be adopted.

The CHAIR. The question is, will you adopt the amendment offered by the gentleman from Shoshone?

Mr. CLAGGETT. I call for a division of the question; first, on the first branch of it.

SECRETARY reads as follows: "Each district judge shall have power to appoint a master in chancery for each county in his district, and may remove him at will. Such master shall have power to issue temporary injunctions, and perform such other duties as may be prescribed by law."

Mr. REID. I just want to ask one question. If you create this office you have another salary to pay.

Mr. CLAGGETT. No, you have not. There is no salary to pay, and it is an office in force in nearly every state in the Union.

Mr. PINKHAM. In relation to that matter just mentioned, I would say if he refers to the laws and constitutions of almost any of the eastern states, he will find it is the common practice in every state to have a master in chancery or a commissioner whose powers and duties are—and the office is created for the express purpose—that he shall grant writs of injunction, mandamus, quo warranto, prohibition, or any other equitable order that he sees proper, with the same authority that the court has if he was personally present to do so. I believe that provision was made and placed in this resolution, or this amendment, by Judge Claggett at my suggestion today. It is a fact, I know it has been practiced for the last thirty years in most of the eastern states. I never found out yet, and no man can ever point to me a time when it ever came in conflict with the practice of the courts. In addition to other provisions or authority conferred upon him by the statutes, by the legislature, is this, that he has authority to take, in certain cases, applications for divorce, and instead of the time of the court being taken to investigate and take testimony of that character day after day in court, it is referred to the master in chancery; especially where there is no contest in the case, and reported back to the court for its decision. I think he is a very useful member of the court and his compensation is provided for by the legislature, and is in fees, and does not come under the provisions of any constitution.

Mr. REID. The gentleman is right where the two systems exist of equity courts as well as courts of law. The first article of this Judiciary article, however, abolishes all this equity distinction, and we have one form of action. We used to have masters in chancery in our system when we had the old common law system, and the biggest fees ever paid to anybody were paid to those masters in chancery. In the state the gentleman comes from, it is just called to my attention, they have the two systems of equity and law. But we have abolished those systems, and now have the code practice. We appoint commissioners instead of masters; but under none of these code systems do they ever clothe masters in chancery with the power to issue writs, because that is a delegation of judicial function, and it is necessary to equip them with all the power of a judge. But as we can try with a judge pro tempore, and have five judges now, and they will all be accessible, and we do not have to go out of three or four counties to find a judge, I don't think we ought to adopt it. Furthermore it is a brand new question sprung here, and my notion is that if we adopt it we will have more litigation and mischief growing out of it than if we leave it out. I believe there will be other mischief arise under it worse than that it is intended to cure.

("Question, question.")

The question is put by the chair. Vote and lost.

SECRETARY reads: "But no temporary injunction or restraining order shall issue"—

Mr. CLAGGETT. I will have to withdraw that in the shape it is, it does not make sense now. I will ask leave to withdraw the amendment.

The CHAIR. If there are no objections it is withdrawn.

## SECTION 13.

Moved and seconded that Section 14 (13) be adopted. Put to vote and carried.

SECTION 14.

Section 15 (14) read, and it is moved and seconded that it be adopted. Put to vote and carried.

SECTION 15.

Section 16 (15) was read.

Mr. REID. I offer an amendment. This is a provision that is now in the Salary bill, and I move to add that just after the section: Add after Section 16 (15), "He shall receive such compensation for his services as may be provided by law."

Mr. HEYBURN. I will accept the amendment.

Moved and seconded that the amendment be adopted. Carried.

Moved and seconded that Section 16 (15) as amended be adopted. Put to vote and carried.

SECTION 16.

Section 17 (16) read, and it is moved and seconded that it be adopted. Carried.

SECTION STRICKEN OUT.

Section 18 was read.

Mr. BEATTY. Mr. President, I ask the chairman of the committee if that is not entirely provided for in Section 6.

Mr. HEYBURN. I would suggest that that should be stricken out. It is all provided for in Section 6, which has already been adopted.

Mr. BEATTY. I move that Section 18 be stricken out. (Motion seconded. Put to vote and carried.)

SECTION 17.

Section 19 (17) read, and it is moved and seconded that it be adopted.

Mr. HEYBURN. I have an amendment pertaining to the salary of the justices.

SECRETARY reads: Amend Section 19 (17) by

inserting before the first words, the following: "The salary of the judges of the supreme court, until otherwise provided by the legislature, shall be $4,000 per annum; and the salary of the judges of the district court, until otherwise provided by the legislature, shall be $4,000 per annum; and."

Mr. MAYHEW. I move that it be adopted.

Mr. REID. I move to amend that by striking out "four" and inserting "three."

Mr. CLAGGETT. I would suggest that the way it is limited there now it is not that each shall receive, but receive that in the aggregate.

Mr. HEYBURN. Put the word "each" in the amendment in each of those cases.

Mr. MAYHEW. I think that is about right; might as well divide the $4,000 between the three.

The question of the amendment to the amendment was put by the chair. Carried.

The CHAIR. The question is now on the amendment as amended, the effect of which is that the judges and justices shall each receive a salary of $3,000 per annum. (Put to vote and carried.)

Moved and seconded that Section 19 (17) as amended be adopted. Put to vote and carried.

## SECTION 18.

Section 20 (18) was read.

Mr. HEYBURN. I believe that word "resident" is not to be in there.

Mr. WILSON. I have an amendment.

SECRETARY reads: I move that Section 20 (18) be amended by inserting the following words after the word "thereof" in line two, to-wit: "but the legislature may reduce or increase the number of districts and district attorneys."

Mr. WILSON. I would say that I submit that amendment for the purpose of making the article consistent as a whole. In Section 12 (11) those very words occur in relation to district judges and district courts,

that the legislature may increase or decrease their number; and they should have the same power to increase or decrease the number of district attorneys.

Mr. MAYHEW. I would call the gentleman's attention to this fact, that in Section 20 (18) a district attorney shall be elected for each judicial district. That would say that if the legislature should in the future increase the districts that increases the number of district attorneys.

Mr. REID. I would like to hear it read.

The proposed amendment is read by the secretary.

SECTION 11.

Mr. WILSON. I simply add that because the same provision is added in Section 12 (11) in relation to district judges.

Mr. REID. Will the gentleman consent to let it come in after line 5? We can go back and insert it, and then it will read: "may increase or decrease the number of judges, district courts and district attorneys."

Mr. WILSON. I will consent to that.

Mr. REID. Will the chairman of the committee consent to that?

Mr. HEYBURN. Yes.

Mr. REID. Then I suppose by unanimous consent we can go back and insert that. In Section 12 (11), line 5, after the words "district judges" insert "and district attorneys."

SECTION 18.

Now, I move an amendment to Section 20 (18).

SECRETARY reads: Add after Section 20 (18), "who shall receive as compensation for his services $2,500 per annum."

Mr. REID. They have increased the number of districts, and I move to insert "$2,500" instead of "$3,000," in the interest of economy; I think we might save that $3,000, but if the convention thinks not, we can go back to it. Kootenai and Shoshone will be one

district. He can live in one county and ride over to court; it won't cost him much, he can make the $2,500 net by practicing law and attending to civil business. Coming down to Nez Perce, Idaho and Latah, he can live in one county and it won't cost very much to attend court in the other counties.

SECTION 15.

Mr. BEATTY. I would like to suggest to the gentleman, some place we have just passed over that is left somewhat to the legislature.

Mr. HEYBURN. That was the clerk of the supreme court.

Mr. BEATTY. Well, this better be so too.

Mr. REID. I made this change at the suggestion of an attorney of experience. He said he did not think a district attorney was worth as much as a judge. The district attorney has a chance to do civil business, and the judge does not.

Mr. MORGAN. I suggested to Mr. Reid that the salary of the district attorney be made $2,500 for this reason. When a judge goes upon the bench you deprive him of the privilege of doing any other kind of business; he cannot practice law at all; he is confined simply to the salary you give him, and he will take out of that his expenses also. The district attorney, if he is a good lawyer—and he ought to be a good lawyer—can easily make $2,000 in addition to the salary you give him here. He can take all the civil business he can do in the district. At least he can do a large amount of civil business, and I think it would be a very easy thing for a district attorney, who is a good lawyer, to make $1,500 or $2,000 in addition to his salary. For that reason, inasmuch as he has the privilege of practicing law, which the judge does not have, I think $2,500 is enough for his salary.

Mr. MAYHEW. Mr. Chairman, I am rather inclined to support the amendment of my friend from Nez Perce for another reason in addition to that just given by

Mr. Morgan. The district attorney is not required, in attending the courts in the different counties, to remain there during the entire term of court. It is the general practice in holding district courts that the first week or two weeks of the term is devoted to criminal business, convening of the grand jury, and preparing indictments, which requires the attention of the district attorney; and after that is through with, if he finds any indictments, the criminal cases have precedence and are tried first. If he insists upon it, unless there is some motion made for a continuance on the part of the defense, his cases are tried first. Therefore, he is not required to remain in the county the entire term of the district court. Besides, as has been said, district attorneys can attend to other business besides that of criminal business, and if they are good attorneys they can make two or three thousand dollars in addition to their salary. I therefore think more ambitious lawyers, who desire to be good lawyers, will desire to be district attorneys than to be judges.

The question was stated by the chair, and the secretary reread the amendment.

Mr. BEATTY. I move as an amendment thereto: "until otherwise provided by law."

Mr. REID. I was going to suggest to the gentleman, if he will withhold his amendment, that when the section is read I will propose to add the balance of the report of the committee on Salaries, and that will keep it out of the constitution: "The legislature may by law, diminish or increase the compensation of any or all officers provided in this constitution; but no diminution or increase shall affect the compensation of the officer then in office during his term: Provided, however, that the legislature may provide, for the payment of actual and necessary expenses," etc.

Mr. BEATTY. Very well, that will be satisfactory; I will withdraw my amendment.

Mr. HEYBURN. The word "resident" in line 9, Section 20 (18), was changed by the committee to

"elector," but has found its way into print as "resident." I think that should be changed to "elector."

Mr. CLAGGETT. I would suggest that the word "resident" be left and the word "elector" added.

Mr. MORGAN. He could not be an elector without he was a resident.

Mr. CLAGGETT. Yes, he may have his legal home in one place, and his domicile in another. He may vote in Shoshone county and live in Coeur d'Alene or Kootenai county or at some other point. I offer an amendment, to insert after the word "resident" the word "elector." (Seconded. Carried.)

The SECRETARY. There is an amendment here by Mr. Reid that has not been acted upon.

The CHAIR. The question is upon the amendment offered by Mr. Reid of Nez Perce, fixing the salary of district attorney at $2,500 a year.

A viva voce vote was taken, and the chair being in doubt, a rising vote was taken, which resulted Yeas 37; Nays 3; and the amendment was adopted.

The CHAIR. There was an amendment offered by the gentleman from Idaho (MR. PARKER), which the secretary will read.

SECRETARY reads: Substitute for Section 20 (18): "The district attorney shall be elected for each county by the qualified electors thereof, and he shall hold office for the term of four years, and shall be a practicing attorney at law, and a resident of the county."

"Question, question." Vote and lost.

The chair then put the question upon the adoption of Section 20 (18) as amended.

Mr. ARMSTRONG. I desire to ask the gentleman from Nez Perce if there is any provision made for deputy district attorneys?

Mr. REID. No sir, we leave that to the legislature. We discussed that in the Judiciary committee and concluded to leave it to the legislature.

Vote upon the adoption of Section 20 (18) as amended. (Carried.)

SECTION 19.

Section 21 (19) read, and it is moved and seconded that it be adopted. Carried.

SECTION 20.

Section 22 (20) read, and it is moved and seconded that it be adopted. Carried.

SECTION 21.

Section 23 (21) read, and it is moved and seconded that it be adopted. Carried.

SECTION 22.

Section 24 (22) was read.

Mr. REID. I would like to suggest to the chairman of the committee—it is just called to my attention by the gentleman from Alturas, that after the words "three hundred dollars" should be inserted the words "exclusive of interest[1]" that is the way it is in the statute.

Mr. HEYBURN. I presume that was within the contemplation of the committee. I dislike to accept anything that will increase the jurisdiction of justices of the peace, because I think it ought to be $100. But I presume that was intended to be excluded.

Mr. MAYHEW. That was agreed upon by the committee in the discussion of the jurisdiction of probate and justice of the peace courts.

Mr. REID. But the question is whether it ought not to be expressed in the letter. I know what we meant.

Mr. HEYBURN. Well, I will accept the amendment.

---

[1]—These words do not occur in the territorial statute prescribing the justice of the peace jurisdiction. (Sec. 3851, Rev. Stat., 1887). But see Sec. 3841, prescribing the probate court jurisdiction.

The CHAIR. If there is no objection, the words "exclusive of interest" will be inserted after the word "dollars" in line 4.

Mr. CLAGGETT. I move to strike out the word "three" in line four and insert the word "one."

Mr. HEYBURN. I second that motion.

Mr. REID. I would like to hear from the gentleman on that.

Mr. CLAGGETT. My reason for it is very simple. The reason why in this territory the jurisdiction of justice of the peace was increased from $100 to $300 was in consequence of the largeness of the judicial districts, and the fact that district courts were held only at long intervals. We have provided here a system of judges and a number of judicial districts, which will bring the functions of the district court into play at least twice a year; and as a general proposition they will remain almost constantly in session where there is any large amount of business to be done. Whenever you bring an action as high as $300 in the justice court it always goes to the district court on appeal anyhow. I say always. I don't know of any case that has happened under my observation in the five years I have lived in Idaho, where it has not. When you bring it above $100 and up to $300 that is the case; but these small petty matters under $100, there is not enough involved to cause an appeal. When you get above that amount they are always appealed, thus doubling the cost, and I think we should limit their jurisdiction to a point where there is no necessity for appealing because the amount won't justify it, to say nothing of the fact that I don't believe that the average justice of the peace ought to be allowed to pass on a question of over $100 anyhow, on principle.

Mr. MAYHEW. You will find by reading the section just passed upon (21) that the probate courts of the counties have jurisdiction to $500, and whenever it is over $100 it can be brought in the probate court.

Mr. MORGAN. There is one matter that the con-

vention ought to consider before they reduce it, and that it this. The counties in this territory are very large and sparsely settled; towns are a long distance apart. There is a justice of the peace in each precinct, and I have in mind now a matter suggested to me by Mr. Hogan, that in Lemhi county there is a town called Gibbonsville, which has a good deal of legislation, which is forty-five miles from the county seat; and if you reduce the jurisdiction of the justice of the peace to $100, it forces everybody that has a claim in that vicinity to go to the county seat over forty miles away, and take all his witnesses. So I think that the jurisdiction being fixed at $300 has worked very well in this territory.

Mr. REID. I hope the amendment will not prevail. These justice courts, with all their defects and errors, are very convenient courts for the people. They provide that with a jury you can have a case tried by a jury of six men, and our counties are large. There is another, reason, too; very frequently we have to attach, and to go into the district court with a case of attachment always makes the cost about double. The justice courts are cheaper, and in nearly all instances of plain debt, where the sums are $200, or under $300, a very simple process is issued from the magistrate's court; and it is a cheap court. Under the attachment laws we have now, and I suppose we will have the same in the state, nearly all proceedings are commenced by issuing summons and attachment about the same time. And there is generally not much defense to it, and it is a cheap and easy method of settling differences. If you have to go into the probate court it is most inconvenient sometimes to people in the outlying districts, and it costs much more. I think they ought to have jurisdiction of $300, and the probate $500.

The question was put by the chair and a viva voce vote taken. The chair being in doubt a rising vote was taken, which resulted, Yeas 10; Nays 23, and the amendment was lost.

Moved and seconded that the section be now adopted. Put to vote and carried.

## SECTION 23.

Section 25 (23) read, and it is moved and seconded that it be adopted.

Mr. HEYBURN. I would like to suggest that in the second line the words "nor unless" be stricken out, and the word "and" be substituted. It is bad construction.

The question was put by the chair on the adoption of Section 25 (23) as amended. Carried.

## SECTION 24.

Section 26 (24) read, and it is moved and seconded that it be adopted.

Mr. SHOUP. Mr. President, I move that Custer be taken out of the fourth and placed in the fifth district.

Mr. MORGAN. I second the motion.

Put to vote and carried.

Mr. AINSLIE. It seems to me the word "counties" ought to be put in there. The word "county" does not appear in the section at all.

Mr. REID. I move that the words "of the following counties, to-wit:" be inserted after the word "constituted" and that we strike out "as follows."

Mr. CLAGGETT. I would suggest that the word "and" in line five, before the word "Lemhi" be stricken out also in consequence of that amendment.

The amendments were accepted and adopted.

The CHAIR. It is moved and seconded that Section 26 (24) be adopted as amended.

Put to vote and carried.

Mr. MYER. Mr. President, I see in Section 25 (23) the age of the district judge is thirty years. I would like to know what the age of the supreme judge would be before he is competent to sit on the bench.

Mr. MORGAN. There is no provision made for it in the section.

## SECTION 25.

Section 27 (25) was read.

Mr. WILSON. I move to strike out "together with bills for curing the same," because if they should draft a bill they would always sustain it and everything in it. I move to strike out line 7. (Seconded. Carried.)

The question upon the adoption of the section as amended was put by the chair. Carried.

## SECTION 26.

Section 28 (26) read, and it is moved and seconded that it be adopted. Carried.

## PROPOSED SECTION.

Section 29 was read.

Mr. CLAGGETT. I move to strike out the words in the second line "agreed to by a majority of," so as to leave it so it will read "agreed to by two-thirds."

Moved and seconded that the section be adopted.

Mr. BEATTY. I would like to ask the chairman of the committee why this section is put in here. I have no objection to the section, but it seems to me it belongs in another place.

Mr. HEYBURN. It was put in under the rules. The committee was instructed under the rules to report the method and manner of it. It is usual to put it here in other constitutions.

Mr. HAMPTON. I understand the word "and" is inserted in the sixth line after the word "state" and left out after the word "election."

The SECRETARY. The word "and" is after the word "state" in the original.

Mr. HEYBURN. Strike it out and insert it after "election" before "cause."

The SECRETARY. So it will read: "To the electors of the state at the next general election and cause the same."

Mr. ALLEN. I move to amend by striking out

after the word "in" in line 7, "not less than four newspapers of general circulation" and inserting "one newspaper in each judicial district." (Seconded.)

Mr. AINSLIE. I would amend that by putting it "in one newspaper in each county."

Mr. ALLEN. I will accept the amendment.

The CHAIR. Send the amendment up in writing to the secretary.

Mr. HEYBURN. Mr. President, I would suggest after the word "weeks" in the seventh line that the words "prior to said election" be inserted. It seems to be somewhat indefinite.

The CHAIR. If there is no objection the words will be inserted. There is no objection and it will be so ordered.

SECRETARY reads Mr. Allen's amendment: In line 7 after the word "in" insert the words "one newspaper of general circulation in each judicial district."

Mr. HEYBURN. I move to amend that by making it one in each county. It seems to me a matter so important as that should be published in each county.

Mr. MAYHEW. I second the amendment.

The CHAIR. The gentleman from Logan moves to amend Section 29 by inserting after the word "weeks" in line seven, "one newspaper of general circulation in each judicial district." To that amendment Mr. Heyburn adds an amendment to the effect that the proposed amendment shall be published in each county in one paper of general circulation. The question is on the amendment to the amendment. (Carried.)

The CHAIR. The question is now on the amendment to the section. (Carried.)

Moved and seconded that the section as amended be adopted. Carried.

## PROPOSED SECTION 30.

Section 30 read, and it is moved and seconded that it be adopted. Carried.

Mr. REID. I move the following section, and that

will dispose of the salary bill. It just applies to those features in the salary bill, matters that are virtually agreed on, and by inserting it here, will prevent the insertion of another article in the constitution.

SECTION 27.

"Section 31. The legislature may by law diminish or increase the compensation of any or all of the following officers, to-wit: Governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction and district attorneys, but no diminution or increase shall affect the compensation of the officer then in office during his term; *Provided, however*, That the legislature may provide for the payment of actual and necessary expenses of the governor, and the secretary of state, attorney general, and superintendent of public instruction incurred while in performance of official duty."

Mr. REID. I have copied this from the report of the committee on Salaries and named the officers named in the salary bill.

Mr. CLAGGETT. You hav'nt district judges.

Mr. REID. Well, I will ask to have the secretary insert district judges before district attorneys.

Mr. SHOUP. The salary of the superintendent of immigration is not put in there.

Mr. REID. We intended to put that in the labor article. It might, however, go in here.

Mr. WILSON. I would suggest that you allow the legislature, if it sees fit, to provide for the payment of expenses of district judges, supreme court judges and district attorneys.

Mr. REID. Well, I am putting in what the convention virtually agreed on the other day. I think their salary covers that. The others are stationary.

The CHAIR. The question is on the adoption of the section offered by the gentleman from Nez Perce.

Mr. WILSON. I move the amendment, that judges of the supreme court, district judges and district attor-

neys be included in this list of officers that the legislature may provide for their expenses. How does it read as now amended?

SECRETARY reads: The legislature may by law diminish or increase the compensation of any or all of the following officers, to-wit: Governor, lieutenant-governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction, justices of the supreme court, and district attorneys, but no diminution or increase shall affect the compensation of the officer then in office during his term; *Provided, however,* That the legislature may provide for the payment of actual and necessary expenses of the governor, secretary of state, attorney general and superintendent of public instruction incurred while in performance of official duty."

Mr. REID. I will ask to add after "superintendent of public instruction" where it first occurs, "commissioner of labor and immigration."

Mr. WILSON. I move to add the words "supreme court judges, district judges, and district attorneys" to the list of executive officers.

Mr. PARKER. Mr. President, I have a substitute.

SECRETARY reads: Section 31; substitute for the amendment: "The compensation of all officers not otherwise provided for in this constitution shall be prescribed by law. Salaries shall be paid quarterly."

The question was put by the chair. (Lost.)

Mr. MORGAN. I think that ought to be added as an amendment to the section.

Mr. AINSLIE. The legislature can make those salaries payable quarterly without putting it in the constitution.

The CHAIR. Now, if you will state your amendment, Mr. Wilson, the chair will entertain it.

Mr. WILSON. I want to add after the executive officers—

The SECRETARY. You want to provide for the traveling expenses of the judges and—

Mr. REID. Well, the reason the Salary committee—

The CHAIR. I think we had better get the amendment first.

Mr. REID. We can argue it while he is writing it, Mr. President. The reason we fixed the salary, for instance, of the governor at $2,500, he is stationary; we provide him with expenses provided he does have to travel.

Mr. MAYHEW. What is the question before the body?

Mr. REID. The gentleman moved an amendment that whenever the legislature sees fit it may provide for traveling expenses additional to salaries. I am opposed to it. We give the judges $3,000 and the district attorneys $2,500, and that is intended to include traveling expenses and all costs. Suppose you give the judges their traveling expenses. A judge's salary might run up to $4,000 or $5,000, and the district attorney's salary might run up to that. Why do we give traveling expenses to the governor, superintendent of public instruction, and attorney general? Because at some time they may be called off in a distant part of the state to look after the state's interests; and their salary is fixed upon the idea that they remain stationary. It is not contemplated that they have to go elsewhere, except the superintendent of public instruction; but if they should, we provide their actual and necessary expenses therefor, and we fix their salary upon the stationary basis. Now, as to the judges and district attorneys. When we fixed their salaries we took into consideration that they would have to travel around three or four counties, and we gave them $3,000 in view of that fact.

Mr. MAYHEW. Don't you think it would be proper to give them mileage?

Mr. REID. No sir, I would object to anything but a salary because I think $2,500 will cover it.

Mr. MAYHEW. I think the judges should have it.

The CHAIR. Gentlemen come to order and the secretary will read the amendment offered.

The SECRETARY. "Supreme court judges, district judges and district attorneys"—where do you want it inserted?

Mr. WILSON. In the section; that is the idea.

The SECRETARY. I will insert it after superintendent of public instruction."

Mr. MAYHEW. I desire to make an amendment, and you can argue it, to strike out district attorneys.

Mr. WILSON. All right. I will consent to that. There is no reason in the world why executive officers should be preferred to judicial officers in this matter. We are leaving the whole matter to the legislature, and if this section was not in there at all I think the legislature would have that power. We have provided for their salaries, and no doubt the legislature could provide for their traveling expenses as well without that section being in there; but while it is in there I would put it in for the whole business. That is, for the legislature to provide if they saw fit.

Mr. REID. I just call attention of the delegates to the fact that when you come to pay mileage to the governor and the other officers, their mileage will be as much as their salary, if not a little more.

Mr. CLAGGETT. If that is so, then under the provisions of the constitution they would not get any salary at all. After you deduct what it will cost them to travel around, according to the theory of the gentleman from Nez Perce, they would have nothing left. So far as the judges of the district courts are concerned, I for one voted to fix their salaries at $3,000, because I wanted them to get that much money for their services, and as to their actual expenses, I think it ought to be paid.

Mr. REID. There is just one reply to that. Mileage allowed me to come to this convention is for 1124 miles, if I can get it.

Mr. MAYHEW. Well, you are not going to get it.

Mr. REID. Ten cents both ways, which would be about $200, and I can get here and get back for $45.

The legislature will fix it at ten or twenty cents both ways.

Mr. MORGAN. I presume if you allow the legislature to provide for the expenses of these officers it is not necessary for them to get that mileage. They may provide a gross sum, any amount you see fit. They have already provided for expenses of the judges of the district[1] in this territory by giving them $100 in each county, where they hold court, excepting the county where they reside, and they can provide a gross sum, just as well as to provide mileage.

Mr. REID. Yes, we have saved $3,000 on the district attorney's office. Now, let's spend it.

Mr. PINKHAM. I wish to amend the section in this manner: "Provided, any judge of the supreme court or district attorney, who is riding upon a pass, over railroads in this country in the discharge of official duties, the amount of mileage, which they are obliged to be paid at that time be deducted from their salaries"; which would be consistent with their vote the other day.

Mr. WILSON. The only objection I have to that in my mind, it does not provide for any mileage for district attorneys at all; and if he—

The CHAIR. The amendment is not supported, and we need not spend time on it. The question is on the amendment offered by Mr. Wilson, to the effect that the legislature have authority to provide for the expenses of justices of the supreme court and district judges.

The vote was taken, and the chair being in doubt a rising vote was taken which resulted: Yeas 7; nays 25.

Upon the adoption of the original section offered by Mr. Reid, a viva voce vote was taken and division demanded. Upon the rising vote the result was: Yeas 26; nays 4; and the section was adopted.

Mr. HEYBURN. Mr. Chairman, I now move that the article as a whole be adopted. (Seconded.)

The motion was put by the chair. (Carried.)

---

1—Rev. Stat. 1887, Sec. 6147.

Mr. HEYBURN. I move that the article be passed to final reading tomorrow at 2 o'clock. (Seconded. Carried.)

Mr. REID. If it is order, I move that the convention be discharged from further consideration of the report of the committee of Salaries of Public Offices, as it has been virtually incorporated in one of the other reports. (Seconded. Vote and carried.)

Mr. SHOUP. I move the Bill of Rights be taken up. Seconded. Put to vote and carried.

## ARTICLE I.

The CHAIR. The question under consideration is the Article on Bill of Rights. The secretary will read.

### SECTIONS 1, 2, 3, 4, 5, 6 AND 7.

Sections 1, 2, 3, 4, 5, 6 and 7 are separately read, voted upon and adopted, without amendments or debate.

### SECTION 8.

Section 8 was read.

Mr. MORGAN. I would suggest that the word "for" between "offense" and "any" in the first line should be stricken out and the word "of" substituted.

The CHAIR. If there is no objection, that will be so ordered.

Mr. AINSLIE. It seems to me there is something wrong with this section. And we discussed it a long time. The way it reads now, if a person is bound over and not indicted—the grand jury ignores the bill—he can still go on and try him on information, even if the grand jury ignores the bill, the way that reads.

Mr. HEYBURN. I call attention to the fact—it will probably be noticed by the Revision committee—that after the word "impeachment" there should be a comma.

Mr. SHOUP. After the word "answer" in line one I think the word "for" should be inserted, so that it will read "No person shall be held to answer for any felony." If there is no objection, I suppose it can be inserted without a motion.

The CHAIR. If there is no objection, the word "for" will be inserted in the first line ofter the word "answer."

Mr. CLAGGETT. I move to insert the words "of the peace" after the word "justices" in line 4.

Mr. MORGAN. I second the amendment. (Carried.)

Mr. AINSLIE. There is an amendment I think will correct the defect in regard to "after a commitment by a magistrate" no person shall be held "unless the charge has been ignored by a grand jury."

Mr. HEYBURN. Do you think a court would consider that in any way, anyhow?

Mr. BEATTY. I have an objection to that section, if I understand it.

Mr. MAYHEW. I desire to second the amendment offered by Mr. Ainslie.

Mr. BEATTY. The way I read this, it requires first, prior action of the committing magistrate before anything of this kind can be done. If that is what it is to mean, it would meet my objection. In other words, the magistrate must act upon the case before the grand jury or anybody else can act. That objection was spoken of once before, and I thought it was corrected, but it is subject to the same objection now.

Mr. SHOUP. This section is entirely different from the section first reported by the committee. I think the original section is a great deal better than it is now.

Mr. CLAGGETT. To cover any possible ambiguity that might be here, I will move to strike out the words "held to answer," and simply insert the word "tried," so it will read, "No person shall be tried or held to answer for any felony or criminal offense of any grade," etc.

Mr. MAYHEW. I don't think that obviates the objection of Mr. Ainslie.

Mr. SHOUP. I will read the section as originally reported by the committee, which I think is a great deal better than this one, and the convention ought to

adopt it. (After reading[1]) I move the adoption of that section, in place of the substitute. (Seconded.)

The question was put by the chair.

Mr. AINSLIE. We went through that discussion pretty thoroughly the other day; it is placing too much power in the hands of the district attorney; he can file an information against anybody in God's world whatever, and bring him up and blacken his character.

Mr. SHOUP. I don't insist on it, if you can fix this one up. I will withdraw the motion at present.

Mr. BEATTY. I suggest this: "No person shall be compelled to answer for any felony or criminal offense of any grade, unless on the presentment or indictment of a grand jury, or after a commitment by a magistrate, or information by a public prosecutor." The design is this: that the public prosecutor should not present an information until after a committing magistrate has acted; but the way it is in here you cannot come before a grand jury and make a presentment until after a committing magistrate acts. If you put that clause, "after commitment by a magistrate" before the word "information" I think it will convey the idea we desire; "unless on the presentment or indictment of a grand jury, or after a commitment by a committing magistrate, or upon information by a public prosecutor." My recollection is we designed that the public prosecutor should not present until after a committing magistrate had acted. I will offer that amendment.

Mr. AINSLIE. I will offer this amendment.

Mr. BEATTY. Let us hear Mr. Ainslie's amendment first.

SECRETARY reads: Insert in line 3 after the word "magistrate" the following: "unless it has been ignored by a grand jury." (Seconded.)

Mr. SHOUP. Let us hear it read again.

SECRETARY reads the section as it would be if so amended.

---

1—Not given in reporter's notes.

Mr. CLAGGETT. If you adopt that, it amounts simply to this, that the grand jury cannot indict at all, for a man cannot be held to any crime unless the offense has been ignored by a grand jury. The way it is, it is all right, and in my judgment perfectly clear. My friend has got the word "unless" in a bad place; "he shall not be held to answer for any criminal offense, unless on an indictment by a grand jury," unless the grand jury ignore.

Mr. AINSLIE. There is a word left out before "information." "No person shall be held to answer for any felony or criminal offense of any grade, unless on indictment by the grand jury, or unless" etc. There ought to be a semicolon after jury in the second line.

Mr. SHOUP. I think that makes the section very plain.

The CHAIR. The question is on the amendment offered by Mr. Ainslie.

Mr. CLAGGETT. I vote no, because I am very clear that I am right on that proposition. It is a matter of English, and I move this section be laid aside until we can—

Mr. MAYHEW. Oh, let us fix it up now.

Mr. CLAGGETT. Fix it this way and you make it nugatory.

Mr. BEATTY. I do not know how the amendment comes in and I cannot vote.

SECRETARY reads: Insert in line 3 after the word "magistrate" the words "unless it has been ignored by a grand jury."

Put to vote and lost.

Mr. BEATTY. I have an amendment, Mr. Chairman.

Mr. AINSLIE. I would like to have some gentleman that knows the English language better than I do, offer an amendment so that the district attorney cannot try a man on information, after the charge has been ignored by a grand jury.

SECRETARY reads Mr. Beatty's amendment: In line 3 strike out the words "after a commitment by a

magistrate," and insert them before the word "information" in line 2.

Mr. MAYHEW. Mr. Chairman, I move a call of the house. We haven't a quorum here, and are going on without it.

The CHAIR. Is the demand for a call of the house seconded?

Mr. CLAGGETT. I second the call.

Roll call.

Present: Ainslie, Allen, Anderson, Armstrong, Batten, Beatty, Bevan, Campbell, Chaney, Clark, Hampton, Hasbrouck, Hays, Heyburn, Jewell, King, Kinport, Lewis, Maxey, Mayhew, Myer, Morgan, Moss, Parker, Pefley, Pinkham, Pyeatt, Reid, Sinnott, Shoup, Sweet, Underwood, Vineyard, Whitton, Mr. President—35.

Mr. MAYHEW. I now move that the further call of the house be dispensed with. (Seconded; and it was so ordered.)

Mr. AINSLIE. I offer an amendment to Section 8.

SECRETARY reads: Continue Section 8 as follows: "And provided, That after a charge has been ignored by a grand jury, no person shall be held to answer or for trial therefor, upon information of the public prosecutor." (Seconded.)

Put to vote and carried.

Mr. BEATTY. I have an amendment in there, Mr. Chairman, that was offered to that section, to make it read in this way. That section now certainly means that no presentment can be made by a grand jury until after the party has been committed by the committing magistrate, "unless on presentment or indictment of a grand jury or information of the public prosecutor after a commitment by a magistrate." Now, I propose to make it read in this way: "No person shall be held to answer for any felony or criminal offense of any grade, unless on a presentment or indictment of a grand jury, or after a commitment by a magistrate, or information of the public prosecutor."

Mr. SHOUP. I think that section is as plain as the English language can make it.

Mr. HEYBURN. I suggest to the gentleman from Alturas that he will accomplish exactly what he is trying to do, I think, if he will just insert the word "on" after the word "or" before "information" in the second line, and without making so much change; "or on information."

Mr. BEATTY. And with the comma struck out after the word "prosecutor" perhaps that will do it; "or on information of the public prosecutor after a commitment by a magistrate;" I guess that will do it; I believe it will.

The CHAIR. If there is no objection, the word "on" will be inserted after the word "or" and before "information," in line 2. There is no objection, and it is so ordered. The question is now on the adoption of Section 8. Are you ready for the question?

"Question, question." Put to vote and carried.

## SECTION 9.

Section 9 was read.

Mr. SHOUP. Mr. President, I have an amendment to that section.

SECRETARY reads: I move to amend by adding after the word "liberty" in line 2, the following: "And in all trials for libel, both civil and criminal, the truth, when published for good motives and justifiable acts, shall be a sufficient defense."

Mr. SHOUP. The section will then read as originally reported by the committee. Those words I move to insert were struck out on motion in committee of the Whole, for the reason it established a rule of evidence. This may be true. It may establish a rule of evidence, but it is the same as in the thirty-three constitutions of the United States already, and I think it ought to be in there.

(" Question, question.")

The question was put by the chair, and a viva voce vote was taken. The chair being in doubt, a rising vote was taken, resulting: Yeas 16; nays 16.

The CHAIR. The Chair votes No. The amendment is lost.

Moved and seconded that Section 9 be adopted.

Put to vote and carried.

## SECTION 10.

Section 10 read, and it is moved and seconded that it be adopted. Carried.

## SECTION 11.

Section 11 was read.

Mr. CLAGGETT. I move to strike out the words "prescribe and." They can regulate the exercise, but they have no right to prescribe it.

Mr. SHOUP. I will accept the amendment.

The CHAIR. If there be no objections, the words "prescribe and" will be stricken out in the second line.

Moved and seconded that the section so amended be adopted. Carried.

## SECTION 12.

Section 12 read, and is is moved and seconded that it be adopted. Carried.

## SECTION 13.

Section 13 was read.

Mr. SHOUP. I move to strike out all after the word "himself" "nor be deprived of life, liberty or property without due process of law." Those words are in the 14th amendment to the Constitution of the United States, which provides that no state shall deprive any person of those rights. I don't think it is in place here. (No second.)

The CHAIR. The amendment is not supported. Are you ready for the question?

Put to vote and carried. Section 13 adopted.

## SECTION 14.

SECRETARY reads Section 14.

Mr. BATTEN. I move that this section be stricken out.

Mr. HEYBURN. I second the motion.

Mr. BATTEN. Mr. Chairman, I gave some few reasons when this section was under discussion in committee of the Whole. I do not know that I can add very much now to what I said then. I think it is attacking one of the most sacred of all rights which are guaranteed to us. I do not propose to enter into any great spread-eagleism or anything of that sort, but we cherish with a great deal of earnestness and a great deal of jealousy our right to private property, and I honestly believe that this section invades that right. It is directly upon one of the most sacred of our rights, in that it permits Mr. A, or John Doe, by setting up some little flimsy pretext, to public use, to take the property of Richard Roe. For that reason I am opposed to the section. The mere declaration in the constitution that a certain thing shall constitute a public use, or certain takings constitute a public use, does not make it such. What does constitute public use? What sort of taking constitutes it for public use? I think it must be such a taking as will redound in effect to the benefit of the public or of the government—beneficial and necessary to the entire public or to some portion of the public. That I think is the rational construction of what constitutes public use. The property must be taken for use by the general government or by the general public or some portion of the general public, and not for the pleasure or benefit of any particular individuals or any particular societies. I say this section is obnoxious inasmuch as it undertakes to and will permit and sanction the taking by a private individual for his own private benefit and use, for his own individual gain and aggrandizement, of the property of his neighbor, and does it under the constitutional sanction that it is for

public use. By parity of reasoning, I may pick my neighbor's pocket and say my necessity was very urgent and I had to construe my necessity into something of a public necessity to gain immunity for my felonious act by this constitutional provision here. For that reason I say it is wrong and should not be incorporated here in our constitution. We see what harm it has done already. One of the ablest members of this body—I allude to Judge Hagan of Kootenai county—left in voicing the spirit of disgust when the committee of the Whole adopted this section, and said he could not approve of the constitution with any provision like this embodied in it. Likely this is a small matter, though seemingly that dose of only one section of one article was a sufficient dose for him to justify him in taking a stand against the whole constitution.

Mr. BEATTY. I would ask you if Judge Hagan didn't go home to go fishing? That is what he told me.

Mr. BATTEN. Well, probably he did.

Mr. MAYHEW. He did not go home for that purpose at all.

Mr. BEATTY. I stated what he told me.

Mr. MAYHEW. He went home exactly for the purpose as stated—he did not care about being a member of a constitutional convention that had this provision in it.

Mr. BATTEN. Now, a plausible pretense of public benefit might be found to sustain almost every conceivable attack upon private rights. And I believe we can easily see, if we stop to reflect a moment, how under this section a plausible pretense can be easily set up and urged with plausibility whereby every attack—any attack—may be made upon private property. Now, I had intended, Mr. President, had the time been such as to admit of it, to prepare something of an argument, drawing my inspiration from so eminent an authority as Judge Cooley in his work on Constitutional Limitations. I will confess this matter offended my sense of constitutional rights so violently that immediately after

its adoption by the committee of the Whole, when it was under consideration in that committee, I went down into the library and tried to brush up some of my general reading on the subject, and my reading of Mr. Cooley in that excellent work of his and also my reference to authorities, convinced me that the stand I had taken was a sound and proper stand. Mr. Cooley says in his work on Constitutional Limitations, if I may be pardoned for reading it:

"It would not be entirely safe, however, to apply with much liberality the language above quoted, that 'where the public interest can in any way be promoted by the taking of private property,' the taking can be considered for a public use. It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied in the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may rightfully be dispossessed. It may be for the public benefit that all the wild lands of the state be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded as a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty —perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide."[1]

Mr. MORGAN. I don't object to that in that work.

Mr. BATTEN. Public convenience can certainly not be urged as an argument in behalf of this section; but

---

1—Cooley's Con. Lim., 5th ed., p. 660; 7th ed., p. 768.

the argument I have heard urged in its behalf has been something like this: That here we have a condition of things which requires us almost to invade private rights. It is an argument—it is a flimsy argument because it it not grounded upon anything solid or substantial. It is an argument, as the lawyers would say—and I hope you will not deem me pedantic—*ex necessitate rei*—from the necessity of the thing; and this sort of arguments are negative arguments, not grounded upon anything firm or solid that will appeal strongly to the reason of man. Now I desire simply to say this, that while I am aware, well aware, we are laboring under a condition of things that calls for some action, yet I will never, so far as I can do it, sanction anything like this under such a plausible pretext, as that we are living under a condition of things that requires us to take private property for private use. Now, sir I think we must all admit that what we seek to attain by this section can be equally attained, just as effectively attained, by the old method of an understanding with your neighbor—an agreement with him.

Mr. MORGAN. Suppose he won't agree.

Mr. BATTEN. Well, I say that, however, the instances of his non-agreement or failure to agree will be very rare, and I lay this down almost as axiomatic that rare instances will not justify a general law of this kind.

The CHAIR. The gentleman's time has expired.

Mr. MAYHEW. Mr. Chairman, I desire to make a motion to take a recess until 8 o'clock this evening. As you know, it is rare that afternoons we have had a quorum, and I think by having a session this evening we can have a quorum here, at least to do this business we have before us of so much importance. I therefore move we take a recess until 8 o'clock.

Mr. BEATTY. I desire to suggest this: The committee on Revision and Enrollment have a great deal of work before them and I have asked the committee and they have agreed to meet this evening at 8 o'clock, and if they have any meeting I suggest this: If we

hold over until 9 or 10 at night, there is no time for them to meet and you will only be delayed the more in the end. My object is not to delay the work now but hasten it.

Mr. MAYHEW. I have this to say in relation to the meeting of the committee on Revision: The committee has not met heretofore for about ten days, and now I say this is such an important matter that I do not desire to see a section of this kind adopted without a fuller house than there is now. I am sorry it interferes with them. I think this motion is not debatable.

Mr. CLAGGETT. No, but the gentleman is debating. I would like to state one thing on this. I think we ought to get through with this bill. We can conclude it before our ordinary time for adjourning. It is true this is an important section, but it was argued for two days in a full convention; it was sustained by a vote of 49 to 11.

The CHAIR. The motion is to take a recess until 8 o'clock this evening. (Vote). The noes seem to have it. (Division called for). 11 in favor, 19 opposed. The motion is lost. The question is on the motion of the gentleman from Alturas to strike out Section 14.

"Question, question."

Mr. MORGAN. Mr. President.

## CALL OF THE HOUSE.

Mr. MAYHEW. I move a call of the house. (Seconded).

Mr. SHOUP. I object to a call of the house.

Mr. CLAGGETT. Then it requires to be supported by one-fifth of the members.

The CHAIR. Call the roll.

Mr. CLAGGETT. Objection is made, and when objection is made the rule provides that it must be sustained by one-fifth of the members.

The CHAIR. I can't tell whether one-fifth of the convention sustains the call by hearing a voice here and there.

Mr. MORGAN. This is a vote whether we sustain a call?

The CHAIR. Yes, sir.

Roll call:

Yeas: Batten, Campbell, Chaney, Hasbrouck, Hays, Heyburn, Hogan, Jewell, Kinport, Mayhew, Melder, Myer, Parker, Pefley, Sinnott, Vineyard—16.

Nays: Allen, Anderson, Armstrong, Beane, Clark, Coston, Hampton, King, Lewis, Maxey, Morgan, Moss, Pinkham, Pyeatt, Shoup, Sweet, Underwood, Whitton, Mr. President—19.

The CHAIR. As I understand the rule, the call of the house is sustained.

Mr. MAYHEW. Now you see, Mr. President, we have not a quorum here.

The CHAIR. The clerk will furnish the sergeant at arms the names of the absentees.

Mr. MAYHEW. I suggest now we take a recess.

Mr. CLAGGETT. No, sir, you have demanded a call, and we will stay here.

Mr. UNDERWOOD. I move we take a recess until 8 o'clock.

Mr. MAYHEW. The gentleman is out of order—you can't move to take a recess under a call.

Mr. CLAGGETT. If we take a recess until evening, the trouble about it is this: We want to get through this week. The committee on Enrollment and Revision must necessarily sit in the evening, and if you take nine of our members away to sit in that committee during the session of the convention, it leaves you without a quorum, for there are only forty members in attendance.

Mr. SHOUP. I have no objection to laying this matter over until tomorrow morning. I move that we adjourn until nine o'clock tomorrow morning. (Seconded).

The CHAIR. I understand that in a call of the house, there is nothing to be done. You can move to suspend the call.

Mr. SHOUP. I move to suspend the call. (Seconded.

The CHAIR. It is moved and seconded that the

call of the house be suspended. (Vote). The chair is in doubt. (Rising vote; 18 in favor; 10 opposed). The motion to suspend proceedings is carried. The question is now, shall Section 14 be stricken out.

Mr. MAYHEW. I move we take a recess until 8 o'clock.

Mr. SHOUP. I move we adjourn until 9 o'clock tomorrow morning.

Mr. MAYHEW. I accept the amendment.

The CHAIR. The motion of the gentleman from Shoshone was not supported. The question is, shall the convention adjourn until nine o'clock tomorrow morning. (Vote and carried).

## TWENTY-FOURTH DAY.

*August 1, 1889, 9:00 o'Clock A. M.*

Convention called to order by the President.

Prayer by Chaplain Smith.

Roll call:

Present: Ainslie, Allen, Anderson, Armstrong, Batten, Beane, Beatty, Bevan, Blake, Campbell, Cavanah, Chaney, Clark, Coston, Crutcher, Glidden, Hampton, Harris, Hasbrouck, Hays, Heyburn, Hogan, Jewell, King, Kinport, Lamoreaux, Lewis, Maxey, Mayhew, McConnell, Melder, Myer, Morgan, Moss, Parker, Pefley, Pierce, Pinkham, Pyeatt, Reid, Savidge, Sinnott, Shoup, Sweet, Underwood, Vineyard, Whitton, Wilson, Mr. President.

Absent: Andrews, Ballentine, Brigham, Crook, Gray, Hagan, Hammell, Harkness, Hendryx, Howe, Lemp, McMahon, Poe, Pritchard, Robbins, Salisbury, Standrod, Steunenberg, Stull, Taylor, Woods.

Mr. CAVANAH. I ask to have the record corrected in this respect, that I answered to my name yesterday morning.

The CHAIR. If there are no other corrections the journal will stand approved.

Presentation of petitions and memorials. None.

Reports of standing committees.