

Mr. BEANE. I move we now adjourn until ten o'clock tomorrow morning. (Seconded.)

Mr. HEYBURN. I move to amend by making it nine o'clock. (Seconded.)

The question was put and the vote taken and before announced a division demanded.

Rising vote taken. Ayes 40. Carried.

And the convention adjourned until nine o'clock July 26, 1889.

NINETEENTH DAY.

SATURDAY, *July 26, 1889.*

9 o'Clock A. M.

Convention called to order by the president.

Prayer by the chaplain.

Roll call:

Present: Ainslie, Anderson, Armstrong, Beatty, Bevan, Blake, Brigham, Campbell, Chaney, Crutcher, Hampton, Harkness, Harris, Hays, Heyburn, Jewell, King, Kinport, Lewis, Maxey, Melder, Myer, Morgan, Moss, Pierce, Poe, Pyeatt, Reid, Robbins, Savidge, Standrod, Steunenbergh, Taylor, Underwood, Vineyard, Whitton, Mr. President.

Absent: Allen, Andrews, Ballentine, Batten, Beane, Cavanah, Clark, Coston, Crook, Glidden, Gray, Hagan, Hammell, Hasbrouck, Hendryx, Hogan, Howe, Lamoreaux, Lemp, Mayhew, McConnell, McMahan, Parker, Pefley, Pinkham, Pritchard, Salisbury, Sinnott, Shoup, Stull, Sweet, Wilson, Woods.

The secretary read the journal.

APPOINTMENT OF ENGROSSING COMMITTEE.

The CHAIR. I have appointed the following as the Engrossing committee: Hasbrouck of Washington; Mayhew of Shoshone and Sweet of Latah. I wish to say that I have not appointed the mover, Mr. Mayhew, chairman of the committee, because he requested that I should not do so.

TRANSCRIPTION OF NOTES OF PROCEEDINGS.

Mr. HEYBURN. Mr. President, it has been sug-

gested that it is necessary to take some action — the suggestion has come from the Secretary of the Territory to me — with reference to having the notes of the stenographers of the proceedings of this convention transcribed, and that it ought to be in progress during the sitting of the convention. When these gentlemen have finished their work they will expect to be paid for it, and the convention does not of course desire that their work shall be delivered in stenographic notes, as it would be useless to them in that shape; so that there should be some provision made that this work of transcribing should be going on during the sitting of the convention, and there should be a committee appointed to correct such manifest errors as will appear necessarily in a report of proceedings of this kind. I desire also, while moving for such a committee, to say that the chair will not consider that it is necessary to name me as one of the committee, because I am liable to have to be absent for a few days, and I would move that the chair appoint a committee of three for the purpose of making the necessary arrangements for transcribing the notes of the proceedings of this convention. I will reduce the motion to writing. I make the motion at the request of the Secretary, who will necessarily have charge of the publication. (Seconded.)

LEAVES OF ABSENCE.

Mr. BEATTY. Mr. President, if it is in order, I desire to ask leave of absence for a few days. As reasons are desired always, I will state mine. As known to most of you, I left my home the day after a fire, and left my matters all in the utmost confusion; my books and papers that were saved are piled up in a heap, and in addition to that, since I left there I have learned of a number of matters which I ought to attend to, otherwise I will suffer considerable inconvenience and loss. I am not desiring to shirk any duty or work, and will come back as soon as I can next week. I may say I

have not been absent at any time since the convention met.

The CHAIR. There are no objections, and it is so ordered.

Mr. TAYLOR. Mr. President, I also desire leave of absence a few days. I have got to be in Blackfoot on next Monday to make report there and settle up some business, and it will be necessary for me to be there.

The CHAIR. Are there any objections? There are none and it is so ordered.

Mr. STANDROD. I shall have to make the same request on account of an adjourned term of court in Bingham county. The court convenes on Monday and I have some matters there I must absolutely attend to on that day. I will perhaps return on Tuesday morning.

The CHAIR. Does the gentleman ask leave of absence from now until Tuesday?

Mr. STANDROD. Yes.

The CHAIR. Are there any objections to leave being granted? There are none, and it is granted.

Mr. SALISBURY. I would ask indefinite leave of absence. My business is such that it is impossible for me to remain longer, and I cannot tell how soon I can return; but I will come back to sign the constitution anyway.

Mr. HARKNESS. I would like to request leave of absence from now until about next Wednesday. My business matters are in such shape at home that I must be there.

The CHAIR. Is there any objection to Mr. Salisbury having indefinite leave of absence? There is none and it is granted. The gentleman from Oneida requests leave of absence until next Wednesday or Thursday. There are no objections and it will be granted.

Mr. POE. Mr. President, after Monday I desire to have an indefinite leave of absence granted me. I have business at home that absolutely requires my presence. I will state now that I expected to remain, and I ask

indefinite leave of absence about Monday. I will be here Monday.

The CHAIR. If there are no objections it will be granted.

The next order of business is presentation of petitions and memorials. (None.)

Reports of standing committees. (None.)

Reports of select committees. (None.)

Final readings. (None.)

SECRETARY reads: I move that a committee of three be appointed to provide for the transcribing of the report of the stenographers of the proceedings of the convention, and for the publication of the same. (Heyburn.)

The motion was seconded. (Carried.)

Mr. REID. I move that the convention resolve itself into a committee of the Whole for the purpose of taking up the unfinished business, the report of the committee on Public and Private Corporations.

Motion seconded. Carried.

COMMITTEE OF THE WHOLE IN SESSION.

Mr. SHOUP in the chair.

ARTICLE XI.—PUBLIC AND PRIVATE CORPORATIONS.

The CHAIR. The business before the committee is the further consideration of the report of the committee on Corporations.

SECTION 6.

SECRETARY reads section 7 (6). The amendment offered by Mr. Ainslie and adopted was: "Amend section 7 (6) after the word 'state' in line 3 by adding, 'except that preference may be given to perishable property.'"

Mr. WILSON. There was another amendment to that section also. After the word "corporation" insert the words "similarly situated."

The SECRETARY. Yes. Also "I move that the

words "similarly situated" be inserted after the word "corporation" in line 1.

On motion duly seconded the amendments were adopted.

Moved and seconded that the section as a whole be adopted. Carried.

SECTION 7.

Section 6 (7) read by the Secretary, and it was moved and seconded that the same be adopted. (Carried.)

SECTION 8.

Section 9 (8) read by the Secretary, and it was moved and seconded that section 9 be adopted. as read. (Carried).

SECTION 9.

Section 10 (9) was read, and it was moved and seconded that section 10 be adopted as read. (Carried.)

SECTION 10.

Section 11 (10) was read, and it was moved and seconded that the same be adopted. (Carried.)

SECTION 11.

Section 12 (11) was read, and it was moved and seconded that the same be adopted. (Carried.)

SECTION 12.

Section 13 (12) was read, and it was moved and seconded that the same be adopted.

Mr. POE. Mr. Chairman, I move that that section be stricken out. I don't see that there is any necessity for it or that the legislature has not such right, and it seems to be an absurdity to put such a section in the constitution.

Mr. CLAGGETT. I was about to move to strike out the word "retrospective" and insert the word "ret-

roactive.” In law the two words have a very different meaning. Retroactive acts are frequently passed and are perfectly legal and binding; while “retrospective” is *ex post facto*. (Seconded.)

The CHAIR. It is moved and seconded that section 13 (12) be entirely stricken out, by the gentleman from Nez Perce. Mr. Claggett offers an amendment, that the word “retrospective” be changed to “retroactive.” Under the former ruling I presume the motion of the gentleman from Nez Perce is first. Does the gentleman from Shoshone having this bill in charge desire to speak?

Mr. MAYHEW. I desire to understand why they want this stricken out. I think the amendment offered by Mr. Claggett would be proper and necessary.

Mr. POE. With that amendment it would be satisfactory to me.

Mr. MAYHEW. Very well, then I second the amendment.

The CHAIR. Does the gentleman from Nez Perce withdraw his motion to strike out?

Mr. POE. You might put the question, Mr. Chairman, and let the convention vote on the question of striking it out.

Mr. MAYHEW. I hope that motion will not prevail. I am satisfied the gentleman does not understand the real purpose of this section, or he would not make the motion. As a legal proposition, or as a general proposition and a legal one too, the legislature of the state is generally prohibited—in fact, is prohibited—from passing retroactive and *ex post facto* acts. But this should be expressed in the organic law of the legislature, to pass no act, to have no law in relation to these corporations in this territory or state to be retroactive in its operation; that is, to go back and add to these corporations any greater rights than they had, or take from them any right they had prior to the passage of the bill affecting those corporations. That is the only object of this. It is to restrict and prohibit the legis-

lature from adding to or taking from them any additional rights these corporations may have had at the original passage of their charter, or origin of the corporation. That is all there is in this law; I hope it will not be stricken out.

Mr. HEYBURN. Mr. Chairman, I cannot sit still and see any inconsistency of this kind incorporated into the constitution. This committee of the Whole has just passed upon a retroactive section (Section 7); upon an *ex post facto* law, in section 8 (7). And we might as well be consistent now, and go on and add it ourselves and leave the legislatures the power to do it. Section 8 (7) says that railroad companies shall, before they are to receive the benefits that individuals and corporations do in the future, subscribe to the terms of this constitution, which in effect says they shall keep all rights cut off by this constitution, however they may have been obtained. I simply mention this to show its inconsistency. I do not desire to discuss it, but simply call attention of the committee to the fact that section 8 (7) says that railroad companies or corporations of any kind shall yield up whatever rights they had heretofore acquired before they shall have any rights in the future. That is in effect an *ex post facto* law being passed by this convention, because we are doing in the constitution what you have said in the legislative article the legislature can never do. I simply call attention to it in the interest of consistency.

Mr. CLAGGETT. My colleague is certainly wrong with reference to that matter. Section 8 (7) reads as follows: No railroad company, express company or other corporation "shall have the benefit of any future legislation," reserving and preserving every right which any corporation in existence at the time the constitution is adopted may have. But, *provided*, that unless they are willing to subscribe to the terms and conditions of this constitution in the manner pointed out in the section, that then they shall not receive the benefit of any future legislation for the benefit of corporations, when

they will take the benefit on the one hand, and refuse to submit to the limitations of the constitution on the other. I think my friend has not carefully considered the language of section 8 (7).

Mr. MAYHEW. I don't think section 8 (7) will affect this at all. The matter was stated by the gentleman from Shoshone, Mr. Claggett, that before any corporation can have the benefit of any future action, it must accept this constitution in binding form with the secretary. That is, file what? File their charter setting forth what the corporation is for, whether railroad or any other corporation. The law in the territory now requires all corporations to file their charter,¹ having their place of business already in this territory, before they can have any effect, or have the right to sue or be sued. And this says it shall in the future be done. Section 8 (7) has no effect here. Section 13 (12) is in here for the purpose of preventing any legislature, notwithstanding they may have filed it, from taking from them any right which they may have by virtue of their charter filed with the secretary. It is to prevent the legislature passing any act in relation to those corporations that will be retroactive in its character. I hope the provision will not be stricken out.

I call the attention of the convention to the fact you will see that it is really necessary for this section to be in here to protect these institutions and other institutions against encroachment on their rights by the legislature. A great many times these things are an oversight; a great diversity of opinion exists in the minds of even lawyers as to what a retroactive law would be, and the effect of it upon individuals and corporations; but if this section remains, it settles it for all time that the legislature shall not infringe upon their rights, or destroy any rights a corporation may have acquired. The fact of the business is, if the gentleman thinks this law has no effect in the constitution because legis-

¹—Sec. 2587, Rev. Stat. 1887.

latures generally cannot pass *ex post facto* laws, or a law retroactive or retrospective in its character or nature, that is true. But I think, taking everything into consideration, it is necessary for this section to remain in this article.

Mr. HEYBURN. Mr. Chairman, I desire to say all I have to say now in a few words. The gentleman says this will do no injustice to corporations. We have today in Northern Idaho perhaps twenty or twenty-five very considerable mining corporations. They were organized under the present law, that empowers a majority of the stockholders to control the action of those mining corporations, to elect their board of directors. Their by-laws have been so framed as to enable them to elect by a majority of the stockholders, and they have elected, and their present management is controlled or formed in that way, upon the assurance that the rights that were granted to them by their incorporation would remain to them, and not be disturbed by the legislature. Six of those corporations have been placed upon the market at a value which was based upon the conditions that surrounded the incorporation and the rights that had attached to it. Men have invested their money in those mines and in those mining stocks relying upon that good faith that is always guaranteed by the people, that the legislature will not come in and by subsequent legislation depreciate the value of their rights that have attached; that is to say, that they will not pass an *ex post facto* law. A constitutional convention should have some conscience. It should not do that which it says is incompetent or wrong for the legislature to do, because we are simply legislating a primary law; and we should not in good conscience do that which we say it is wrong for the legislature to do. If we do, it would be hard to find a reasonable excuse for it as a moral principle.

You have already provided — passed upon it the last time the committee had this matter under consideration — that hereafter corporations shall not proceed in the

way they have proceeded heretofore. That is to say, that hereafter a majority of the stockholders of corporations cannot elect its board of directors; you have said that by your vote, by an overwhelming vote. This committee has said that, and this vote goes out as the law of the land that cannot be changed by the legislature. Now, the gentleman is asking you to say that hereafter any corporation whose rights have attached; any stockholder whose money has been invested upon the faith of the stability of this law that has existed heretofore, shall not have the benefit of any future legislation unless he is willing to concede the righteousness of this principle, and unless a corporation is willing hereafter to change its by-laws that are already in existence to conform to the will of this legislature or of this convention. Now, that is the effect of it. Those by-laws are in existence, those corporations are in existence; and unless those corporations subscribe to the provisions of this article in this constitution hereafter, your legislature may represent everybody else in the territory, it will not represent them, because they cannot have the benefits of any legislation in the future. Now, is not that a reasonable interpretation of that proposition? Is it fair? I have nothing further to say.

Mr. MORGAN. My objection to this section is that it has no force or effect whatever. The gentleman misapprehends, it seems to me, having charge of this bill, the effect of this provision in the constitution. It is this: "The legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual or association of individuals retrospective in its operation." There is no provision here, which prohibits the passage of a law against a railroad company, which is retroactive in its operation, none whatever. There is a provision here, which prevents the passage of a retroactive law generally. Is it pretended by the chairman of this committee that the legislature would have power to pass retroactive laws with reference to railroads or anything else if this provision were not in the constitution? I

don't think the legislature would have such power under any circumstances; and if it does have the power, the constitution should prohibit in terms the passage of any retroactive law. Again, the second clause of the section is this: They shall pass no law "which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past." Is it pretended by any lawyer that they can pass laws which will impose new conditions for an old consideration? New liabilities upon the county or state or any subdivision of the state, which are retroactive in their character, or which will impose a new liability for considerations that are past? Such a law would be necessarily invalid; and it seems to me that the section is entirely unnecessary and has no force whatever. Neither of the provisions can have any action whatever with reference to the power of the legislature.

Mr. MAYHEW. I am satisfied, Mr. Chairman, that no corporation lawyer looks upon any act, or those who desire to be corporation lawyers cannot look with complacency at measures that have a tendency to prevent those corporations from infringing upon the rights of the people. The gentleman asks me as a lawyer, if I think the legislature would have the power to do such things as are prohibited by this section. I say yes, as a lawyer. And I say further than that, that the provisions of this section are wholesome and necessary for the protection of the people against those corporations—absolutely necessary. And it is no argument that the legislature cannot pass a retroactive act, that therefore this should not be in here. I am perfectly willing to be guided by other constitutions of other states of this Union; and I will not go so far as to say that the members of this convention, with their great wisdom, can do away with or do without the examples that are set us by the different constitutions of the states. Such a provision is in the Colorado¹ constitution, such a pro-

¹—Art. 15, Sec. 7, Colo. Const., 1876.

vision is in the California¹ constitution, such provisions are in the different states or territories now forming, or that have heretofore formed a constitution, and asking to be admitted into the Union. I know very well what the feeling is of most of these men upon these questions; and I say it is best for us to follow some of the examples of other states in the constitutions that have such provisions in constitutions of this character, in order to protect the people against these institutions.

The general feeling with the people is that they are imposed upon by these corporations; not all of them, but a great many. The gentleman says there are fifteen or twenty corporations in the northern portion of this territory who have issued their stock and placed it upon the market. I admit that. I don't know the full history of all of those corporations, but I believe, and I know, in fact, that some of those corporations have been formed upon wild-cat property. They have issued their stock, placed it on the market and sold it. A number of men in our section of the country have done so, and that stock has been issued and is today worthless. I know such transactions are still continuing there. And while they have done that, I claim it is no argument against this section. I believe Mr. Ainslie has an amendment here; if the convention desires to adopt it, I don't know as I shall have any particular objections to it.

Mr. AINSLIE. I offer an amendment to section 13 (12).

SECRETARY reads: Amend section 13 (12) by continuing line 4 as follows: "other than to enable such corporations, individuals or associations of individuals to comply with the provisions of this article."

Mr. MAYHEW. I move the adoption of that amendment.

Mr. CLAGGETT. I don't think this section 13 (12) seems to be thoroughly understood, and I think the

¹—No exactly similar section in the California constitution.

amendment offered by the gentleman from Boise, makes it even less capable of being understood than it seems to be now. The only criticism I would make upon that section as it stands now is that it might prohibit enough in this regard to forbid the passage of any or all retroactive laws, which certainly ought not to be put in any constitution. Let me illustrate.

Mr. MAYHEW. Just let me ask you how many constitutions have erred in the same way?

Mr. CLAGGETT. Well, I don't know anything about that. I don't know of any constitution anywhere that forbids the passage of all retroactive laws. I have never seen one.

Let me illustrate. Your statute books are full of them. Has any injustice been done by them? For instance, here in early days we had our statutes relating to what was necessary to convey property. It was required to be conveyed by deed under seal. Nevertheless, miners went to work and transferred their properties, involving the whole mining section of the country around here by bills of sale that did not comply with the law. What did the legislature do?¹ Came in and validated those past defective interests, without which the whole real estate of the country would have been at the time thrown into confusion. I don't think in reading the matter that it is subject to that criticism. But it is not as clear as it ought to be. I shall support the section most heartily, whether it is in the constitution or not. "The legislative assembly shall pass no law for the benefit of any railroad or other corporation or any individual or association of individuals retroactive in its operation." That is, the law must be passed for the benefit of special classes in order to be obnoxious to this section, "or which impose on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or con-

¹—Act of Jan. 10, 1866, validating transfers of quartz claims in Idaho county made by bill of sale without acknowledgment. 3rd Terr. Sess. Laws, p. 201.

siderations already past." Now, that last clause is put in for the purpose of covering this thing which has been in the past a very gross abuse, and that is, where towns and counties and municipalities would grant subsidies to railroads on certain terms and conditions, which terms and conditions were not complied with. And the consequence was that they would go to work and issue the bonds of the corporation, and then the legislature would come in and by a subsequent retro-active law validate this concern and cinch the people to the extent of the bonds. But the point about it and where the thing comes in is this, that we have absolutely forbid that any municipality shall issue any bonds, and as a consequence I think this section must have been taken from some constitution, where at the time it was adopted, the state was endeavoring to guard against that particular trouble. But that particular trouble we have protected ourselves against in another section of this constitution, by prohibiting it. I shall vote for the section for fear that there might be some special necessity for it, and I certainly don't see any harm in it.

Mr. AINSLIE. Mr. Chairman, section 8 (7), referred to by the gentleman from Shoshone, only applies to railroad, express or other corporation companies, in existence at the time of this constitution. There is no conflict between section 13 (12) and section 8 (7), because it requires the future legislature to provide for the manner of filing the acceptance of these provisions by those corporations. But the constitution, or this section, is self-operative; it does not require anything on the part of the legislature to provide the manner in which railroad, express or other transportation companies in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation; they shall have such benefit by filing in the office of the secretary of state an acceptance of the provisions of this constitution in binding form. The manner and time of filing and the contents of the article to be filed have

all got to be provided by the future legislature. The constitution cannot operate as a law itself without the aid of the legislature providing by law and detailing the manner in which it shall be done. Therefore section 13 (12) would be in conflict with section 8 (7) so far as that is concerned. The amendment I propose now, goes only to this, that the legislature shall pass no law compelling a railroad or other corporation or any individual or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past, "other than to enable such corporations, individuals, or association of individuals to comply with the provisions of this article." It fails to specify for what purpose; it does not enlarge their powers any.

Mr. BEATTY. I hope this section will be stricken out. I am ashamed, for one, that we ever adopted it, and I hope we will go a little cautiously. We have started off this morning to adopt everything we have come to. I am sorry my friend Gray is not here to call a halt. If I understand the meaning of this, it would prevent the legislature from doing the very thing I understood my friend Claggett said should be allowed. It frequently occurs, Mr. Chairman, that legislatures do want to pass retroactive acts, as, for instance, in the case which Judge Claggett referred to; in the case of mining conveyances, as we all know. There was a time here when conveyances were made which were entirely invalid, and even some are made now, and only a few years ago an act was passed retroactive in its character allowing those mistakes to be corrected, validating, in other words, conveyances and transactions which were entirely invalid under the law. Now, if I read this right, the legislature will be prevented from ever enacting any law that is retroactive in its nature, and from correcting any errors of the past, either as to individuals or anybody else. The legislature "shall pass no law for the benefit of a railroad or other corporation,

or any individual, or association of individuals, retroactive in its operation." Now, I ask, if a law of that kind is passed, if that is made a part of the constitution, how can a legislature ever correct any errors such as have been referred to by Judge Claggett? And we all know those occur, and it is a very frequent thing for legislatures to pass some law, which to some extent is retroactive in its character. I think that part of the section is certainly objectionable. As to the latter part, "or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past," I doubt whether that can be done. I doubt whether the legislature can pass an act imposing a new liability upon the people. However, that part of it I should have no objection to if it were really necessary. My objection to that is that it is unnecessary, because the legislature cannot do that.

SECTION 7.

Now, reference has been made to section 8 (7). It is passed. I am glad to say I did not vote for it. I don't know whether I voted against it or not, but I did not vote for it. We passed over several things that ought to have been more carefully put; but I call your attention to what we have done to show what a strange provision we have adopted here. We undertake to bind railroad companies, corporations, and everybody else named in that section 8 (7) — to bind them if they even have a cause of litigation, that they shall bind themselves not to litigate that section.

Mr. MAYHEW. I don't understand the remark.

Mr. BEATTY. I am referring to section 8 (7). It is passed, it is true, but I am calling attention to what we have done. And under that section, if I read it right, if a railroad company or a mining company or any other company, is convinced that it has a right which it ought to litigate in court, you bind them by this section to waive that right; you bind them to come

in and submit to the laws passed here, whether right or wrong, and as a penalty, if they do not submit to those laws, they shall have the benefit of no future legislation. Then, if I have any matter which I desire to litigate in court, and you have some advantage of me, you compel me to come in and waive my rights to litigate that matter, and as a penalty, if I fail to do so, you will put upon me some other punishment. That is the substance of this section. You say to the corporations: "Here, you come in and subscribe to this document, no difference whether you think it is right or wrong; if you don't come in and bind yourselves to obey what is in this law, we will cut you off in the future, we will give you no right of any legislation in the future, give you no benefit of any future legislation."

Just look, gentlemen, at what we have adopted. I think when we come to look over this in the future we will regret a little that we are adopting some sections while running along here and adopting them without a word of discussion. I think we better say with our friend Gray, "Let us call a halt here." Somebody ought to do it. I take upon myself the fault, for one, the way we are running over matters this morning, and I object to this section 13 (12) going in for the reasons given. It seems to me that we make a fatal mistake to prevent the legislature from passing any retroactive law, for there are numerous instances where that becomes almost absolutely necessary to protect the rights of individuals or associations or corporations. It includes all the people, and I think it would be a dangerous section to adopt.

Mr. VINEYARD. I want to inquire if we could not reconsider that section 8 (7). I am like Judge Beatty; my attention was not called to it. I voted for it, and I move that we—

Mr. WILSON. I rise to a point of order, that we are considering section 13 (12) now. Let us get through with that first.

The CHAIR. The point of order is well taken.

Mr. CLAGGETT. Section 8 (7) seems to be the block on the consideration of 13 (12), and after we dispose of this motion to reconsider this we can proceed.

Mr. VINEYARD. I move that we drop back to section 8 (7) and reconsider the vote by which it was adopted.

The CHAIR. I think the motion will not be in order until this section is disposed of.

Mr. VINEYARD. I don't know how we can dispose of it.

The CHAIR. My understanding of the committee of the Whole is that it is not necessary to reconsider, to go back and reconsider anything that has already passed. There is a certain amendment latitude allowed in the committee of the Whole, which is not allowed in the house. That is my opinion, but I may be wrong, of course. I think a vote to reconsider is not necessary.

Mr. HEYBURN. I see that in the Washington Territory constitutional convention this question was raised and discussed at length, and it was held there that in the committee of the Whole it is not necessary to make a motion to reconsider; that until the committee has reported to the house, all matters before it are under consideration; the fact that they are considering it by sections notwithstanding. That was the ruling of that body.

Mr. VINEYARD. Then I move to strike out section 8 (7). (Seconded.)

The CHAIR. The chair is of the opinion that there is a motion already pending, which I think is in order. After that question has been decided, then the gentleman's motion will be in order.

Mr. VINEYARD. Well, I substitute, then, section 8 (7).

The CHAIR. You can substitute the entire proposition, but not on this. The question is on the motion of the gentleman from Nez Perce.

Mr. MAYHEW. There is so much disorder here and confusion that I cannot hear.

SECTION 12.

The CHAIR. The question is now on the motion of the gentleman from Nez Perce (Mr. Poe) that section 13 (12) be stricken out.

“Question, question.” (Vote.)

The CHAIR. “The chair is in doubt.”

A rising vote was taken: Ayes 14, noes 20. The motion is lost.

The CHAIR. The question now is upon the amendment offered by the gentleman from Shoshone (Mr. Claggett) that the word “retrospective,” in line 2, be stricken out and the word “retroactive” inserted in lieu there of. Are you ready for the question?

“Question.” (Vote and carried.)

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

SECRETARY reads: Add at the end of the section “other than to enable such corporation, individual or association of individuals to comply with the provisions of this article.”

The question was put.

The CHAIR. By the sound the ayes have it. (Division demanded. On the rising vote: ayes 20, nays 10.) The motion prevails.

SECTION 7.

Mr. VINEYARD. Mr. Chairman, I now move that we drop back to section 8 (7) and reconsider that or strike it out.

The CHAIR. The chair is of the opinion to reconsider is not in order, but that any section can be returned to at any time in committee of the whole that has already been passed without a motion to reconsider.

Mr. VINEYARD. I move to strike out section 8 (7). (Seconded.)

Mr. MAYHEW. I don't think this committee can

do that; I don't think it has any authority to do it. It has been stated by my friend Heyburn of Shoshone that notwithstanding what action this committee may take, whenever this matter comes up in convention they can change any action this committee has taken in relation to that section or any particular article. The action of the committee is not binding upon the convention. When it comes up in convention it can be stricken out in its regular order; because they have as a body a right to reject any amendment that the committee may have made to any section or any article; or they can strike it out if necessary. But I think when a matter is once disposed of by this committee,—and you cannot in committee of the Whole reconsider a matter parliamentarily,—then it would not be in order if you cannot reconsider after the committee has once adopted a measure—you cannot go back in the committee and strike it out. It should be reported to the house, and in convention it can come up anew, and in that body can be stricken out if it is the pleasure of the convention.

Mr. VINEYARD. I understand that we are in committee of the Whole on the consideration of this article.

Mr. MAYHEW. No, sir, we have passed upon this.

Mr. VINEYARD. I am talking about the article. We are in committee of the Whole, considering the article section by section, of course; but at the same time if we can pass this now, there being no motion in committee of the Whole to strike it out or amend it in any shape or form under the rule as has been amended, and as I understand it, when this matter comes up for consideration in the convention, no matter will be in order as to section 8 (7) except the matters that have been considered with reference to it by the committee of the Whole. Am I right about that?

A MEMBER. Yes.

Mr. VINEYARD. Well, that seemed to be the ruling the other day, and —

The CHAIR. The chair has no power to rule what would be in order in the convention.

Mr. VINEYARD. Whether we can consider section 8 (7) outside of amendments or motions that have been made with reference to section 8 (7) while under consideration in committee of the Whole. Whether that can be done in convention or not.

The CHAIR. The chairman of the committee of the whole has no authority to decide that.

Mr. VINEYARD. To go beyond the action of the committee of the Whole. I ask the ruling of the chair on that.

The CHAIR. The chair cannot rule on that.

Mr. VINEYARD. Then I renew my motion to strike out section 8 (7).

The CHAIR. The chair has already ruled that if the committee makes a mistake, it has the power to go back and re-examine. The chair has decided that, but of course it is subject to appeal.

Mr. WILSON. I will inquire if the ruling of the chair is that the gentleman's motion to strike out is in order.

The CHAIR. Yes.

Mr. WILSON. I am in favor of striking out section 8 (7), for this reason. It has been said, and very properly, I think. that we have enacted fundamental law, which, taken in connection with that section, would be retroactive in its nature, so far as some corporations, or perhaps so far as all corporations, are concerned, and it would probably impair the obligation of contracts. I am aware that some retroactive laws have been sustained, and properly so, but all retroactive laws are not necessarily good laws. Retroactive laws validating deeds which were invalid before, anterior obligations, contracts impaired, or where any wrong has been done, are sustained.. Now, I think if this section is adopted, we do pass a retroactive law and impair the obligation of contracts. If we do that, manifestly this section is void. That is one horn of the dilemma. On the

other hand, if the section is good, and we do not pass a retroactive law, and do not impair the obligation of contracts, then it is not necessary to say that corporations shall file acceptance of it with the secretary of state, because they are bound by it anyhow just as you or I or any other individual. A corporation is simply an artificial person and we are natural persons, but we are all bound by the same law. A corporation, therefore, if the section is good, good fundamental law, or good legislative law, is bound by it. It is not necessary to say they shall file acceptance of it with the secretary of state. That is the other horn of the dilemma. It seems to me that section in law is a *reductio ad absurdum*. That section is absolutely worthless, or if good, it does not, leaving that latter clause out, require them to accept it by filing acceptance thereof with the secretary of state. For that reason I think it ought to be stricken out.

Mr. SAVIDGE. Mr. Chairman, the gentlemen of the committee, when they were considering this report, gave it a good deal of careful attention and compared it as the chairman has said, with the constitutions of other states. We found that this section 8 (7) did appear in many of the other constitutions, and we took those somewhat for a guide. But it does seem upon consideration that the provisions of that section might work a hardship upon corporations, which compels them to file an article of acceptance with the secretary of state to all of the provisions that may be contained in this constitution. It puts an absolute liability upon them to comply absolutely and unquestionably with whatever may appear in the constitution. Now, it may be that there will sections appear in this constitution that will put great hardships upon corporations, and prevent or discourage them from coming into this state. For that reason, and that only, I think it would be well to have that section stricken out, because it imposes upon them an absolute covenant to comply and abide

by whatever may appear in this constitution, and file a written article to that effect.

Mr. CLAGGETT. It may be that I am all in a muddle about this, but I don't think I am; and I certainly do hope that that section, of all the sections of this article, will not be stricken out, for there are the most vital reasons for retaining it; and neither do I think section 8 (7) has anything whatever to do with section 13 (12). It has nothing to do with retrospective laws. Section 13 (12) simply provides that the legislature shall pass no special law for the benefit of a railroad or other corporation or any individual or association of individuals. They are all really single persons. A railroad, or other corporation, an individual, which is a single person, or an association of individuals, which is a firm or a joint stock company,—it shall pass no law for their special benefit, or of some particular person. It is aimed at retroactive legislation for the benefit of some particular person. That is one thing. But when you come to section 8 (7), it deals with a subject that is altogether different. "No railroad, express or other transportation company, in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation," without first filing in the office of the secretary of state an acceptance of the provisions of this constitution. Now, what is the object of putting that in? It is this. The committee will readily see that section 8 (7) does not take away one single right which any corporation or any person has at the time the constitution is adopted. It leaves them with every right which they had before that absolutely unimpaired. But it goes on and imposes upon the corporation a thoroughly reasonable and necessary restriction, that if they are going to come to the legislature hereafter, while existing rights are all protected in every respect, if they are going to come to the legislature hereafter and claim the benefits of future legislation, that then they must accept the terms of the constitution in other respects and must not go out, and

while hanging onto everything which they have, obtain the benefit of everything which the legislature may impose, fighting the provisions of this constitution and prevent or try to prevent their being put into force and carried into execution. That is exactly what this section 8 (7) is.

Mr. POE. Is not this in the nature of class legislation, and would not they have the same right to require every individual within the limits of this state included? Instead of saying "corporations," suppose it stated "individuals" and required every individual in this state before he should have the benefit of any laws passed by this legislature to first file an acceptance of the provisions of this constitution?

Mr. CLAGGETT. Why, certainly not. In the first place, corporations are not like natural persons; they are the creatures of the state. They have no power and existence except such as created by the laws of the state. And in answering the question of my friend from Nez Perce I would say yes, if any individual should come before the legislative body and say, "I will not obey the provisions of this constitution, but I will demand the benefits of future legislation." I would say, "Not at all, sir; when you get ready to obey the law you don't like, then we will be ready to consider the question of what benefits we will confer on you."

Mr. POE. In the absence of this section would not the legislature or the people have the same right to say that to the railroad companies if they came and said, "We don't like the provisions of your law," and then we could tell them to take a walk.

Mr. CLAGGETT. To take a walk, so far as the benefits of future legislation are concerned, most assuredly it would. And this section is aimed exactly at those autocratic powers, persons, individuals, firms and corporations, who claim the benefit of all the laws while repudiating the obligations of the laws. And while protecting every right they have which existed at the time of the adoption of the constitution it says "Unless you

will obey the constitution of the state you shall not get the benefit of any future legislation," and I say it is right.

Mr. POE. Isn't it a matter of law, fixed and established beyond all doubt, that every man, corporation or individual is bound to obey the law before he can ask for the benefit of it?

Mr. CLAGGETT. No sir, it is not, because if you go ahead and pass a general law by the state relating to corporations they will come in and do it, unless you go to work and require them to accept this provision. They may turn in and claim they have certain existing rights, and they have certain existing rights; they have existing rights which it is not competent for the legislature to take away. And this section 8 (7) preserves and protects those rights, inasmuch as it does not in any way, shape or form, take them away, or profess to take them away; but it does say this: that whenever they claim the right, for instance, suppose they shall come in and claim they were properly incorporated and chartered prior to the time of the adoption of this constitution, and whenever the legislature undertakes to regulate freights and fares, they set up that it is unconstitutional and does not affect them; that it only applies and can only be made to apply to corporations created after the adoption of the constitution, and hence all existing railroad corporations in this territory now will be entirely freed from the obligations of the laws and constitution in that regard; suppose they should set it up,—and set it up they will, to a dead moral certainty—nevertheless, if you strike out section 8 (7) you will give them the benefit of all future legislation, while they are trying to evade all legislation which the constitution imposes. I say it is right the way it is.

Mr. HEYBURN. I have sent up an amendment and ask that it be read.

SECRETARY reads: Amend section 8 (7) by inserting after the word "railroad," in the first line, the words "private corporation or individual."

Mr. VINEYARD. In support of the motion to strike out, I have a word to say. It is quite true, as Mr. Claggett has said, that corporations are creatures of the state. If that is so, they are amenable to every law enacted by the state under which they exist. Then what is the use of that section if that is so? That before they can receive the benefit of any future legislation they must file in the office of the secretary an acceptance of the provisions of this constitution. I understand that this is absolutely worthless there. It adds no force or effect to the constitution. They are under and amenable to the laws, not only of the constitution of the state as it exists, but to the laws made in pursuance thereof. When a corporation is organized in this state or comes into this state to do business here, it by that very act assumes the obligation to live within the laws of the state, and to live under the constitution of the state. It amounts to an acceptance of every term and condition imposed upon them by the constitution and by the laws made in pursuance thereof. Hence this Section 8 (7) is absolutely worthless so far as giving additional powers to the state over corporations. And it would be so held, I think, in the courts. It is a condition precedent to the very existence of corporations, to the very existence of their doing business within the limits of the state, that they must conform not only to the constitution, but to the laws made in pursuance thereof.

Now my friend, Judge Mayhew, said it appeared to him that it was necessary to file a charter, etc., in the office of the secretary of state under this article. I do not so understand it. I understand this Section 8 (7) to mean exactly what it states, that before any corporation can get the benefit of future legislation it must first file in the office of the secretary of state an acceptance of the provisions of this constitution. There is no use in that. They have already accepted the provisions of the constitution if they propose to do business in this state. It does not add any additional force to their liabilities to the state or to an individual, if

any acceptance was filed in the office of the secretary of state. They could not go scot free and get out of liability, which they are equally liable for on any law in the world. Hence the section is worthless standing here as it does in the article. I will admit it has no particular connection with Section 13 (12); but it is simply encumbering this constitution with a lot of stuff that is worthless so far as an addition to the liability of these corporations.

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

SECRETARY reads: Amend Section 8 (7) by inserting after the word "railroad" in the first line the words "private corporation or individual."

Mr. BEATTY. Mr. Chairman, I did not expect, when I made the suggestion awhile ago in passing, referring to this Section 8 (7), that any motion would be made to strike it out; but I am glad the motion was made, for I think we passed over it rather hastily. But let us look a little further. I did not comment on the section before, but let us look at what it means. "No railroad, express or other corporation now in existence." You are making that provision apply only to railroad companies now in existence. What about other companies that come into existence hereafter? They are not bound by it at all; "in existence at the time of the adoption of this constitution shall have the benefit of any future legislation." You are legislating now as to companies in existence at the time of the adoption of this constitution. Other companies that come in are not bound.

Mr. MAXEY. I would suggest that when members talk and whisper when gentlemen are talking we cannot hear what is said.

Mr. CLARK. I would ask the chairman if the gavel is lost

The CHAIR. The gavel is here.

Mr. BEATTY. Now I claim that there are two fatal objections to that section. It is undertaking to put

a rule upon certain corporations, those in existence at the time of the adoption of this constitution, and does not apply the same rule to any future corporations which may come into existence. So there you have class legislation. The next objection is that they shall not have the benefit of any future legislation. I would like to know how you can pass a law, or how you can in the future pass any laws, which shall apply to one corporation and not to another. Does any lawyer here pretend to tell me that in the future, if some corporation fails to comply with this section, you can pass a general law applicable to all other corporations save that? That is class legislation of the worst nature. I undertake to say that that cannot be done. But my last objection is this, that that section is not worth the paper it is written on. My objection to it is simply, not that it does anybody any harm, but it is simply a lot of fudge and stuff put in the constitution that we should be ashamed of. Does any lawyer here pretend to tell me that I have no right to litigate any question; that you can prevent me, by putting me under duress, from litigating that question? Can you, by putting me in a position where I am not a free agent, bind me to a certain thing and attempt to hold me to it afterwards? All courts and lawyers will tell you that if a man is put under duress, if he does that which the conscience says is not right; for instance, while in prison or under the control of another person; any act he performs under those circumstances is not binding upon him. Now, I submit, is not this an attempt to put corporations, or if the amendment of my friend goes in here, individuals and associations, under the duress of a threat that the benefits of future legislation shall not apply to them unless they comply with this section? I submit, is not that such duress as that the party subscribing to the article shall not be bound by? I suggest these three objections, and I ask any lawyer here to answer them. First, we apply this only to corporations that now exist, discriminating against them in favor of future cor-

porations. In the next place we say that in the future laws shall be passed that shall apply only to one set of corporations but not to another. And in the third place we attempt to put parties under duress and compel them to endorse that which they say is not right, or which they have a right to litigate, and hold them by that process.

Mr. HEYBURN. My amendment may seem rather broad and sweeping in its terms, but inasmuch as we have not yet finally passed upon the question of a free ballot in this convention——

The CHAIR. The question is now on striking it out.

Mr. HEYBURN. Very true. I will speak to that. But inasmuch as the amendment goes to the vicious feature of the section itself, I desire to give my reasons for it. I desire to have harmony throughout this state, and that this constitution shall be ratified by a unanimous vote; and I cannot see any better way to do it than simply to put a penalty on the man who votes against this constitution and who is not in favor of it, by excluding him from the benefits of all future legislation. In other words, make every gentleman—all the people come into court, everybody litigates, make everybody who does, file an acceptance of the terms of this constitution or ratification of it before the secretary of state, before they shall have a right to sue or go into court at all, or have any benefit of future legislation. I think it would result in obtaining for the constitution a unanimous ratification. The provisions of Section 8 (7) provide now that a certain percentage of the people shall ratify it as a matter of compulsion; that is to say, they shall not be free to oppose the provisions of this constitution or its ratification at all; that is to say, railroad corporations. They are a part of course of the citizens of the state; and the section takes away from them the right to object to the action of this convention; and inasmuch as I have great confidence in its wisdom I want to compel all the people to ratify it. I have

offered an amendment therefore that "no railroad, private corporation, individual, or express or transportation company, shall have any benefits of any future legislation," unless they are heartily in sympathy with our action in this convention.

Mr. ANDERSON. I have sent up an amendment to cover the point made by Judge Heyburn as to railroad companies now in existence.

SECRETARY reads: Amend Section 8 (7) line 2 by inserting after the word "constitution," the words "or hereafter created in this state."

Mr. AINSLIE. Mr. Chairman, in regard to the position assumed by the gentleman from Alturas, as a legal proposition I will state that the deprivation of any benefits of future legislation by the legislature, of corporations now in existence, would not be impairing the obligations of a contract at all, any more than the passage by the legislature of the statute of limitations or changing the statute of limitations. It has been decided by the supreme court of the United States¹ as well as by the supreme courts of the states that the statute of limitations never impairs the obligations of contracts, because it only affects the remedies under them. So, therefore, the right of the convention to adopt a provision of this kind is, in my opinion, not only a very proper exercise of legal authority, but I think Section 8 (7), as stated by the gentleman from Shoshone, Judge Claggett, is one of the most important provisions that could be put into this article. We all know that no corporations can be formed under the laws of Idaho without filing a certificate signed by the incorporators stating the purpose of the incorporation, etc., in pursuance of the laws of Idaho Territory, which provide the manner in which corporations shall be formed.

Now, Sir, in our transition from territorial to state existence, it is necessary that something should be done to indicate that the corporations in existence at the

¹—Sturges v. Crowninshield, 4 Wheat. 122.

time of this change accept the law as embodied in the organic law of the state in regard to the formation and perpetuation of their rights.

Mr. BEATTY. I would like to ask the gentleman a question.

Mr. AINSLIE. Certainly.

Mr. BEATTY. I will ask you whether, if this constitution is in conflict with the Constitution of the United States, and a corporation in order to get the benefits of future legislation, files its acceptance of this constitution, binds itself to comply with all its terms, whether it then is prevented from litigating any question of conflict in this constitution with the Constitution of the United States?

Mr. AINSLIE. I don't know any corporation in existence that is organized under the Constitution of the United States.

Mr. BEATTY. Perhaps I do not make myself understood.

Mr. AINSLIE. There are railroad companies incorporated by act of congress.

Mr. BEATTY. My point is this: If this constitution is in conflict now with the Constitution of the United States——

Mr. AINSLIE. Then it falls to the ground, of course.

Mr. BEATTY. But, is a corporation then, which files an acceptance of this constitution prevented from litigating that question in the future?

Mr. AINSLIE. I will state in answer to the gentleman, it is a proposition universally established by supreme courts wherever a provision similar to the one we have in our constitution has been passed upon; but I don't know whether the legislature is prohibited by this language in the second section of this act, from the passing of special acts under which these bodies can exist—"provided, that any such general law shall be subject to future repeal or alteration by the legislature." Now, in the absence of a provision of that character in many state constitutions, considerable litigation has

arisen in regard to the power of the legislature to alter or amend an act of incorporation, or a general act of incorporation where the power was not deposited in the constitution, as we provide here. But a great many of these cases that have been litigated have arisen under special charters of incorporation. You will find the law books full of cases of litigation, where special charters of incorporation have been granted by the legislature, where the constitution contained no provision that these corporations shall be formed under general law, and then an attempt of the legislature to alter or amend the special charter of such corporation has been decided in the negative in a great many cases. The Dartmouth College case, argued by Mr. Webster, is familiar to every lawyer on the floor. Now, it is necessary in our transition state from the territorial to the state organization, that these corporations existing under the statute law of Idaho Territory, the territory having no organic law, except the act of organization passed by congress, should renew their filing of certificate, and in a similar manner to that in which they organized under the territorial statute. For instance, suppose we should pass, or incorporate in this constitution, as they passed in Montana, that all territorial officials and county officials should hold over until the expiration of their terms of office for which they were elected under territorial statutes, and serve out their terms under the state organization. Would you deny but what it would be proper for those officers, after the adoption of that constitution, to be required to give new bonds in the state of Montana, or renew their official oaths that they will support the Constitution of the United States? It provided that they should support the Constitution of the United States and the organic act of the territory of Montana. It is the oath which would be required of the makers of the constitution itself, to serve out their terms of office when they are elected under territorial government, without which could they support the Constitution of the United States? Of course not. Then

you see, these corporations that have been organized and gone into existence under territorial act of the state legislature should, when that is merged in the higher power under the constitution, come in and renew their allegiance to state authority which supercedes territorial authority.

And I propose to meet the other objection stated by the gentleman from Alturas. There might be some force in another amendment, which I think will cover the whole business, which is a very short one, namely: Strike out of line 1 in Section 8 (7) down to the word "in" just before "existence." This confines it to railroad, express or other transportation companies. Strike out all that line, and insert "no corporations other than municipal corporations in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, without filing in the office of the secretary of state an acceptance of the provisions of this constitution in binding form." And I think that covers all the objections the gentleman stated. It is general legislation affecting all corporations, and that takes it out of the special inhibition.

Mr. MORGAN. The amendment that was offered by Mr. Heyburn shows the inconsistency and impropriety of this clause being inserted in the constitution. We certainly don't want to legislate against any class of corporations or any class of individuals. His proposition is that we shall insert after the word "railroad" the following words "private corporation, individual." It would then read "no railroad, private corporation, individual, express or other transportation company in existence at the time of the adoption of this constitution, shall have the benefit of any future legislation, without first filing in the office of the secretary of state an acceptance of the provisions of this constitution in binding form."

The amendment that is offered by the gentleman from Boise does not do away with the objection at all. This increases the objection, if anything would increase

it, and gives it more force. His amendment to the section as it stands here would apply not only to stage lines and express lines and railroads, but it would apply even to freight lines, any corporation organized in this territory for the purpose of carrying freight from one point to another over a wagon road—would have no benefit of this constitution or laws enacted in pursuance of it, unless they file this acceptance of the provisions of the constitution. Therefore, every freight line or corporation in existence in the territory must file its acceptance of the provisions of this constitution before it could have any benefit of any future legislation. It will be noticed also that this cuts off all those corporations from the benefit of the criminal laws. If a railroad company should be robbed of one-half of the contents of a car it could not employ the criminal laws of this country to pursue the criminal and imprison him. Neither could any other transportation company or stage line or freight corporation, if the amendment of the gentleman from Boise is adopted—every corporation in the country, including water corporations, corporations organized for the purpose of furnishing water, corporations organized for the purpose of working mines, amounting to hundreds of corporations in this territory—must all of them file their acceptance of the provisions of this constitution or they cannot have any benefit either from the civil or criminal laws of the territory.

Mr. MAYHEW. Mr. Chairman, I have listened to the argument of this gentleman who has just taken his seat. I must say that argument was amusing. I won't say that the argument is logical, I won't say that it is nonsensical; and I don't desire to criticize the argument to any extent, farther than to say that when any man, being a lawyer, can get up in this body and say that when a man steals anything of any person the thief could not be prosecuted for that theft unless the person robbed was born in the United States or had declared his intention to become a citizen he is, to put it mildly, a man of remarkable courage. If that is the law under

this constitution, and if this provision in this article can go so far as to say that if you do not file your acceptance of this constitution with the secretary of state, that every road agent in this territory has a right to steal all you have got—if the gentleman thinks that it a legal argument——

Mr. MORGAN. Will the gentleman allow me to say I did not say any such thing. I did not say that they could not be prosecuted under the laws. I say it will prevent these corporations appealing to any of these laws of their own motion.

Mr. MAYHEW. Does the gentleman change his position? No, not a bit. I say the argument of the gentleman goes to the effect of saying that it prevents these corporations from pursuing a criminal who has stolen their property. Such an argument as that as a legal proposition is absurd, and I venture to say that no such idea ever emanated from any person's mind before. You can't excuse by the organic act of this territory a man who has committed treason against the government of the United States. You could not excuse a man who commits a crime against the laws of another state by engrafting such a provision as this in the constitution. Nor can you in this constitution engraft a law that will prevent a corporation of any character at all from pursuing persons who commit a crime against the laws of the country. That is to say, Mr. Chairman, this: How can any law be passed, or could it be possible, can you put such an interpretation upon this section as the gentleman puts upon it when he says it will prevent these corporations from pursuing parties who commit crimes against them? Now, that is not the question.

What is the object of this law is clearly stated both by Mr. Claggett in his remarks and also by Mr. Ainslie. That is, changing from the territorial position to that of the state simply requires these corporations to file their acceptance of this constitution with the secretary of state. What does that mean? It simply issues a com-

mand to them to file this acceptance—to show what? That they have accepted the constitution of this territory, showing to the state itself that they have a corporate existence. That is all there is of it. And I say it is absolutely necessary that some provision of this kind should be placed in the constitution, as it has been said here, the laws of this territory require all corporations to file a certificate of incorporation with the secretary of state before they can have any legal existence. This requires them to renew their fealty to the state by filing an acceptance similar in character to that of the certificate of incorporation, with the secretary of state. I understand exactly the argument and the amendment offered by my distinguished friend from Shoshone, and his argument was very amusing to me in relation to the adoption of this constitution by the people, requiring individuals to go to the secretary of state to file their acceptance of this constitution. The gentlemen seem to forget that corporations are artificial persons. When they say that a corporation is nothing more than an individual, a corporation is an individual for what purpose? As it is laid down by all text writers, there are two kinds of persons, one a natural person, the other an artificial person. What are the artificial persons? Corporations. Now the reason of the law that makes them individuals is this, that they can be sued and they can sue; they can plead and be impleaded in court, and appear and defend and prosecute matters in the courts the same as individuals. That is all that means, but it gives to corporations such powers as individuals do not have; and that is the object of this Section 8 (7) in this constitution, that they, being creatures of the law, creatures of a creation of law giving them certain powers and immunities and privileges that individuals do not have, that they shall do certain things before they can have an existence under the law.

Now let us read this section and look at it calmly. If this constitutional convention desires to cut this out, I don't think I am going to go crazy over the subject;

but I think it is important, and hence put it in here. Another argument, I desire to say to my friend Mr. Savidge: In the discussion in the committee in regard to this matter we all agreed there as to the importance of this provision. So did he. But I see that he has deemed it necessary, according to the reason that he has given, to change his position; and what is his reason? If there is any legal reason, if there is any philosophy in his reason, if there is any legitimacy in his reason, he has failed to state it in this committee. He says that his reasons are that it would be a hardship for these railroad companies to file this acceptance with the secretary of state. Is there any reason in that? Is there any political philosophy in it? Is there any legal argument in it? Not at all, only this, that it would be a hardship for these corporations to file this acceptance. I tell the gentleman this: That this constitution will provide and require that these individuals (as some gentlemen here have desired to call them, that these corporations are simply individuals) that had been once created under the territorial general law of this territory and filed their acceptance and their certificate of incorporation with the secretary—it simply requires those persons or associations of persons in the way of a corporation to file their acceptance of this constitution, or to renew their fealty to or faith in the state government with the secretary of state. And my friend from Shoshone who pretends to get up here, not for the purpose of amending this article, but with a view, adroitly as he has done this, to bring this section (as I presume my distinguished friend has done) into a condition of ridicule before the convention in order to defeat this section! Requiring individuals to file their acceptance of this constitution, before they can do what? Now, before they can do what? Read the amendment that the gentleman has sent up: “and that individuals shall file this.” For what purpose? Can we place any reason with that amendment there, further than to bring this matter into such ridicule that it may be defeated by men in this

convention, perhaps as he thinks, who will not give sufficient attention and consideration to this section? And that is all the gentleman's object and purpose. If the amendment cannot defeat the legitimate cause of the section in the constitution without placing it in any other light than that of ridicule, then his wits and his great wisdom fall short indeed. There is no reason in that, in a matter claiming the serious attention of this committee to a subject which is, I think, of a serious character. "No railroad, private corporation, individual or express or transportation company shall have the benefit of any future legislation, without filing in the office of the secretary of state an acceptance of the provisions of this constitution." Does that amendment, according to the argument of my friend from Alturas, require a man and these corporations to simply come here and bow down and accept all provisions of this constitution? Not at all. It simply means that they shall file in the secretary's office a renewal of their certificate of incorporation.

Another argument of my friend from Alturas is that if this article is adopted it prevents these parties litigating any rights they have or should have, or think they have in the courts—those rights that should be litigated. The gentleman assumed that if a corporation which had not filed its acceptance with the secretary of state felt it necessary to litigate some imaginary or real right that it had against another person, and filed its complaint against this individual, that that complaint would be demurrable on the ground that it did not state facts sufficient to constitute a cause of action at law. That would be all there is of it, but that is not the case. That section does not deny them the right of litigating or trying any rights they may have. But what does it say? Unless they file their acceptance of this constitution "that they shall not have the benefit of any future legislation." That is it. Not that they are cut off from litigating any of their rights, not at all.

There is no such proposition as that in this constitution.

Mr. BEATTY. May I ask the gentleman a question? Is it the meaning of this section then that if a corporation files acceptance of its provisions that they are cut off from contesting any constitutional questions under this constitution?

Mr. MAYHEW. Why, no sir, no sir, this constitution does not go to that extent.

Mr. BEATTY. It looks so to me.

Mr. MAYHEW. It does not look so to me.

Mr. BEATTY. I do not mean to say they would be bound by it. I think if they filed their acceptance of it, it would be held that they filed it under duress, and may still contest any matter under the constitution.

Mr. MAYHEW. Not at all. I don't know what the gentleman means by being under duress. I don't know how you can apply such a legal term to anything of this kind.

Mr. BEATTY. Allow me to interrupt you.

Mr. MAYHEW. Certainly. I would rather be interrupted than not, to get your meaning and understanding.

Mr. BEATTY. This section holds out a threat that unless they comply with the provisions by filing an acceptance of the terms of this constitution, they shall have no benefit of any future legislation. I claim that is a threat, and puts them under duress, compels them by filing an acceptance to subscribe to an article, which they may think is unjust and unconstitutional.

Mr. MAYHEW. Then say so; but don't come up here and argue to the committee that they are denied legal rights in a court of justice; that they could not litigate any right they may have there. That is a different question. This question involved here is, if they do not do so, they can only be barred from having the benefit of future legislation.

Mr. BEATTY. Well, I did not claim anything beyond that.

Mr. MAYHEW. But I understood your argument to go much farther than that, if you will pardon me.

Mr. BEATTY. No, I claimed this, Judge. I simply claimed this, that this prevents them from receiving the benefit of future legislation.

Mr. MAYHEW. No question about that; that is the purpose and that is the understanding.

Mr. BEATTY. That the benefits of any future law could not apply to them.

Mr. MAYHEW. That is it in so many words.

Mr. BEATTY. I did not mean to say nor have you understand that I thought they could not have the benefit of any laws now in existence.

Mr. MAYHEW. I am happy to be corrected. That is just what I understood your argument to be. I am perhaps a little dull of comprehension. The only reason is, I am made that way and can't help it. Another one of his arguments was this, that this was class legislation. Now, don't the gentleman see the difference between the creation of a corporation at the present time under the state constitution? I presume to say that the legislature will pass a general incorporation law, and in that general corporation law they will require the parties who are then incorporating to comply with the provisions of the constitution and the general corporation act that the legislature may pass. I presume to say that the legislature will require all those corporations to file their certificate with the secretary of the territory or the treasurer, more than likely the office of the secretary, because that is the office where such records are made. Now, the gentleman says that is class legislation. How can it be? All corporations created under state law will have to file their certificate under state law as passed by the legislature in accordance with this constitution. Now it only requires the party that has heretofore been incorporated to do the same thing that corporations created after the organization of the state are required to do. That is all. Or

in other words, Mr. Chairman, it places these parties upon an equal footing.

Now, I do not desire to go on to any extent and argue this thing, but I have answered this question of the gentleman, particularly my friend Morgan, who I thought truly and sincerely made an argument that was not correct and cannot be correct, when he attempted to argue to this committee that the provisions of this article prevented these associations and corporations from pursuing persons who committed crimes against them. I have no objection, Mr. Chairman, to any amendment that may be offered to this, because I happen to be chairman of the committee. There are many things, even in this article, to amend if I had my own individual view about it; but I think so far as my individual views would go, it would go to the extent to place a larger and more extended restriction upon these corporations. For I must say, Mr. Chairman, that I am jealous of their rights, and I think it is prudent and necessary in our legislative bodies to throw such a safeguard around the people that they may not be imposed upon in any manner or form by corporations. Not that I say they all do it in this territory, but in order to prevent their doing it, I am in favor of this section.

Mr. HEYBURN. Mr. Chairman, the gentleman has objected to the remarks I have made in this matter because he says they were trifling with a serious matter. Very well, for a moment we will consider this matter seriously. When the gentleman speaks of all future legislation, he speaks of all legislation in this state, because all of the legislation that is to govern the affairs of this state is a thing in the future. The state is not yet organized. There will doubtless be adopted by the legislature of the state when it is organized a code of civil and penal laws, so that when he uses the term "future legislation" he covers all laws that will govern the people of this state. Now then, we find that there has been a contract entered into upon the faith of this

territory with certain individuals who have formed themselves together for the purpose of forming a corporation. We find that contract, and the terms of it set forth in the present laws of the territory of Idaho in section 2584¹, which says:

“Upon filing the articles of incorporation in the office of the county recorder of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the county recorder, with the secretary of the territory, and filing the affidavit mentioned in the last section, when such affidavit is required, the secretary of the territory or such county recorder must issue to the corporation, over his official seal, a certificate that a copy of the articles containing the required statement of facts, has been filed in his office; and thereupon the persons executing the articles and their associates and successors shall be a body politic and corporate by the name stated in the articles, and for a term of fifty years, unless it is in the articles of incorporation otherwise stated, or by law otherwise specially provided.”

Mr. Chairman, I say that is a contract, a solemn contract between the people of the territory of Idaho, speaking through their legislature, and this aggregation of individuals who form themselves together for the purpose of doing business within the territory. It is a contract for the term of fifty years that these people shall have the rights guaranteed to them by the provisions of that law.

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

Mr. HEYBURN. Certainly.

Mr. MAYHEW. I admit that is a contract, and they are entitled to be protected, because it is a legislative contract, a contract between the legislature and individuals and associations for the purpose of forming a corporation. But I say this: While they are doing that, does this article take from them any rights at all? I ask you that question, by requiring them to file an acceptance with the secretary. If they do not do it,

¹—Rev. Stat. 1887.

they do not comply with the law; that is all of the proposition.

Mr. HEYBURN. I will try to answer that inquiry. If it does not take away from them any rights, and if it is not intended to take away any rights, then the section should be stricken out. Any individual citizen of this state will have the right, if he considers that the provisions of this constitution are in violation of the rights guaranteed to him by any higher law, to test that fact in the courts. The provisions of this section 8(7) take that right away from the corporations. Corporations sometimes consist of only five persons, a very limited number, and sometimes of a great many people. There are various kinds of corporations that will come within the scope of this provision and amendment as proposed by the gentleman from Boise County. It is a discrimination against those persons who have associated themselves together as a corporation, which is not made against a single individual. And if a corporation were to refuse to file its acceptance of the terms and provisions of this constitution, then if its property was stolen, if its rights were invaded, the door of the court would be closed to that corporation, because it would be necessary, if this provision were contained in the constitution, to plead the fact that the corporation, after you had pleaded its existence, had complied with the provisions of this constitution, because it would be a jurisdictional question. So that if in filing your complaint in the court you fail to set up the fact under oath,—if your complaint was under oath, that your corporation plaintiff had complied with the terms of the constitution by filing an acceptance in binding form of the provisions of this constitution, then the complaint would be demurrable on the ground that it did not state facts sufficient to constitute a ground of action. And it is not, as it seems to be considered by gentlemen who have discussed this, that it follows the same legislation which we already have. Every enactment which

we now have contained in the code, and every enactment which is to be contained in the laws will be future legislation, so far as the provisions of this act are concerned; because it has to be re-enacted and will be re-enacted by the legislature of the state as the fundamental law of the state. Are you going to impose this condition upon corporations,—some of which I have in my mind in this territory are composed of but five individuals—who have, in order to more conveniently work their mining property or their property of any kind, associated themselves together—are you going to say that those individuals shall be precluded from the right to test the constitution, or test the validity of the provisions of this constitution as applied to the Constitution of the United States or to any other interpretation? Are you going to take away from them that right that is reserved to every other citizen in the state? Is it fair and equitable to do it simply because they are corporations, simply because they are another class of corporations, which are a little more indefinite in their being, such as a large railroad corporation, where the stockholders are scattered all over the country? Are you going to make a sweeping provision in this constitution that all corporations shall be prohibited from contesting the validity of it, unless they agree as to the terms of it, when, in their judgment of it, its terms may be an abrogation of their rights or a curtailment of their privileges which they have now under the state or territorial government or government of the United States? Are you going to compel them to do that which you do not compel anybody else to do, to accept without demur this constitution we present? Where is the ultimate justice in that? Apply it to the whole mass of the people or apply it to no part of them. That is as strictly class legislation as it is possible to conceive. I say again, that it is a contract that has been entered into between you gentlemen, as a part of the people of the state, and these persons who have associated themselves together,

that they shall have those rights. The legislature always has a right to control them, to keep them within bounds, so that they may not infringe upon the rights of others; but this constitution has no right to exclude from them any rights and privileges which it reserves to the balance of the people.

Mr. CLAGGETT. Mr. Chairman, I do hope this committee will not allow itself to be befogged by these extraneous and outside suggestions and arguments which have nothing to do with the question before the committee. The entire proposition embraced in this section 8 (7) which is proposed to be stricken out can be stated in a nutshell, and has been stated in a nutshell before. It is this: It does not propose to take away one solitary existing right of any corporation in this territory. Every chartered incorporation which was created or granted under territorial law is a contract, which cannot be impaired in any shape or form. To that extent it is protected by the Constitution of the United States. And that Section 7 (8) does not propose to impair it in any way, shape or form. It leaves every corporation precisely as it was at the time the constitution is adopted, *except* that it does say this, that if you want to go ahead and fight the provisions of this constitution, all right, gentlemen, go on and fight it. If you want to test the validity of this constitution in any way, shape or form, we claim these provisions are put in for the restriction and control and *necessary* restriction and control, of corporate bodies under the laws of the territory, and we say, all right, go ahead, contest it, bring all the statutes you are a mind to, and stand pat and ha ha, if I may use the expression, upon every right you have; but during the time and while you are contesting the right of the state to regulate and control you, you shall not receive the benefit of any future legislation. That is the operation of this law. You can fight it just as much as you are a mind to, you can test the validity of it as much as you are a mind to, but as long as you are fighting the sovereign power of the state in these

matters which the sovereign power has deemed proper to exercise—the right to regulate and control—as long as you do that, as long as you fight the state on this proposition, and will not accept the terms and provisions of this constitution, and as long as you insist upon standing upon your existing rights and stand outside the pale of the law, then do not ask any favors, while you are occupying that attitude, of the law in the future and for your benefit. That is the whole business in a nut-shell.

“Question, question.”

The CHAIR. The question is upon the motion of the gentleman from Alturas, Mr. Beatty, that section 8 (7) be stricken out. (Vote.) By the sound the noes have it.

Division demanded. On the rising vote, ayes 14; nays 26.

The CHAIR. The question is now upon the amendment of the gentleman from Shoshone, Mr. Heyburn.

Mr. HEYBURN. Mr. Chairman, I will withdraw the amendment.

The CHAIR. The question then recurs upon the amendment offered by the gentleman from Boise.

Mr. AINSLIE. I do not withdraw my amendment; I think it is a very important one and material.

SECRETARY reads: Amend section 8 (7) as follows: strike out all of line 1 down to “in” in said line, and insert “no corporation other than municipal corporations.”

The question was put, vote taken, and amendment carried.

Mr. AINSLIE. I now move the adoption of the section as amended.

Vote taken. Carried.

SECTION 13.

Section 14 (13) was read by the secretary.

Mr. CLAGGETT. I offer an amendment, to strike

out all after the word "section" in line 5. (Seconded.) I just want to say a word.

Mr. MAYHEW. I think it is necessary to try and make it comply with the whole section.

Mr. CLAGGETT. Yes, I don't think we ought to undertake to interfere with the business of private or public corporations.

The CHAIR. The chairman of the committee agrees to accept the amendment, as I understand it.

Mr. MAYHEW. Yes.

The CHAIR. If there is no objection those words will be stricken out. The chair hears no objection, and it is so ordered.

Mr. POE. I move that the section be now adopted. (Seconded. Vote and carried).

SECTION 14.

Section 15 (14) was read by the secretary, and it was moved and seconded that the same be adopted. (Vote and carried).

SECTION STRICKEN OUT.

Section 16 was read by the secretary.

Mr. MORGAN. I move that section 16 be stricken out. (Seconded.)

Mr. WILSON. Mr. Chairman, I desire to ask a question of the chairman of the committee having this article in charge. Is it not true, as a matter of law, that the contract referred to in that section would be absolutely null and void, whether the section was adopted or not? In other words, is not a contract releasing or discharging from liability or responsibility on account of personal injuries, made as condition precedent to appointment by the corporation of the individual, void as a matter of law?

Mr. MAYHEW. I am rather inclined to think that the courts have in some instances held that that is true. But while this is an organic act it settles the question as to that matter, and hence we think it is necessary

to have it inserted. I would like to hear from my friend Morgan why he wants it stricken out.

Mr. MORGAN. I will ask the gentleman if it has not been the decision of every court in the country that has ever passed on this question that such contracts are void?

Mr. MAYHEW. I can't say that it is the decision of every court in this country, because I have not read them all. (Laughter.)

Mr. MORGAN. Well, every one that you know anything about?

Mr. MAYHEW. I have seen some dissenting opinions on this subject in several courts, but I will say the majority of the courts have sustained the provisions of this constitution. I will say that I have seen some dissenting opinions, and if the gentlemen will observe, the text writers on the question of contracts, even Story and Parsons, you will find give quite a number of instances of dissenting opinions upon these main propositions. I can't see that because there have been dissenting opinions—and opinions of courts at all, affirming or rejecting that proposition, goes to argue that this should not be in this constitution—I don't know any reason for having it stricken out.

Mr. WILSON. Mr. Chairman, I believe it is a rule of law in England and this country both that contracts of this kind have not been sustained for the reason that they were void as against public policy. I think that is the general rule of law both in England and in this country. I had occasion to look it up before I came here this morning. If they are void, I don't think we better encumber the constitution with it. Put nothing in for buncombe. If the chairman admits that is the rule of law, and he is a very good lawyer, for that reason I would not burden the constitution with it. We are putting things in here because they are law and of right ought to be here. Now, it is conceded this is immaterial, and I think it ought to be stricken out.

Mr. MAYHEW. I beg to disagree with my friend

Wilson. I cannot say positively that the courts have held that they are null and void. It is true, the main principle that governs the courts in their decisions on this question is the legal position, and unquestionable too, that it is against public policy. But if you let this section remain in here it settles for all time that question of litigation, and prevents any future litigation upon any question of that kind, stops it entirely.

Vote taken on the question to strike out section 16. (Division demanded. On the rising vote, ayes 22; nays 17, and section 16 is stricken out.)

SECTION 15.

SECRETARY reads section 17 (15).

Moved and seconded the same be adopted. (Vote and carried.)

SECTION 16.

SECRETARY reads section 18 (16), and it is moved and seconded that the same be adopted.

Mr. CLAGGETT. I move to strike section 18 (16) out. It seems to be entirely and wholly unnecessary—defining a corporation; we all know what a corporation is. And certainly the articles herein contained should not apply to joint stock associations, except where it has been made so by the terms of the various sections as we go along. It is too broad and sweeping. And as for the rights of corporations to sue and be sued, that is fundamental; it is a particular right of every corporation. I submit to the chairman whether or not it is not pure legislation.

Mr. MAYHEW. The gentleman is correct in saying that the proposition is declared upon in this section, and there is some question about the section itself. All there is about it in relation to joint stock companies is this: "shall be held and construed to include all associations and joint stock companies" for instance, at this time; includes them all. All there is about it, it

declares them all to be classed as corporations.

(The motion to strike out was seconded.)

Mr. AINSLIE. I move to strike out all after the word "partnerships" in line 3, and leave the remainder standing.

Mr. CLAGGETT. I would suggest to the gentleman that he include the word "and" at the end of line 3.

Mr. AINSLIE. No, my motion was to strike out all after the word "partnerships."

SECRETARY reads: Strike out all after the word "partnerships" in line 3 in section 18 (16).

The CHAIR. The question is shall section 18 (16) be stricken out?

Mr. MAYHEW. I would like to have the section read as proposed to be amended.

SECRETARY reads: The term corporation as used in this article shall be held and construed to include all associations and joint stock companies having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships."

The CHAIR. The gentleman from Boise moves to strike out all after the word "partnerships." The question is on the motion that the section be stricken out. (Vote.) The noes have it. The motion is lost.

The question recurs upon the motion of the gentleman from Boise, who moves to strike out all after the word "partnerships" in line 3. (Vote and carried).

Mr. MAYHEW. I move the adoption of the section as amended. (Seconded. Carried).

SECTION 17.

Section 19 (17) was read.

Mr. CLAGGETT. I move to amend section 19 (17).

SECRETARY reads: At the end of section 19 (17) add "at the time the liability was created."

Mr. CLAGGETT. It is indefinite now. To get at the question of how much stock he owned at the time the suit is brought, not at the time of the liability.

Mr. BEATTY. This tends to make him liable on

the stock owned at the time the debt was created.

Mr. CLAGGETT. Yes.

Mr. AINSLIE. Suppose one man owned ten shares of stock in a corporation, and it contracts some very heavy debts, twenty or thirty thousand dollars, and after it contracted these debts the man who owns the ten shares of stock buys three-fourths of the stock of the corporation. Now, after he owns three-fourths, according to that amendment he could not collect from him only what he would owe under the ten shares. And the public have no means of knowing the financial condition of the corporation. I think it ought to be on the amount of shares he holds at the time the suit is commenced, not at the time the debt is contracted; because there would be stock transferred on the books back and forth, and persons dealing with them would not know anything about how many shares one man has got more than another. It seems to me it places it rather in the hands of the corporation.

Mr. CLAGGETT. So far as this matter is concerned, I simply offered an amendment to correct an ambiguity. It does not specify when it shall be. My own idea, when I come to think about it, is that it ought not to be in the constitution at all, but leave the matter to the legislature. They might desire to change it to meet the shifting conditions of business. The fact of the business is, there has been a great deal of experimentation on this subject, and at one time you would have a law opposing the individual liability of stockholders; but I am not speaking now of corporate liability, where the creditor can go after all the corporate property, but in cases of bankrupt corporations, and then you go after the individuals; and at one time it has been fixed one way and another time fixed another way in the same state. But I will withdraw my amendment by the leave of my second and move to strike the section out altogether.

Mr. AINSLIE. I think that would be better.

Mr. POE. Mr. Chairman, I am opposed to striking

this section out. I think this section as it now stands will be a greater inducement for capital to come into this country to invest in mining and other enterprises than anything we could engraft in this constitution. For the reason that if it stands there, whoever may appropriate or lend his money to an enterprise of whatever nature it may be, or enter into a company that is incorporated, he knows when he puts that capital in there that he will only be liable to lose the amount that he subscribes in stock. To that extent his liability goes, no farther. But if you leave it open, so that a man may become liable and held individually for the entire loss of the whole company, he might be the only responsible party in that corporation, and the whole loss would fall upon him. Whereas, if we leave that section in he will know he will only be liable to the extent of his stock, and therefore a man of capital will be much more liable to invest his money in the country. If there is any section in this article that is going to result to the benefit of the people, I think this is the very section, and the gentleman of Shoshone now proposes to strike it out; it is the one most essential, and that will do the country the most good. I therefore oppose it being stricken out.

Mr. MORGAN. I think, Mr. Chairman, the section ought not be stricken out. If we go to the east to raise capital for the purpose of building railroads in this territory or in this state, a man worth a million dollars might be willing to take \$50,000 of stock in this company if he knew what his liability was; but if he knew he was liable to lose millions, he would not invest a single dollar. That is why I think it should be retained. He knows his liability; he may be willing to lose \$50,000 because he can stand it, but he may not be willing to jeopardize his whole fortune.

(“Question, question”)

The motion to strike out was put by the chair.
(Vote and lost.)

Mr. CLAGGETT. Then it will certainly require

some very substantial amendments. The first thing here is with regard to the time and amount of stock. What does that mean? Face value of the stock? It ought to be amended in such a way as to omit the amount of unpaid capital stock owned by him at the time the liability was created. Suppose a man, for instance, has a thousand shares of stock of \$5.00 per share par value, amounting to \$5,000; and on that he has paid \$2,500 as it is called in under the assessment plan, which is provided for by all corporation laws nowadays. He has paid 50 cents on the dollar. Here the corporation becomes bankrupt and he is sued. Now, then, how do you get at it? If you leave it in the way it is you have to provide for it in some way, shape or form, so as to make it the unpaid capital stock. And then suppose he owns a lot of stock today and sells out. And suppose he steps out altogether, and after he has ceased to be a stockholder some debts are created and he is sued individually on the outstanding indebtedness of the corporation. Then at what time are you going to fix his liability and measure his proportion or ratable share? Why, in order to carry out that provision in there and make it definite and clear you have to pass a law upon the subject which will cover all of these and twenty other considerations I can mention. But certainly we cannot amend it; we can't amend it without drawing a bill, such as we have under our corporation law. Let the gentlemen that vote to not strike this out draw a bill.

Mr. POE. If the gentleman wants to amend it, let him draw his amendment.

Mr. MAYHEW. The gentlemen that vote for it as it stands don't want to amend it.

Mr. CLAGGETT. Well, I call attention to what it is. I would not undertake to amend it inside of twenty-four hours' hard work.

Mr. MAYHEW. I have no objections to an amendment such as the gentleman proposes, but as to drawing a bill—

("Question, question.")

Mr. MAYHEW. There is no question before the house.

Moved and seconded that the section be adopted. (Vote and carried.)

SECTION STRICKEN OUT.

Section 20 was read.

Moved and seconded that section 20 be stricken out.

Mr. WILSON. Section 22 is duplicated in the Legislative Department, already adopted.

"Question, question." Vote and carried.

Mr. MAYHEW. Mr. Chairman, I have two amendments to two of these sections. Section 21 (18)—the two sections are too broad to change—

The CHAIR. There was no section 21.

Mr. MAYHEW. No, but the sections sent up were section 21 and section 22. Now, I desire in offering these amendments to state that these are not individual amendments of my own, but they are amendments to this article on corporations by the committee. After the committee had reported and our attention had been called to the important subjects of these amendments sent up, we concluded we would hold them until after the action of the committee of the Whole on this section. I desire to have them read.

SECRETARY reads: Section 21 (18) : That no incorporated company or any association of persons or stock company in the state of Idaho, shall directly, or indirectly combine or make any contract with any incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or in any manner whatsoever, for the purpose of fixing the price, or regulating the production of any article of commerce or of produce of the soil, or of consumption by the people, and that the legislature be required to pass laws for the enforcement thereof by adequate penalties, to the extent, if neces-

sary for that purpose, of the forfeiture of their property and franchise.

Section 22: The legislature shall prohibit the granting of subsidies of either money or land to any corporation.

Mr. MORGAN. Mr. Chairman, that section 22 has been substantially adopted in the Legislative Department.

Mr. MAYHEW. Yes, I think it has myself, but I desire to say this in relation to the section, after somebody moves the adoption of it.

Moved and seconded that the section be adopted.

Mr. MAYHEW. After consultation with the committee on Corporations and after the report, they concluded that it was necessary that there should be something in the constitution that will prevent these trust companies from being formed in this territory for the purpose of regulating the production and sale and price of commodities, either produce or manufactured articles. The purpose was to destroy the creation of those trusts in the territory, notwithstanding it is the opinion of a great many persons that it was nobody's business in relation to those trusts. But I observe there has been quite a discussion in many states, and in fact in the state of New York late decisions of the courts are to the effect to annul these associations that combine for the purpose of creating corners upon the products of the country, whether the natural production of the soil or manufactured articles. Individually I think it is an important measure and should be incorporated in our constitution, and I hope it may be adopted.

Mr. CLAGGETT. I presume this is a section that will give rise to a good deal of debate. As twelve o'clock has arrived I move the committee rise, report progress, and ask leave to sit again on this measure. (Seconded. Carried.)

CONVENTION IN SESSION.

Mr. Claggett in the chair.

Mr. SHOUP, chairman of the committee of the Whole. Mr. President, your committee of the Whole desire to make the following report: Your committee of the Whole have had under consideration the report of the committee on Public and Private Corporations, have come to no conclusion thereon, and ask leave to sit again.

The CHAIR. The report of the committee will be received and lay on the table.

Mr. HEYBURN. Mr. President, the last amendment proposed in the committee of the Whole by the chairman seems to be an important one, directed at a subject that is attracting a good deal of attention. I therefore move it be printed and laid on the desks of the members. It is impossible to consider anything without having it read. I mean the one that is directed at trusts, section 21 (18).

(Seconded and carried.)

Mr. WILSON. I move that we take a recess until two o'clock. (Seconded and carried.)

AFTERNOON SESSION.

Convention called to order by the president.

Moved and seconded that roll call be dispensed with. (Carried.)

The CHAIR. I think after taking recess that is not necessary.

Is the committee on Engrossment ready to report on the bill that was offered for engrossment?

Mr. HASBROUCK. Mr. President, I think not. There was a slight error in the engrossment of the article, which is now corrected, but I have not been able to call the committee together for them to note the correction.

The CHAIR. What time will the gentlemen be able to report?

Mr. HASBROUCK. Just as soon as I can get the members of the committee together.

The CHAIR. In one hour?

Mr. HASBROUCK. Yes.

The CHAIR. If there is no objection we will postpone that matter until three o'clock. There is no objection and it is so ordered. What is the pleasure of the convention?

Mr. SHOUP. I move the convention go into committee of the Whole on the report of the committee on Public and Private Corporations. (Seconded.)

Mr. WILSON. I believe we completed the report except the two last sections which were reported by the chairman and are to be printed. I believe we postponed action on them until they could be printed and laid on the members' desks. We have nothing to do now on that order in committee of the Whole, and I would amend the motion by saying, on the general order.

The CHAIR. I will state for the information of the gentleman from Ada that the two sections were ordered printed and the printer thought he would have them here by two o'clock. They have not arrived, but they are looked for every moment. The question is on the motion of the gentleman from Custer that the convention resolve itself into committee of the Whole for the purpose of taking up the report of the committee on Public and Private Corporations, to which there was an amendment offered that the convention resolve itself into a committee of the Whole for the purpose of taking up the regular order. As many as favor the amendment say aye. (Vote and carried.)

COMMITTEE OF THE WHOLE IN SESSION.

Mr. McCONNELL in the chair.

ARTICLE XV.

The CHAIR. Gentlemen, the matter next for consideration in committee of the Whole is the report of

the committee on Agriculture and Irrigation, being number 10.

SECTION 1.

SECRETARY reads section 1, and it is moved and seconded that Section 1 be adopted. (Vote and carried).

SECTION 2.

Section 2 was read, and it is moved and seconded that section 2 be adopted. (Vote and carried.)

SECTION 3.

Section 3 was read, and it is moved and seconded that section 3 be adopted.

Mr. SHOUP. Mr. Chairman, I don't exactly understand that section, and if the chairman of the committee is present I would like to have him explain it. I understand by the reading of it that agriculture has the preference over mining.

Mr. CHANEY. Over manufacturing.

Mr. SHOUP. If any person or company has been using this water for mining, and any person desires to use it for agriculture, they shall have the preference over those using it for mining?

The CHAIR. I don't know that the chairman of the committee is present. I will say to the gentlemen that I was on that committee, and the object of putting in that clause was, that where water had been used for the three purposes from one ditch, and the water ran short, the preference should be given first to domestic purposes, household use, and next to agricultural purposes, because if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost. That is the reason why the committee saw fit to state it in that manner.

Mr. SHOUP. It would then stop any person or company from using the water for mining purposes, provided they desired to use it for irrigation?

The CHAIR. If it had been during the season for irrigation, and also for use for mining, and the water failed to such an extent that there would not be enough to carry on both purposes, then agriculture should take the precedence over mining. That was the object of the committee.

Mr. SHOUP. And mining would have to stop?

The CHAIR. Mining would have to stop if it was necessary to protect agriculture.

Mr. WILSON. I don't understand that section as the chairman of this committee interprets it. As I understand it, priority and preference is given those who desire to use water for domestic or household purposes, to all there is.

The CHAIR. Yes.

Mr. WILSON. That is the first clause. Then next, those using water for agricultural purposes shall have preference over those using the same for manufacturing purposes. Now, that does not say that those desiring to use the water for agricultural purposes have priority over those desiring it for mining purposes; manifestly not. Nothing said about those desiring to use it for mining purposes at all.

The CHAIR. No, it is manufacturing and not mining.

Mr. WILSON. And mining is not manufacturing by any means.

Mr. SHOUP. You manufacture bullion, don't you?

Mr. WILSON. No sir. I don't take it that the word manufacture includes mining. I am certain I am right about that. There is no preference given to agriculture over mining, but there is a preference given to agricultural purposes over manufacturing purposes, which I think is proper.

Mr. BEATTY. Mr. Chairman, I move to strike that section out.

Mr. MORGAN. I second the motion.

Mr. BEATTY. I can't understand what is the full intent of all that, but I do see enough in it to make it

very damaging. "Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Now, let us see what that will lead to. That section proposes to disregard entirely priority of right. In other words, we will suppose that the three classes of persons are using the water of one stream. It makes no difference now who has priority of right. Some manufacturing establishment may have started there first and obtained the use of the water. An agriculturalist may go in after that and locate a farm and take up all the water if he needs it for agricultural purposes, and virtually destroy the manufacturing establishment. Now, there are many things resulting from this. Here you will give the farmer, we claim, more preference right to all the water of that stream, and shut down a manufacturing establishment that may employ a hundred families in carrying on its business. You will destroy the interests and rights of a hundred families in order to benefit one agriculturalist. That is not all of it. If you enact a law of that kind, I would like to know what manufacturing establishment would ever be put up on a stream of water, when that stream may be suddenly taken away from him by some one else who wants to use it for agricultural purposes? Now, see the danger it leads to by undertaking to establish a law of that kind? It would be most destructive, I think, to the interests of the country. I know of but one way to regulate it, and that is that the parties first in time hold the water; the parties who come and take up the water for any purpose should be entitled to the use of that water. If parties come

along, an agriculturalist, a farmer, and have taken the water up, they are entitled to it. If some one wants to establish a manufacturing business, and wants that water, let him buy of the farmer; or if, on the contrary, a man takes up the water for manufacturing purposes, it is his. If somebody else wants to start a business more productive, and can afford to buy the water, let him buy it. But to attempt to say here that prior rights shall be divested in that way, because, forsooth, we think some interest is more entitled to protection than another, would lead, in my opinion, to fatal results. More than that, I don't believe such a law as that would be constitutional; it would be taking away the priority right of one man and giving it to another; and I do not see how it is possible that we could make such a law as that. But the main objection is this; it makes all interests uncertain. I put the question to any of you, who of you would invest your money in establishing any large manufacturing establishment when you know that the water that you desire to use in running that establishment may at any time be taken away from you by either of these two other interests, that is, the agriculturalists, or for domestic use? For that is what this section means, if it means anything, or else I do not properly construe it. I have for the first time just read it, I have not examined it before, but on first blush that is what it means.

Mr. WILSON. Judge, let me make a suggestion. I think if you would strike out all after the word "purpose" in line 7, you will get at the point. Of course, we are giving the whole preference and priority to those desiring to use the water for household purposes, for food, if you please. In some places they depend upon ditches for water for household use, and their stock and such things, and they must be given the preference; it is absolutely necessary for life that they be given the preference; but I would not give those engaged in agriculture preference over manufacturing, for large manufacturing establishments might be erect-

ed depending upon that water. I would move to strike out all after the word "purpose" in line 7.

Mr. AINSLIE. Leave out the word "purpose."

Mr. BEATTY. Suppose the case, Mr. Wilson, of a stream of water running through some section of country here, and there is just enough water in that stream to start a large manufacturing establishment, which may employ from fifty to one hundred men. Now, some other parties come in and locate in the neighborhood not connected with this manufacturing establishment. They may be there as stock-growers or for different purposes, and they come in and claim the water of that stream for domestic purposes. Now, I ask you, are you going to pass a law to allow them to take the water out of that stream and shut down the manufacturing establishment, shut up the houses of all those employes working for the establishment? In other words, to benefit probably half a dozen families, you may discommode or inconvenience or throw out of employment a hundred families. That is what I think the section holds, but that is what I want to guard against, and that is why I say this ought to be governed by the law of prior appropriation. The man who first goes there and takes possession is the man entitled to it, and if somebody else wants that right and can make better use of it than the man who first took possession of it, let him buy it from him. That is the principle I think we ought to incorporate.

Mr. WILSON. It is among the possibilities that a few settlers or many settlers, or a few head of stock or many head of stock, can drink up all the water in a ditch simply for the necessary existence of life. I think that is absolutely essential. I would not give agriculture the preference, nor mining, nor anything else the preference, but I would give domestic purposes the preference.

The CHAIR. Gentlemen of the committee, if you will allow me to call Judge Morgan to the chair a

moment, I will explain the position taken by the gentlemen who formulated this article.

Mr Morgan in the chair.

Mr. McCONNELL. Mr. Chairman, the chairman of the committee on Agriculture is not present, I believe, and it is necessary for some one to defend the report of this committee. I was not the chairman—

Mr. BEATTY. Who was the chairman?

Mr. McCONNELL. Mr. Cavanah. When we came to consider this matter of irrigation and appropriation of waters in this territory, we found that beneath the surface there was something more than what appeared to the casual observer, or appeared to any of us who were on the committee at first glance. We found it was a difficult problem to handle, and as a result we took the experience of Colorado and carefully reviewed it; we took the experience of California, which in this matter alone was largely the cause of calling a new constitutional convention—the matter of adjusting priority rights of water. We called in the wisdom of several attorneys, and we formulated this article. I believe by a careful scrutiny of this clause you will see that it does not do what the gentleman thinks it does; for instance, a man takes up a stream of water for manufacturing purposes, and there is nothing in this article to prevent him from retaining that; but the moment he thinks he has a surplus of water and undertakes to rent that surplus of water for domestic or agricultural purposes to as to derive an additional revenue thereby, he then dedicates that amount of water to domestic or agricultural purposes. So long as he retains that water for the original purpose for which it was taken up, he has priority of right over everyone else. But if he diverts it, and through that diversion causes men to come in and settle on these arid plains, to build houses and barns and the different accompaniments of civilization, it is for a right he could never take away from them and divert back to his own use at his option. Because if he did, he might conclude

at any time after those farms were in a high state of cultivation, that he could use this water temporarily for such a time as should compel those men to abandon their properties or sell them out for a mere nothing. That was the object of this committee. The object was to fix the fact that when water was once diverted for domestic or agricultural purposes it could not be taken away from those people, because their homes and everything they had in the world depended upon its continued use. I hope the motion to strike out this section will not prevail. I do not know of anything that will come before the convention at our sitting which will probably be of more importance to the future existence of the state of Idaho than this question of irrigation; and this committee has as carefully considered it as it was in their power, with the records before us, to consider it. All the history we have on this question of irrigation is the history of Utah, Colorado and California. We carefully reviewed all these. We considered the important matters brought up, which have caused so much litigation in the courts and so much feeling in entire neighborhoods, and we formulated this, thinking it would come as nearly as possible to administering the wants of the community as they may arise hereafter. If there is any other objection I have not explained I would like to have opportunity to explain.

Mr. AINSLIE. While you are on the floor I would like to offer an amendment to section 3, line 3, by striking out "for the same purpose."

Mr. BEATTY. I have a motion to strike out, prepared by the present chairman, Judge Morgan, and I will send it up, as he is now occupying the chair.

Mr. WILSON. I have a motion to strike out.

SECRETARY reads: I move to strike out all after the word "purpose" in line 7, section 3.—WILSON.

Amend section 3, line 3, by striking out "for the same purpose."¹—AINSLIE.

Strike out all of section 3 after the word "denied" in line 2, and insert "and those prior in time shall be superior in right."—MORGAN.

Mr. BEATTY. I will withdraw the motion I made to strike out the entire section, in view of the motion which you have just submitted.

Mr. SHOUP. Mr. Chairman—

The CHAIR. I think the gentleman from Ada has the floor.

Mr. COSTON. Mr. Chairman, I simply want to state what my understanding is of the meaning and purport of this section. It starts off primarily with this assertion or with this assumption that water is sacred, no matter about the priority of use; that water is sacred for domestic purposes, and for such must ever be held; that priority views do not apply to that; that all using water to drink, for cooking and for the ordinary domestic purposes, have the best right by nature. Now, as it passes from this, we will take for instance, to illustrate this right, which by the theory of this section is held sacred. It must always remain so. It cannot be diverted from the community for that purpose. Second to that comes the use of it for irrigation. As to any conflict between irrigation and manufacturing, it is deemed to be proper that there should be a preference given to the use of water for irrigation. Why? Because all manufacturing establishments can substitute power in case of unusual scarcity of water or drouth. As illustrating that feature we will say that all the waters of a stream have been appropriated and used; as year after year has passed that stream would supply a given amount, for domestic, agricultural and mining purposes. These comes an emergency like this season, when from natural causes there is a limited

¹—These words appeared in the section as reported, after the words "as between those using the water." See p. 1127.

supply. Now, the question is which will suffer the most; the orchards that are located along this stream for which the water has been used to irrigate them, or those manufacturing plants. We can see that situation today on many streams. Suppose this priority right should give to those men for manufacturing the absolute priority of use. If so, all those agricultural interests, all the work of years would be sacrificed for the want of water; while the injury done to the manufacturing interests, inasmuch as that power could be supplied from other sources, would not compensate for the loss done to the agricultural interests. The latter loss would be irreparable, it could not be remedied, there is no substitute for it; and I claim there is good logic, and anyone having due regard for the public interests will recognize that right and preference. It is not an absolute one. This question of irrigation and the use of water is yet in its infancy. We do not know yet all the conflicting interests or all the circumstances, which it will be necessary to know, to exactly regulate it at this time; but the committee was desirous of incorporating in this fundamental law some fundamental principles which should be a foundation upon which future legislation could work and build up to meet the necessities of the country. I object to striking out that section. I think it covers the case, if gentlemen will recognize this principle enunciated in this argument. I want them to bear in mind that this prior use when taken up and used for manufacturing purposes may be superceded by greater necessities. Bear in mind that they, to tide over an emergency like this, could substitute other power and other power is likely to displace water power. If the water power of this country can be used to prevent irrigation of the country, if it can be held by virtue of a prior right, good-bye to all the prosperity that we expect to come from the use of water in irrigating our plains and developing this country. It will be seen by reading this section carefully—"the right to divert and appropriate the

unappropriated waters of any natural stream to beneficial uses, shall never be denied." "Priority of appropriation" for what purpose? What does that mean? Say all the water of a stream limited in quantity has been located from time to time for domestic purposes. Say there is a failure to supply all these locations for domestic purposes. Then as to the use of that limited supply, when there is not enough in that stream, who shall have the first right to what there is? The first appropriator shall have it. That is all that portion of that section means. "But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose." I have given the reason for that. That is held to be the most sacred purpose to which water could be applied. It belongs there, and agriculture must suffer, and manufacturing must suffer if people are thirsty and want drink. "And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes." Subject to such limitations as may be prescribed by law. We did not desire to incorporate all the details of an irrigation system that should be necessary to meet all the exigencies of the future, or all the circumstances that surround us. We only aimed to incorporate here a foundation upon which future legislatures might create a law to the best advantage of the public good. I think the section is not ambiguous, that every word of it could be explained to the comprehension of every individual here, and I think the principles that underlie it and govern this distribution of water under those different circumstances are the correct ones.

Mr. McCONNELL. Is this discussion on the amendment offered by the gentleman from Ada?

The CHAIR. It seems to be a kind of general discussion on the section.

A MEMBER. It was my understanding it was in addition to that, of the intention of the committee.

Mr. McCONNELL. Yes, but I want to speak to whatever question is before the house, if there is one.

The CHAIR. The question is upon the amendment offered by Mr. Wilson.

Mr. McCONNELL. What is the amendment?

SECRETARY reads: To strike out all after the word "purpose" in line 7, Section 3.

Mr. McCONNELL. That is the question which comes up first, I believe. I desire to explain to you one little proposition, which is right under your own eyes, and particularly of the gentleman from Ada, that I think would cause him perhaps to withdraw this amendment. You have here, as I understand it, quite a large irrigation canal on this river. Part of the waters of that canal are used today for manufacturing purposes, in generating electricity to light this town. It might occur, as the science and use of electricity become more fully developed in this country, that it will pay the proprietors of that ditch better to use the water entirely for the generation of electricity, and if they should so conclude and there should be no law to prevent them diverting that which is their own to that use, they could throw that country, which is now attempting to be brought under cultivation, and some of which is already blooming as a garden, out again into a waste. I hope this amendment will not be adopted. I can see danger in it, very great danger.

Mr. WILSON. After listening to the argument of my brother from Ada, Mr. Coston, and the gentleman from Latah, I find there is much method in their madness. I am rather inclined to think that portion of the section ought not to be stricken out, but ought to be left there. I will withdraw my motion to strike it out; but if it is left there, it is absolutely essential that there should be an amendment, and I shall offer one. I shall move to insert the word "power or motor" after the word "manufacturing" in line 8, and for this reason.

The case Mr. McConnell cites is motor power of the electric light company of this city on the other side of the ditch. Of course that is not the manufacturing purpose; they might have several establishments of that kind for the purpose of generating power and monopolize all the water of that ditch, and this word "manufacturing" would not include it. They don't manufacture anything; they generate electricity.

A MEMBER. They manufacture light.

Mr. WILSON. They don't manufacture light.

Mr. MAYHEW. What does it come under?

Mr. McCONNELL. I think it is a distinction without a difference, but I do not object to the change.

Mr. WILSON. I will show you the difference. Suppose they want to run an electric motor car in this town some time. You are not manufacturing anything there; you are generating electricity for the purpose of running that car, and generating it by means of that power over there, and nobody can say that it is a manufacturing purpose, I think. I think there is a distinction and a difference both; and therefore I move to insert the words "power or motor" after the word "manufacturing."

Mr. McCONNELL. I second the motion.

Mr. POE. Mr. Chairman, this question of the use of water as has been stated is one of great importance to the people of this country. I have looked over this section very carefully and I am aware that there are certain provisions in it which might appear to be taking vested rights away from parties. But when we come to look at it in its proper light, and give the proper construction to it, I do not think that construction can be placed upon it that it would deprive any person of vested rights. It reads: "the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied." That simply says that any water that is unappropriated may be appropriated by any person for any use he sees proper.

The CHAIR. Will the gentleman suspend a mo-

ment? I want to ask Mr. Wilson, the gentleman from Ada, if he withdrew his first amendment to strike out all after the word "purpose"?

Mr. WILSON. I did.

The CHAIR. The secretary will read the next amendment.

SECRETARY reads: Amend section 3 in line 3 by striking out "for the same purpose."

Mr. AINSLIE. That is the amendment I offered, Mr. Chairman, and I think it renders the section more consistent with itself by striking out those words.

The CHAIR. The gentleman from Nez Perce has the floor.

Mr. AINSLIE. I was speaking to my amendment. I thought he was speaking to the one that had been withdrawn.

Mr. POE. Well, I do not wish to occupy the floor only one time, and I will give my views upon this subject, and I will come to that place in the section to which I wish to speak. "Priority of appropriation shall give the better right as between those using the water." Strike out the words Mr. Ainslie suggests "for the same purpose;" I think it is perfectly proper that should be stricken out, because this simply says this, as a proposition of law, that "priority of appropriation shall give the better right as between those using the water." Now, there is no constitution and no law, no legislature, than can deprive a citizen of a vested right. A man who has once by prior appropriation used and taken the water from a stream and appropriated it for a particular purpose, either for the purpose of mining, the purpose of agriculture, or for a manufacturing purpose, so long as he uses it for that purpose his right is vested and no law can divest him of it. "But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose."

Now, that is merely a dictum interjected here which will never probably be denied by any man who has priority of right to the use of the water. He will never deny a man who has located along that stream or ditch the use of sufficient water for cooking and drinking and to water his stock; never deny him that purpose, that right and leave him there parched, dry and thirsty for the want of that water, and use it absolutely for manufacturing purposes. While I do not pretend to say that it is even within the power of this convention to deprive that man of the use of that water which he has taken from the stream and flows along in the ditch there—while I do not pretend to say that any law would take that away from him so long as he used it for the purposes for which it was originally taken, yet, at the same time I am satisfied that no man would ever deny the family who lived on that ditch, or would permit them to perish for the want of that water, and use it for agricultural purposes. Therefore, I should not be in favor of striking out “domestic purposes.” Now, the next clause: “and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.” Now, the right to water; no man can acquire any right to water. There is no such thing as property in water. It is what is called a usufructuary right, or the right to the use. Now, a person who appropriates a stream of water, having the first right, and conveys it along the hillside by means of a ditch to a mill, is always required and always expected at the time of its location to state for what purpose he is taking it out. He either takes it out for mining or for agricultural or manufacturing purposes. What this law is intended to get at is that the man who takes water for manufacturing purposes, and appropriates that water while it is running along there in his ditch, has the right to the use of it during the time it is passing through his ditch. The moment it leaves his ditch it becomes subject to relocation. Now, what I claim, Mr. Chairman, is this:

that so long as that man uses that water for the purpose for which he took it out of its original bed, to-wit: for the purpose of manufacturing, he has the right to use that water for that purpose. So, if he has taken it out for mining purposes he has the right to use it for that purpose; and if he has taken it out for irrigation or agricultural purposes, he has the right to use it for that purpose; but the moment the manufacturer might conceive of the time when he could make the water more profitable for irrigating purposes than for manufacturing purposes, then he loses his priority right as a manufacturer, because he undertakes to appropriate it for a purpose which he never intended when he took it, and his priority right does not come in, and those men who have located along the line of that ditch then step in and say "here, we are first entitled to the use of this for agricultural purposes." We do not propose that we shall take the ditch away from him; the right to his work can never be forfeited; but the water was taken for a specific use, the use of manufacturing. He now undertakes to say that he has a priority right to use that water for another purpose; but the law, and in my opinion is that this article, if it is adopted, will confine him to the use for which he originally took it; and I am satisfied, Mr. Chairman, that if this article is adopted it will be of great benefit. There is no use in talking about depriving a man of a vested right; you cannot do that, however much you may attempt it. The only attempt here made is this: that that man having taken water for manufacturing purposes, so long as he uses it for that purpose and that alone he has a priority right, but if he should attempt to appropriate it for another purpose, then his priority right would be gone.

Mr. SHOUP. I will say to this committee that I have no interest in any manufacturing establishment anywhere. My business is agricultural—

Mr. GRAY. What do you raise?

Mr. SHOUP. —and nothing else, and I am opposed

to this section and provisions of this section; not because it will affect me personally in any way whatever, but because I have lived too long. We heard a great deal about retrospective law. If that is not retrospective law then I am unable to tell what a retrospective law is. We certainly cannot go back and take rights away from persons that they have had twenty-five or maybe fifty years in the use of water. As regards this question of giving the preference to agriculture over manufacturing, I do not believe in that. I think the history of any country that has been devoted exclusively to agriculture shows that that country will never advance to any great extent and never become a great and powerful country or state. Agriculture only gives employment to the strong; for those who can go into the fields and do hard work. While manufacturing establishments give employment to everybody; they give employment to the strong men, they give employment to women. Under this section, if any manufacturing establishment should take up the water of some stream and should establish a large manufactory there, giving employment perhaps to a thousand people, and another company would come in and take out a ditch from that stream for the use of that water for agricultural purposes; that water is rented out and sold to persons living along that ditch. There is a drug which is one of the by-products or waste from many manufacturing establishments, which is carried away in the water, and this product by polluting the water of this ditch renders it unfit for domestic purposes, and therefore the manufacturer must shut down his factory, notwithstanding he had a prior right to the water and used it long before it was ever used for agricultural purposes. For that reason I am opposed to it; not on account of any question of profit to myself, because I believe it is wrong in principle and not good law.

Mr. GRAY. Mr. Chairman, I want to say one word about this. I am in favor of the preference to agricultural purposes. In the east we have nothing further

than every man placed in the same position; but in our country here is situated differently, and without we have water for agricultural purposes, what in the world can our country amount to? As for manufacturing, I am not opposed to it, but I maintain that we must first protect those who cultivate the soil. I certainly firmly believe that that is the correct principle. In the east we do not require laws that give preferences to anyone, but the condition of this country is different from the east. I care for the manufacturing interest too, but first we must give the preference to those who till the soil, for from that we get what we live on. We can get our food from no other source. Let us protect that particularly. I want this section to pass as it appears in the text of the article.

Mr. VINEYARD. I have sent to the clerk's desk an amendment which I desire to have read. I am in favor of this section as it stands with the addition of that amendment.

SECRETARY reads: Add in line 8 after the word "purposes" the following: "but no appropriations shall defeat the right to a reasonable use of said water by a riparian owner of the land through which said water may run."

Mr. VINEYARD. I want to add to my amendment after the word "use" the following, "for irrigation." Now, there is an effort here to make every other right to the use of water secondary to its use for agricultural purposes, notwithstanding the time of its appropriation. That is the effect of this amendment. Priority of right is governed by priority in time, except in instances here specified. Now, if the doctrine of appropriation is to obtain in this territory absolutely, it will be for this convention to announce that doctrine as against the doctrine of the right of the riparian owner for the use of the waters to a reasonable degree and a reasonable use of the waters for irrigation, which would be cut off here.

Mr. Chairman, I desire the committee to understand

my position here. The owner of land through which a natural stream of water flows is the riparian owner; and according to the doctrine of the common law he has the right to the use of the waters of that stream as it flows through and along his lands, provided he turns it back into the stream so that the riparian owner below him may enjoy the use of the water of the stream without any diminution thereof except by the former use. There is no question about this doctrine, and it is admitted here in this territory. I tried a case upon this proposition here not a month ago in Alturas county in which this very question arose. I maintain, and I maintain it in all sincerity and candor, if you propose to protect agriculture in this territory, as my friend Gray says, I think this is the first step towards their protection.

Mr. GRAY. Let me add, that I don't propose that this takes away any vested right that lives today.

Mr. VINEYARD. But suppose the doctrine of appropriation obtains here. A man who gets a patent from the government to his land, although he has no appropriation, somebody has appropriated the water of that stream, either above or below, and claims another use of the stream; what becomes of the rights of the owner of the land?

Mr. POE. Let me ask you a question right there. Suppose that water had been appropriated by some party prior to the time that he located that land. Now, I will ask you if he does not have to take that land as he found it?

Mr. VINEYARD. He takes under the act of congress of 1866; but no vested water rights.

Mr. POE. That water has been appropriated.

Mr. VINEYARD. That is, for the purpose for which it had been appropriated, and no other purpose.

Mr. POE. But he has no right to go and take that water out of that stream just because he does live along the stream, subject to that right.

The CHAIR. I hope the gentleman will be permitted to proceed with his argument.

Mr. VINEYARD. I will answer that by putting another question to the gentleman. Suppose that the appropriator attempted to take all the waters of that stream for manufacturing purposes, and for no other purposes, we will say, to the exclusion of the riparian owners who may have located upon the land subsequently and gotten patent from the government; and this appropriator attempted to divert the use of that water for commercial purposes. Would he have the right to do it to the exclusion of the riparian owner along the banks through which the water ran, or could that water be taken absolutely away? It could be if you engraft in the constitution here that the doctrine of appropriation shall have precedence to the doctrine of the common law upon the subject of riparian ownership. That is the second effect of it.

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

Mr. VINEYARD. With pleasure.

Mr. AINSLIE. If the waters of a stream are already appropriated and taken out, how could the man go to the head of that ditch, who never had any riparian rights or ownership?

Mr. VINEYARD. I am not talking about a ditch, Mr. Ainslie. I am talking about a natural channel, not about artificial ditches. I am talking about a stream like the Boise river where it flows through his ranch or farm. Can a man by prior appropriation exclude the riparian owner of the land through which that stream runs from a reasonable use of the water for irrigation? I say no, unless you overturn the common law. That is all there is to it. I want that added by this amendment.

Mr. ALLEN. Gentlemen, I think that the committee have taken under consideration all the arguments that have been presented, and in behalf of the committee I wish to say that these points that have been

brought up in detail, have been carefully considered. I think that Mr. Ainslie, who has been present before the committee, would have been very glad to yield and withdraw his amendment striking out the words "for the same purpose," because it vitiates the very idea which is carried out in the balance of the article. That matter was very carefully considered, and I wish to say on behalf of the committee that I have listened very attentively, and I find no argument presented yet that changes the view or alters the determination of the committee in coming to a conclusion to adopt this theory. For if we take the proposition of the gentleman who has just taken his seat (MR. VINEYARD) we throw aside all the experience of California, Utah and Colorado and go back to the primitive age when the riparian doctrine was first established. They considered this question in all fairness to all interests; and as the gentleman from Alturas, Mr. Beatty, who first asked to have this section stricken out, considers all the facts I think he would yield that point. Answering his question in regard to the right of domestic and agricultural purposes taking precedence over manufacturing, I will say that the committee deemed it more important that a woolen mill or a brewery or a cannery or any manufacturing purpose which are established, should suspend operations, if necessary to the life and health and sanitary interest and welfare of the people during the two or three months in the summer which are the months of irrigation; that those interests should be subsidiary to that of agriculture, and it was for that very purpose that this language was inserted by the committee. I have in mind a town of a thousand inhabitants in this territory whose vital question today is, shall we have the right to the use of water for domestic purposes as against those who have appropriated water for agricultural or manufacturing purposes, who perhaps had a preference in that right of appropriation, and are turning out the waters of that stream upon which the people are

dependent for their meadows, and nearly one-half the stream is appropriated and used today by three or four parties, and there has been a great deal of trouble; and as one individual I represent that community in asking that the right for domestic purposes shall be protected. That is, the right to the water for a town in preference to all other agricultural interests. They may divert the entire stream, when it becomes so low as it did at one time this year and did a year ago, and I think the committee should be sustained. Practically I have no objection to one or two amendments at the close of this section, but I think the section should be adopted practically as it is presented by the committee.

Mr. GRAY. Let me hear the question that is now before the committee.

The SECRETARY. It is the amendment offered by the gentleman from Boise: Amend Section 3, line 7 by striking out the words "for the same purpose."

Mr. GRAY. I want to say this: First in time, first in right. In answer to the gentleman from Alturas I will say this: When I go upon a stream I take it subject to all prior rights. I don't want it so that after I have got a farm and have been irrigating from a stream, some man may come there and settle and say riparian rights to me. I say first in time, first in right, and that water he has appropriated and which is for a necessary purpose, he shall have.

Now let him read the west coast doctrine and he will find it clear in that. The idea is here: I go first upon a piece of land, I take the water upon it, then this gentleman from Alturas wants to come and say "riparian rights," and he will go and shut me entirely out, notwithstanding I owned it first, and after the loss of water by percolation and what would be absorbed, there would be nothing left for me. Why wasn't there? I found it in the condition it was; I took it; my rights were good upon it; but he wants to come in years after I have cultivated my land and

say "It is for me now, because I am a riparian owner on that stream." I say take it as you find it. When I find that men have taken the water from a stream I say it is theirs, not mine. I adapt myself to the condition of things as I find them. When I go there first I will take what I need; we cannot have any more than we need as a matter of course; the law won't permit us to do that. But I say, let the first man who goes and blazes a trail into the country and finds a ranch and cultivates it, let him have his rights because he is prior to me, and I shall not go above him or below him or any other place and say "it is riparian, I must have it." As I said before, I say again, first in time, first in right, and that doctrine must be protected in this country.

Mr. McCONNELL. I believe we are participating in a sort of general discussion, debating all of these amendments at the same time. I will refer first to the amendment offered by the gentleman from Boise as regards striking out in line 3 Section 3 the words "for the same purpose." The committee in formulating this section put that in there for what they deemed good cause. I think it would be fatal to strike that out. Now, you may read "priority of appropriation shall give the better right as between those using the water." That would be the way it would read if we struck that out. A man might go up here on this stream and take out a ditch and use the water for generating electricity or running a flour mill; but as I explained before, he might after a while conclude that he could dispense with a part of that water and let it out to his neighbors below for irrigating purposes. But if those words "for the same purpose" are stricken out, he might afterwards conclude he would take that water all back and not allow the people to have any for irrigating purposes, but use it all for his manufacturing enterprise. He might for a dozen years let them have a portion of that water so that they would make valuable a section of country which he practically had the

key to in his own hands, and when they got their farms made and in a condition to be profitable as an investment, he could crush those farmers by turning the water again on to his wheels and taking it away from the farms. It is all right to have priority "for the same purpose" where men are along the ditch; one man goes in here today, another tomorrow, another next year. And this article provides that those who settle first shall have first claim to draw water from that ditch, those second, and so on to the end. And where there is not water enough for all parties, it provides that the legislature may prescribe in what proportion they shall get it under rules and regulations.

Now, in regard to this riparian right business, I had my attention called to a question since I have been here, on that subject; and as I told the gentlemen of the committee, that was very largely what was the occasion of the calling of the late constitutional convention in California. They found that under those claims of riparian right large capitalists were crushing out the poor settlers, and there was a clamor for a constitutional convention that this thing might be regulated, so as to give every man an equal show. I believe I had the first irrigating ditch that was ever taken out of the waters of this or Boise county for irrigating purposes, and under the plea of riparian rights today one of the finest farms in Boise county is left a desert after the crop was planted and grown. Parties came in above, and under the claim of riparian rights, diverted the water, and the man who has been cultivating that land and using that water for twenty-six years is today deprived of it and is compelled to go into the courts, and probably spend as much in litigating for what should be his vested rights, what every man would admit are his vested rights, as the farm is worth. I hope this section as printed will be adopted; I hope there will be no further amendments to it, or if further amendments appear that they will be brought up one at a time, and let the different members of

this committee explain why the lines are as they are and why they should not be amended. I don't like this scattering discussion. I would like to meet every line as it comes up in detail, and let us explain. I don't think it would require very long. I think we could explain it so that amendments would be withdrawn.

Mr. BEATTY. Mr. Chairman, one of my chief objections to incorporating this as a part of the fundamental law is that we do not know just what we want. I do know that this is a very important question. I know that the question of appropriation of water is yet in its infancy in Idaho, and I, for one, scarcely know what we want. But we are undertaking in the doctrines here incorporated to establish as it were something that will result in a great deal of damage. My friend from Boise touched upon the keynote. My friend, the Ajax of the bar, as he has been properly termed, of southern Idaho, seems to use good logic, but I don't like some of his conclusions. He says "first in time, first in right." That is the true principle, but when he argues farther and comes up to his conclusion, he says he proposes to dry the manufacturer up, if necessary, in order to save the agriculturists. Now, let us see what it will lead to if we adopt this principle. Perhaps we can get at it better by taking an illustration. Take the case of the agriculturist. He finds a little stream, large enough to irrigate 160 acres of land. He takes up that water right, being the first man there. He certainly under all laws of nature would be entitled to it, because he is the first man there, and so far by our laws he would be entitled to it. He builds his home, improves his farm; perhaps after he gets everything in a perfect state of cultivation half a dozen people come along and start a town above him—and that strikes my friend over in the corner (MR. ALLEN)—and they want that water for domestic purposes. Now, I ask whether it is just that this little town shall undertake to deprive the agriculturist of all his water, break up his home, destroy the fruit of his

labor for years, perhaps, kill out the orchard my friend speaks of, destroy all he has simply for the benefit of this little town. Your answer is this: Is it not better half a dozen people in town shall be benefited rather than one man on the farm? Perhaps so, but if so, I say, let those people in the town buy the water right. If it is a great benefit to them, let them buy it from the farmer, who has taken up his water right there. He was there in time and has built up his home, everything is based upon that right. Now, let the people who want to start a town buy his water right and not take it by force. You attempt to say here, gentlemen, simply this, that if the farmer locates a farm, and builds it up for years, half a dozen other men can come in ten years afterwards, start a little village and take his water right away from him. That is it precisely; you can't dodge it; my friend to the right, Mr. Poe, says he is not in favor of it, and yet he is in favor of leaving the section in, and the reason he gives me privately is this, that it is of no account if you put it in, that it is all bosh.

Mr. POE. No sir, I take this position, and I think the gentleman misunderstood me, that the man who appropriates water for manufacturing purposes, having established that right by prior appropriation, obtains a vested right for that use. Whenever he undertakes to change that use and use it for any other purpose than that for which it was originally taken, then parties, coming subject to his original location, but prior to the time that he undertakes to appropriate it for this other use, have a prior right to him. That is the position I take. In other words, that he has only the right to the use of that water for that particular purpose, and as long as he uses it for that purpose he is entitled to it and nobody could divest him of it.

Mr. BEATTY. And this section provides just to the contrary of what my friend states that he wants done. In other words, it provides that if a manufacturer has established his works, gone there and worked

ten years, half a dozen farmers can come in (or half a dozen people) and establish a town—or a hundred people, for that matter—and take that water right away from the manufacturer. That is just exactly what it provides.

Mr. McCONNELL. Let us see if it does; I cannot see that it does.

Mr. BEATTY. “Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.”

Mr. McCONNELL. Does it say anything about any restrictions or regulations?

Mr. BEATTY. You cannot make a law in conflict with this. You provide “subject to such limitations as may be prescribed by law,” but you cannot make a law that is contrary to the provisions of this section.

Mr. COSTON. Will the gentleman allow me to interrupt him? Is there anything in this section that is retroactive or assumes to give any right as affecting vested rights?

Mr. BEATTY. Yes. I will tell you where I think it assumes to go back of a man’s rights. If a farmer has taken up his water right, established his home, there is nothing in this section that prevents people coming in and using that water ten years afterwards for domestic purposes, and absolutely taking it away from him. I tried to illustrate the case by supposing a stream just large enough to water 160 acres of land. Let me make this clear if I can. Here is your stream just large enough to water 160 acres of land. You go and take possession of it and develop your farm. Now,

will you tell me what there is in this section that would prevent half a dozen people from coming in afterwards and starting a little village above you and claiming that they wanted that water for domestic purposes?

Mr. MOSS. What right would those half dozen people have to take any of this water that is already appropriated?

Mr. BEATTY. They ought to have no right, but you propose by this section to give them that right because they are going to use the water for domestic purposes. These people that come and start the town propose to use it for domestic purposes, and that, you say, by this section, shall be a superior right to that of the farmer who took it up for agricultural purposes.

Mr. HASBROUCK. That is only in time of scarcity.

Mr. BEATTY. It matters not whether it is in time of scarcity or not. Why should you, because water is scarce, take it away from the man who was first entitled to it, in times of scarcity or any other time?

Mr. ALLEN. I think the gentleman forgets that this priority has already been provided as a fundamental principle. He forgets that fact and argues from a premise that does not naturally follow. The committee took all that into consideration.

Mr. BEATTY. The committee made a great mistake in putting in the words it has and giving it a different meaning. I will go back to them: "Priority of appropriation shall give the better right as between those using the water for the same purpose." And then you go on and say "but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same" as used for those different purposes, domestic, agricultural or manufacturing purposes, then in that case, regardless of the priority, certain parties shall have the preference. That is exactly what this is, and you cannot make it mean anything else. You first provide all right for the

“priority of appropriation;” that is the principle you start on, but you say that when this same water is used for those different purposes, then certain parties shall have the preference in the use of it regardless of the right of priority.

Mr. COSTON. Subject to such limitations as may be prescribed by law.

Mr. BEATTY. That is true, but you cannot make a provision contrary to this, can you? Can you say in your constitution that a party who is using it for domestic purposes shall have the preference, and then by law undertake to say that he shall not have it, but that priority shall govern? Of course you cannot; you cannot contradict yourself.

Mr. McCONNELL. We can say if they have priority subject to such regulations as the law may determine, we can regulate as to what amount they shall take and what they shall pay for it.

Mr. BEATTY. But that does not change the provisions of this law. You establish the absolute right here of one party over another, regardless of when the water may have been taken up. That is just exactly what you do by that provision. I submit it to any lawyer if that is not the only construction that can be placed on that provision.

Mr. GRAY. Let me ask you one question. What I mean is this: With equal rights, as I understand it, the agriculturist shall have the preference.

Mr. BEATTY. What do you mean by equal rights?

Mr. GRAY. This: Suppose there may be upon the stream farmers and manufacturers, and in ordinary years there is water for them all, but in some years there is not. Then I want the farmer to have it, because his are the products I live on; I can't live on cotton or wool or anything of that kind; I want something to eat, and my idea is that——(Laughter. The gavel falls).

Mr. HAMPTON. I desire to ask for information if the amendment offered by Mr. Beatty was not with-

drawn. I understand the discussion has been on that amendment for the last half hour, and I understand it was withdrawn.

The CHAIR. You are discussing the amendment offered by the gentleman from Boise. The amendment submitted by Mr. Wilson was withdrawn.

Mr. WILSON. One of them, and another one put in.

Mr. BEATTY. In my opinion it is impossible to discuss these amendments one by one because they all strike at substantially the same thing.

The CHAIR. Yes.

Mr. TAYLOR. I don't understand this section gives anybody any right to appropriate any water that has already been appropriated.

Mr. BEATTY. No, but it applies in the future just the same. As to rights that have already accrued, it cannot affect those further than this.

Mr. TAYLOR. But you say that a village might form and take a man's water right away from him for domestic purposes. I do not understand that anybody can appropriate any water that has been appropriated. "The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied."

Mr. BEATTY. Very well, let us take that proposition now, "the unappropriated waters."

Mr. TAYLOR. Any further than the right to——

Mr. BEATTY. Very well, Mr. Taylor, I will illustrate that. You see it refers to "waters unappropriated." Now here is a stream half a mile out here that is unappropriated, never has been taken up at all. Tomorrow you go there, take up that water and use it for farming purposes; you build up your farm, grow your orchards and make a home. In five years thereafter I and half a dozen other men come along and start a little village above you there, and step down and tell you, "Mr. Taylor, we have started a little village and we want this water for domestic purposes," and the

section which we are acting upon provides that we can drive you out if we want the water for domestic purposes.

Mr. TAYLOR. I don't think so.

Mr. BEATTY. That is exactly what it says. And this same rule applies to manufacturing. There is a stream out here large enough to start a manufacturing business. My friend over there says that the way to meet that is this: That the manufacturer can start some other power than water power. Why, that is not the only use that water is used for in manufacturing. Many manufacturing establishments require water for other purposes of manufacturing than for producing power, and need the water in the various processes of manufacturing, and you propose to shut them down. After he has started his establishment you propose to shut him down, and the agriculturist can come in and take it away from him, or a little town start up above him and cut out fifty or one hundred families.

Mr. McCONNELL. Do you claim that if a manufacturing establishment started, the farmer can come along and take it away from him?

Mr. BEATTY. Yes.

Mr. McCONNELL. Read the clause.

Mr. BEATTY. It is plain enough, and I fear a great many men are acting upon this with the wrong idea of the result of it. That is why I say we ought to be careful about adopting this. We are doing something in the dark, something that we do not know just what the effect will be. I will answer the gentleman's question now: "Priority of appropriation shall give the better right as between those using the water for the same purpose." Now if you stopped there that would give the man who first takes possession the right of the water. That would be right. But let us go on and see. "But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be

prescribed by law) have the preference." Now, take the case of the farmer and the party using water for domestic purposes. The farmer locates his ranch and has taken up a water right. Then these parties come in subsequently and want that water for domestic purposes. Now, the farmer has the priority——

Mr. McCONNELL. The amount of water he would cook with and drink, but not for all manufacturing.

Mr. BEATTY. But the farmer has the prior right to the use of the water.

Mr. McCONNELL. Oh, yes, if he could use enough for cooking and drinking to stop the mill.

Mr. BEATTY. And then you go on and say when some other party wants it for domestic purposes they shall have the preference regardless of priority. That is the difficulty with your law. It pays no attention whatever to priority, but gives absolute right, first, to those using it for domestic purposes; second, to the farmer; and lastly, to the manufacturer.

Mr. GRAY. Let me ask the gentleman one question.

Mr. AINSLIE. I want to offer an amendment and see if it meets with the objections of the gentleman from Alturas.

Mr. GRAY. I want to ask a question, if a man can get a vested right by——

The CHAIR. The time is up.

SECRETARY reads: Continue Section 3 as follows: "but the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in Section 14 of Article 1 of this constitution. Ainslie.

Mr. AINSLIE. I will explain that, Mr. Chairman, that in the Bill of Rights the other day in regard to private property and prior appropriation of water, is inserted private property for public as well as private uses, but private use is denominated a public use in

Article 14. The article was amended so that I have not got the full text of it.

If we recognize the principle of priority of rights, which is practically the law, and not only the law, but common sense also, and if we can by this provision of the irrigation law provide that persons may have prior right to the use of water for agricultural purposes, notwithstanding the prior appropriation by persons who want the same for manufacturing purposes, if the manufacturer has the prior right he ought to receive compensation for the use of his water by agriculturists under Article 14 of the Bill of Rights. And that would go to the question of taking private property and giving it to another without giving anything for it. By protecting the prior appropriator and recognizing his right, he would be entitled to compensation if he was shut down in order to allow the agriculturists to cultivate their farms. Let them pay the manufacturer for the use of the water.

Mr. ALLEN. I will say that the committee accepted that very view in conference with the committee on Mines and Mining, and the committee on Irrigation and the committee on Bill of Rights, where that same question came up, accepted that very view. It is subordinate to that proposition in the Bill of Rights, and that is the theory we are working upon. "Subject," as it is said in this clause preceding, "to the limitations prescribed by law;" and also subject to and in perfect harmony with the very theory presented by this committee.

Mr. AINSLIE. But this is an article of the organic law.

Mr. ALLEN. Certainly; but the committee accepted that act and are perfectly willing to interpret it.

Mr. AINSLIE. I desire to explain my position upon that and show the necessity of it. The question of mining is not mentioned in this section at all. The first appropriation of waters in this territory, as anybody knows who was here in the early days, or has

gotten it by tradition, was almost entirely for mining purposes; and in some sections mines are little patches of ground that can be cultivated and potatoes and sometimes fruit raised. Now, under section 3 the rights of miners in their appropriation of water are not recognized at all. There might be a conflict between the prior right to the use of the waters for mining purposes, and its use for agricultural or manufacturing purposes. The miners of this territory are willing that the right to the use of the waters for domestic purposes shall be prior to all other rights, being necessary to sustain human life and the lives of livestock, and nobody would have refused that or asked compensation for it. While we are willing to concede that, still, where our rights are taken up we do not desire that persons should come in subsequent to the miners of this country—and this country was built up by the miners, and it is the gold taken out of the ground by the miners that is building your cities and towns—we do not propose that parties shall come and take up a patch of ground 400 or 500 feet long, appropriate the water for agricultural purposes, and make our mining interests subordinate to the agricultural interests of people who come there ten or fifteen years later.

Mr. ALLEN. I will ask the gentleman if he read the section that was directory in the Bill of Rights, and to which this should be subordinate?

Mr. MAYHEW. Do you mean section 14 passed the other day?

Mr. ALLEN. Yes. I will say to the gentleman from Boise that the committee can very well adopt this language.

Mr. HEYBURN. I have an amendment which I think will cover that which I am preparing to send up now.

Mr. REID. I rise to a point of order. The hour has arrived at which the bill that was to be engrossed should be presented by the committee. I move that the committee rise for the purpose of taking up the

special order, and then we can go back to this. It is the engrossment of the bill disposed of this morning. I understand the committee is ready to report and I move that the committee rise for that purpose.

Mr. GRAY. May I ask what bill?

Mr. REID. The Suffrage bill.

Mr. GRAY. I second the motion.

Mr. MAYHEW. What advantage is there in that?

Mr. REID. It was made a special order for two o'clock, and it went over until three; and some gentlemen are going off this evening who want to vote on it. It will take but a moment to dispose of it. But I will yield to have the amendment reported that was offered by Mr. Heyburn.

SECRETARY reads: Amend section 3 by adding after the last word "in any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes."

Mr. MAYHEW. I second the adoption of that amendment.

The CHAIR. The question is, shall the committee rise with permission to sit again? (Vote and carried.)

CONVENTION IN SESSION.

Mr. MORGAN. The committee of the Whole have had under consideration the report of the committee on Agriculture and Irrigation, and have come to no conclusion, and have risen and asked leave to sit again.

The CHAIR. Without objection that will be so ordered.

Mr. HASBROUCK. Mr. President, your committee on Engrossment is ready to report.

The CHAIR. The clerk will read the report.

FINAL READING ARTICLE VI.,—ELECTIONS AND SUFFRAGE.

SECRETARY reads: Mr. President, your committee on Engrossed Articles of the constitution of the state of Idaho to whom was referred the article in re-

lation to Elections and Suffrage, have carefully examined the same and find it correctly engrossed. Hasbrouck, Chairman.

The CHAIR. Under rule 52, which reads as follows: (reading the rule which has been heretofore set out) I suppose the question now in order is upon the final reading of the bill?

Mr. BEATTY. I move we proceed to the final reading and adopting of the bill. (Seconded. Carried).

SECTION 1.

SECRETARY reads: Article —, Section 1. All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect.

The CHAIR. The rule now is, "vote therefor."

Mr. BEATTY. I would inquire whether the bill cannot be read as an entirety instead of section by section, and voted on by one vote.

The CHAIR. That cannot be done without suspension of the rules.

SUSPENSION OF THE RULES.

Mr. BEATTY. Then I move a suspension of the rules for that purpose. (Seconded.)

Mr. PEFLEY. I object.

Mr. AINSLIE. I object.

The CHAIR. Objection having been made it would require a two-thirds vote to suspend the rule.

("Question, question.")

(The vote was taken on the question to suspend the rules. The chair was in doubt. A rising vote was taken, resulting ayes 29; nays 7.)

The CHAIR. Twenty-nine having voted affirmatively and seven in the negative, the necessary two-thirds voted to suspend the rule and the rule is suspended.

SECTIONS 2, 3, 4 AND 5.

The secretary thereupon read the remaining sections, 2, 3, 4 and 5, of the article on Suffrage and Elections as the same had been amended and reported, and it was then moved and seconded that the entire article as read be adopted.

The CHAIR. The question is now upon the adoption of the article. I think it should have been read as a whole anyway, on looking at the rule. The question is now upon the final reading of this article to be incorporated into the constitution. Under the rule the vote must be taken by ayes and nays. As many as favor the proposition answer aye when their names are called, and those opposed will answer no.

The secretary proceeded to call the roll:

Mr. AINSLIE. Mr. Chairman, I desire to explain my vote, I have the right, I believe. I have stated my objections fully upon this bill, and I desire to repeat them, so that no lying correspondent can misrepresent me to the people through the Tribune. I endorse every measure here supressing the Mormons and preventing them from voting and disfranchising them, but I shall vote against this bill on account of its containing the section, for the reasons I gave in the few remarks I made last night. I want that understood, and I don't want to be misunderstood any more. I vote No.

Allen, aye; Anderson, no; Andrews, —; Armstrong, aye; Ballantine, aye; Batten, —; Beane, aye; Beatty, aye; Bevan, —; Blake, —; Brigham, aye; Campbell, aye; Cavanah, —; Chaney, aye:

Mr. CLARK. I would like to explain the reason of my vote. I cannot give the same reason my friend from Boise did in the hope of preventing misrepresentation in the newspaper press. That is something you cannot do until you are able to send mountain streams up hill. I object to that part of the act relating to disfranchising the polygamists which disfranchises them on the ground of membership simply. In my judgment per-

sons should be punished for the violation of law where the intent is clearly ascertained. Many persons are members of that organization who are ignorant of the consequences of their act, ignorant of any evil intent. I object also in regard to the scope of the passage conferring such broad powers upon the legislature. My experience with legislative bodies is such that I think constitutions ought to be authoritative; if I believed with the majority, that the legislature should have the powers which that section confers, then I should think that no constitutions were necessary. But if there is any need of a constitution it is in the protection of those who exercise the right of suffrage. I therefore vote no.

The roll call continued: Coston, aye; Crook, —; Crutcher, aye; Glidden, aye; Gray, aye; Hagan, —; Hasbrouck, aye; Hays, aye; Hendryx, —; Heyburn, aye; Hogan, aye; Howe, —; Jewell, aye; King, no; Kinport, —; Lamoreaux, —; Lemp, —; Lewis, aye; Maxey, aye; Mayhew, aye; McConnell, aye; McMahan, —; Melder, aye; Meyer, —; Morgan, aye; Moss, aye; Parker, “No sir”; Pefley,

Mr. PEFLEY. Mr. Chairman, as explanations appear to be in order I wish to explain my vote also. I am very sorry that the suspension of the rules was allowed. In fact, there are a great many things in that which I heartily approve of. I am very sorry to vote against the first section of that report in regard to the secret ballot. I am highly in favor of that and always have been; I think the only redemption for the American people is to have absolutely a secret ballot. But, sir, when it comes to going into the cradle, into the schools among innocent children, and into the future generations and disfranchising them, and cursing innocent persons that have never violated any law of this territory or any state, but who have their opinions and perhaps would die for them, as the martyrs of old have done, I say, so far as I am concerned, I am highly in favor

of every man in these United States exercising the rights that are guaranteed to him by the Constitution of the United States, one of which is the right to serve God according to the dictates of his own conscience, and therefore, Mr. Chairman, with some regrets, however, I have to vote against the whole bill. I vote no.

Roll call continued: Pierce, aye; Pinkham, —; Poe, aye; Pritchard, aye; Pyeatt, aye; Reid, aye; Robbins, aye; Salisbury, aye; Savidge, aye; Sinnott, aye; Shoup, aye; Standrod, —; Steunenberg:

Mr. STEUNENBERG. I am unqualifiedly in favor of sections 1, 2, 3, and 5 of this bill. I object to the power which is granted to the legislature by section 4, and therefore I vote no.

Roll call continued: Stull, —; Sweet, aye; Taylor, aye; Underwood, aye; Vineyard:

Mr. VINEYARD. Mr. Chairman, I am very sorry I am compelled to explain my vote on this article of suffrage. I am aware it takes a good deal of nerve to vote against this article as an entirety; and as has been well expressed by Mr. Steunenberg, who preceded me, and voted no, upon this article, I heartily approve and would give my hearty support, if it were not for the section which I regard as un-American; so undemocratic in every sense that I am compelled, on account of that section, to vote against this article as a whole. The debate on yesterday fully disclosed the reasons of the minority upon this subject; it is unnecessary to go over them now. Sections 1, 2, 3 and 5 meet my hearty approval, and would meet my hearty approval if I was permitted to vote for those sections as they stand in the article; but inasmuch as I have to vote upon all these various sections in this article, if I have got to take all, I hold that this section 4 so overrides and outweighs everything contained in the other articles that I am compelled to vote no upon the entire article.

Roll call: Whitton, —; Wilson:

Mr. WILSON. I vote aye, because I think this

article provides the best way of crushing the Mormon hierarchy.

Roll call: Woods, —; Mr. President, ——

The CHAIR. The vote for the adoption of the article is ayes 39, nays 8. The ayes have it, and the article is adopted.

Under the rule the article now goes to the committee on Revision to be incorporated in the constitution in its proper place. I will state to the gentleman that the chair did not want a precedent established. After looking carefully at rule 55 I do not think it was necessary to call the ayes and nays on each separate section. I think the words "proposition" on the final vote, "and upon the agreement to the instrument as a whole" mean each article, and I will hold, on looking at it more carefully, that it was not necessary. There was no necessity to suspend the rules. I say this in order that that may not be made a precedent. I think after it has been considered in the committee of the Whole, gone back to the convention, then this final vote is taken on the "proposition as a whole" and the ayes and nays called upon it, and then the adoption of the entire constitution is finally taken on the ayes and nays, that the words, "the entire instrument" means the constitution. What is the pleasure of the convention?

Mr. BEATTY. I move that the vote by which this article was adopted be now reconsidered, and that that motion be laid upon the table. (Seconded.)

Mr. MAYHEW. I rise to enquire what is the purpose and object of such a motion as that?

Mr. GRAY. That is what I want to know.

Mr. BEATTY. The simple purpose is to prevent any further reconsideration of the matter, and finally settle it.

The CHAIR. That is what the chair so understands.

Mr. REID. A motion of this sort, as in the House or Representatives, finally disposes of that article and it cannot be reconsidered again at this session of the convention.

Mr. MAYHEW. I am aware that would be the explanation, and I cannot see the necessity, when this convention with such a large majority has adopted it; for it would never permit this to be again introduced in the convention. I think it is encumbering the record for a useless purpose entirely.

The CHAIR. The question is upon the adoption of the motion. (Vote and carried.)

Mr. BEATTY. I would like, Mr. President, to be excused now; I was excused this morning.

The CHAIR. Without objection, the gentleman is excused.

Mr. McCONNELL. I now move that we resolve ourselves into committee of the Whole for further consideration of the report on Irrigation. (Seconded.) (Vote and carried).

COMMITTEE OF THE WHOLE IN SESSION.

Mr. Morgan in the chair.

Mr. PARKER. I move we take a recess until 9 o'clock tonight.

The CHAIR. The chair is of the opinion that the motion is out of order. The question under consideration is section 3 of the report of the committee on Water Rights and Irrigation.

ARTICLE XV.—SECTION 3.

Mr. ALLEN. Mr. Chairman, when we closed our discussion on this question a few moments ago, substitutes for section 14 were referred to. I now read the substitute in the Bill of Rights, and there is one clause—I will read section 14:

“The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes to convey the water to the place of use, for any useful, beneficial or necessary purpose, or for drainage, or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state or the preservation of the health of its

inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

“Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.”

And I say with reference to the amendment offered by Mr. Ainslie, the committee has no objections to that clause being added so far as it corresponds.

The CHAIR. The question is on the amendment offered by the gentleman from Boise, to strike out the words “for the same purpose” in line 3.

Mr. HAMPTON. Mr. Chairman, I desire to say a word upon that. I believe those words are right and should be left there. I call the attention of the gentleman from Boise to certain statements in the supreme court of California, which perhaps used the same language, and they were applied to cases like this. Where persons have appropriated water for milling purposes, for instance, not continuously, but for one or two days in a week, or where they have appropriated water for mining purposes perhaps one or two days in the week, or perhaps certain hours of the day, it has been held there, and in this same language, that the parties who appropriated the water in the first place for mining purposes, if they had only appropriated it for two days in the week, they had no right to take it the remainder of the time. Now, these words will exactly cover that ground and make the whole section harmonious and carry out the idea. I believe those words are the same as they have in California, or similar, and it seems to me they are necessary, or if not necessary, really proper and ought to be in there, and I am in favor of their remaining. I can't see that they can hurt anything.

Mr. ALLEN. I wish to correct an error. I understood the gentleman from Boise had withdrawn that portion of the amendment. It was the amendment Mr. Heyburn offered that I had in mind with reference to the use for mining purposes.

Mr. AINSLIE. This is to the same effect as the first amendment I offered about an hour ago. When the question came up between agricultural and mining interests I drew that amendment which you are willing to accept. Upon mining purposes Mr. Heyburn offered one which I did not hear read.

Mr. ALLEN. This is the amendment I had reference to. I don't want to be understood as agreeing to the amendment first proposed.

The CHAIR. There are four amendments before the committee now. Which one will you have read?

Mr. AINSLIE. I would like to hear Mr. Heyburn's amendment read for information.

Mr. HEYBURN. It is not very plainly written, and if the page will hand it to me I will read it. (Reads:) Amend section 3 by adding after the last word, "And in any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing and agricultural purposes." That applied to organized mining districts.

The CHAIR. The question is upon the amendment offered by the gentleman from Boise to strike out the words "for the same purpose."

Mr. AINSLIE. The gentleman from Cassia county, as I understand, says the supreme court of California refers to that matter. I never knew a decision in the supreme court of California or any other mining state or territory that refers to any such thing as that. All statements go to the proposition that priority of appropriation of water for any beneficial purpose whatever gives the best right. That principle is recognized by the supreme court of every mining state and territory of the United States. Now, sir, the reason I want to strike out "for the same purpose" is this: that there may be a conflict of the right to the water between manufacturing and agricultural purposes and for mining purposes. And I say that we are going to sustain the doctrine of he who is first in point of time is

stronger than he who is best in right. That is the only correct doctrine that can be maintained. If a person owns water for mining purposes, and only uses it for three or four hours of the day, *if he is not using that water*, anybody in God's world has the right to use it when he is not using it. Nobody contradicts that right, and that has nothing to do with striking out "for the same purpose;" but that confines it to three of four purposes. If a person takes water for mining purposes upon the same stream that is already appropriated, then the prior appropriator has priority over the subsequent appropriator for the same purpose. And if a person takes it out for mining purposes, and another person comes and takes it for mining or for agricultural purposes, subsequent to that time, there is a conflict at once between those two parties, and if you strike out those four words, "for the same purpose," it places them all upon the same level with the qualifying words following. "But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose." That does not conflict by striking those four words out; nor does it conflict by giving the agriculturalist priority over the manufacturer. But it recognizes to the fullest extent the priority of appropriation by any person who has taken the water; and that I believe is the true doctrine in these mining countries and all countries on the Pacific Coast. That is the reason I ask to have those four words struck out. It does not affect the matter at all, except the way it is there now it confines priority of appropriation between persons of the same class; priority between men who have appropriated for mining purposes, and priority between men who appropriated for agriculture, but does not give priority of appropriation by the miner any preference over priority of appropriation for manufacturing or agricultural purposes, and that is what I insist on, no matter what the rights are if the use is for a beneficial purpose.

Mr. GRAY. I must retort that I am for prior appropriation; first in time, first in right; I care not for what purpose.

("Question, question.")

The vote was taken upon the question of the amendment offered by Mr. Ainslie to strike out the words "for the same purpose" in the third line.

(Division demanded. On the rising vote, ayes 18, nays 11, and the amendment was carried.)

Mr. HEYBURN. I do not know, Mr. Chairman, whether there are any amendments prior to the one I sent up.

The CHAIR. Yes, three or four.

Mr. HEYBURN. Let us have them read in order.

SECRETARY reads: Strike out all of section 3 after the word "denied" in the second line, and insert "and those prior in time shall be superior in right."

Mr. MAXEY. I would like to enquire if 18 and 11 is a quorum?

Mr. HEYBURN. That question cannot be raised in committee of the Whole.

The CHAIR. The inquiry is not in order.

Mr. CLAGGETT. I would suggest to my colleague that that matter is passed upon already. The very sentence says: "Priority of appropriation shall give the better right as between those using the water." By striking out "for the same purpose" it leaves it just the same.

("Question, question.")

The vote was taken on the adoption of the amendment. Lost.

SECRETARY reads: Insert the words "power or motor" after the words "manufacturing" in line 8, section 3. (Vote.)

A division was demanded. On the rising vote ayes 4, and the amendment was lost.

SECRETARY reads: Add in line 8 after the word "purposes" the following: "But no appropriator shall defeat the right to a reasonable use for irrigation, of

the said water by a riparian owner of the land through which said water may run.”

Mr. VINEYARD. Mr. Chairman, I desire to make a statement about this proposed amendment. I do not desire the members of this convention to understand that this amendment shall defeat the right of any ditch owner through whose land the ditch runs, because the owner of the land would not be a riparian owner, and that would not be a natural stream. But I desire it to be understood that it is purely and simply for the purpose of protecting the riparian owner of the land through which the water runs. That is to say, that all the waters of a stream could not be diverted to the exclusion of him who owns the land.

Mr. CLAGGETT. That is all covered thoroughly by a following section.

Mr. VINEYARD. I believe upon examining the section as it now stands, that that right is already guaranteed outside of it; but I put it in there for the purpose of putting it beyond any question in the courts as to whether the rights of a riparian owner were saved by this section. I believe they are; that is my opinion; but in order to save any question upon that subject I have inserted this amendment. I am aware that all prior water rights are respected, nor does this interfere with any prior water rights. But the right of the parties to the stream for a reasonable use, which has been interpreted by the courts in California upon this subject, is for domestic and irrigating purposes, the reasonable use and circumstances of each particular case governing what a reasonable use was. Now, under the act of congress of 1866 all water rights located upon the public domain are protected, and all patents now issued by the government of the United States to the patentee state that fact. But I do not desire the members of this convention to misapprehend what that means as I understand it. I don't know whether you all understand it as I do or not. A prior right that is respected by that act is the right, is the easement over

the lands that have been acquired by appropriation. That is respected and no more. It never was the intention, as I understand it, by the act of 1866,¹ to take the waters all and entirely from their riparian owner; but simply the easement that had been acquired by an appropriator through his land prior to his settlement upon it, was the only thing that is reserved in the patents, and water rights acquired in that way are protected by this act of congress and are secured to the appropriator, and no more. This question was very ably determined and settled in a celebrated case in California long since the adoption of the new constitution; I refer to the celebrated case of *Lux versus Haggin*, reported in 69 Cal. 255, upon this subject. As between appropriators, Mr. Chairman, prior in time, prior in right, that is the doctrine, and I am not here contending against any such doctrine as that. That rule only applies as between appropriators; but where a man locates upon the soil and acquires a patent from the government of the United States, the stream running through the land in its natural channel as defined by nature, the reasonable use to that water is absolute, and I say that it will be beyond the province of this convention to attempt to take that away from the locator, which is secured and guaranteed to him by the law of congress; and I have simply added this amendment for the purpose of securing beyond any question that right. Although I believe upon examination and looking at this section again that that right is not interfered with; that the doctrine of appropriation is a doctrine inferior, so to speak, to that of the riparian owner, to that of the man who owns the land, who owns the soil through which the water runs. And I understand that nobody can take that absolutely away from the man who owns the soil, provided he turns it into the channel below so others can use it as it flows over his estate. Nobody by act could do that; it would

¹—14 Stat. at L., 253.

amount to confiscation of his estate if it could be done.

Mr. GRAY. Just one word. If I go upon a stream I have a right to that unappropriated water; if I find water there I have a right to it, a right which attaches to the land which I take. But if I find it all taken from there by prior appropriators, I do not claim that I can go below them and settle down, and when I saw at the very time I located my land the conditions existing there, I cannot go up there and make them cut their dam or ditch and run the water down below to me. I say, the prior appropriator has the right; first in time, first in right.

Mr. CLAGGETT. That same doctrine of priority protects the riparian owner, provided he takes up his land first; and as said by the gentleman from Ada, if all the water is taken out and applied upon their land, then when a man comes and takes up the land and finds that the water is all gone, he takes the land subject to the other man's rights.

Mr. GRAY. He takes it as he finds it.

Mr. CLAGGETT. Certainly.

The CHAIR. The question is on the amendment offered by the gentleman from Alturas. (Vote and lost.)

SECRETARY reads: Continue section 3 as follows: "But the usage by subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public or private use, as referred to in section 14, Article I., of this constitution."

Mr. AINSLIE. I would like to have the committee on Irrigation and Mining accept that amendment.

Mr. ALLEN. That chairman is not present, but for one, so far as the idea corresponds with that in the Bill of Rights, I think there would be no objections.

Mr. AINSLIE. That would secure all their constitutional rights, and I move the adoption of it.

Mr. GRAY. Wouldn't it be proper to be in the next section?

Mr. CLAGGETT. So far as that matter is concerned, I think that whole subject is covered by sections

5 and 6, so far as it ought to be covered. I don't believe there should be absolute priority in irrigation by any claimants, but let that right be limited as it is here, and in the other sections, so that when the first man comes in and takes up the water he is not going to be allowed to play the dog-in-the-manger policy. There may be in ordinary years enough water to supply all of the people that settle along a ditch or canal, which is being distributed, but when there comes a dry season, is one-half of the farms to be absolutely destroyed because the other man has an absolute priority, or is there to be an equitable distribution under such rules and regulations as may be provided by law? And sections 5 and 6 deal specifically with that question.

Mr. GRAY. I say, Mr. Chairman, that the man first in time is first in right. If he was there first, and the water is short, it is his. If there is more than he wants, he shall not be allowed to play the dog-in-the-manger policy. That is, if he does not need the water, as a matter of course, the general law will keep him from doing that; but if he was there first, he shall be first served, and when he has supplied his needs, then his neighbors below him can be supplied, and so on down.

Mr. AINSLIE. I have read these sections carefully, and it is not provided for in any other section; but if you contemplate making the agricultural interests of the territory superior to the manufacturing interests, as proposed in the section as it stands, without this amendment, then any person, who has appropriated water for manufacturing purposes alone, and is using it for that, and during a dry season the water becomes scarce, the farmers below the line of that ditch, if they have built another ditch appropriating those same waters, could deprive the manufacturer of his prior right to that water, deprive him of a prior appropriation without compensation. I go this far in a conservative way, and say while we may give them a prior right to use the water if there is not enough for the agriculturalist and the manufacturer both, give the

agriculturalist a prior right to the use of the water, but include in section 14 of your Bill of Rights that he shall pay the manufacturer for its use.

("Question, question.")

Vote on the question of the amendment offered by the gentleman from Boise. Division. On the rising vote, ayes 13, nays 12. And the amendment was adopted.

Mr. CLAGGETT. Mr. Chairman, I was not here when these amendments were adopted, but I call the attention of the gentleman from Boise to this fact, that his amendment is not applicable to the condition of things as he thought it was. It does not say that this question of preference is an absolute one at all; "but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes." Where there is a stream of water or large canal furnishing power in a given year for manufacturing purposes, and is also supplying water for the purposes of irrigation, then it comes along to a dry season when there is not water enough to supply them all, and then the power is required to give way to irrigation. Now, I don't believe this convention understood this proposition.

Mr. AINSLIE. Give way on just compensation.

Mr. CLAGGETT. For what?

Mr. AINSLIE. For the prior appropriator of the water. If there is not water enough for manufacturing and agricultural purposes both, preference is given to agriculture so far as the use of the water is concerned, but makes the agriculturalist pay the manufacturer, who is the prior appropriator, for the use of that water.

Mr. CLAGGETT. Well, I would support any such amendment as that, if the section was a case for dimi-

nution of anything, but it is not. The language of this section you have amended does not propose to take away the prior right of the manufacturer at all. It simply says that when there is a scarcity of water for those desiring to make use of it in that shape, as in the case of a dry year, then for that year the power shall yield to the interest of agriculture. If you were to stop right in the middle of the season, when the whole thing would be over in two months, to condemn under the provisions of the Bill of Rights the right to the use of the water for that season——

Mr. POE. (Interrupting.) Let me ask you a question.

The CHAIR. There is nothing before the committee.

Mr. POE. Then I don't see why the gentleman is occupying the floor, if there is nothing before the committee. I hope the chair will see that there is something before it, before it permits anybody to talk.

SECRETARY reads: Amend section 3 by adding after the last word, "and in any organized mining district those using the water for mining purposes, or for milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes."

Mr. HEYBURN. Mr. Chairman, it seems that this is an absolutely necessary provision. Perhaps there may be some persons in this convention who are not familiar with the necessities of mining and mining districts; but in the absence of such a provision as that, those little Italian ranchers, who settle along our mining streams to raise their truck, without professing to have any title to the land at all, would take preference over the miners who have appropriated the water for their use, because that is agriculture, notwithstanding it is done in a small way. We do not want any such class of people to acquire a prior right to the use of our streams in the mountains, which we need for the primary industry of the country, which is mining. And in the absence of some such provision as that, those

men, being agriculturalists, when the water runs low in the summer time would shut up our mines, which would not do; and I therefore offer that amendment.

The CHAIR. I would inquire of the gentleman if the amendment he proposes would not be directly opposed to the provisions of this section.

Mr. HEYBURN. It is an exception from the rule specified or laid down in that section. Making it applicable to organized mining districts alone, it does not apply anywhere except in organized mining districts, and mining districts are seldom organized except where there is some mining industry and where it predominates. It would not apply outside of that.

Mr. GRAY. I have one word to say. I shall stick to my principle, first in time, first in right. The man that is there first and gets the water first, I don't care what its purpose is if it is a legitimate purpose, I want him to have it. I think the principle is as clear as can be, whether he is a farmer or a miner or whatever he may be. Although, as a matter of course, I would prefer that the agriculturalist should have it ahead of the manufacturer; but mining is just as much an industry as raising wheat, and brings more money to us, a great deal.

Mr. HEYBURN. Mr. Chairman, I want to call the attention of the gentlemen having this matter in charge to the fact that I do not find anywhere any provision that a person appropriating water must be a citizen or have declared his intention. It was called to my mind that the majority of these Italian farmers are neither; and I do not know whether the gentlemen intended in that first section to provide for that or not. It seems to me there ought to be some such provision.

Mr. CLAGGETT. I think the amendment offered by my colleague is a beneficial one. The idea of that section was to give the preferred use to irrigation and agriculture in agricultural districts, without affecting in any way the question of priority of appropriation in other districts.

The CHAIR. The question is on the amendment offered by the gentleman from Shoshone.

Mr. STANDROD. I would like to have the amendment read.

SECRETARY reads Mr. Heyburn's amendment.

("Question, question.")

Rising vote taken; ayes 21, nays 6; and the amendment was adopted.

ADDITIONAL SECTION PROPOSED.

Mr. HEYBURN. Mr. Chairman, I desire to propose, following that, a new section.

SECRETARY reads: Where land has been located along or covering any natural stream for any purpose, which contemplates the use of the water of such stream, then no person shall be permitted to take the water from said stream at a point above the land so located to the exclusion of such locator after such location.

The CHAIR. It is the opinion of the chair that we ought to proceed with the adoption of the article.

Mr. HEYBURN. It should follow the mining section because it is intended to apply to this.

The CHAIR. It can be considered now if it is desired by the convention. No objection heard, and it will be considered.

Mr. HEYBURN. Mr. Chairman, I will explain the object of the section. When a party goes upon a natural stream and makes location of a mining claim he does not immediately commence to use that water for any beneficial purpose perhaps, because the mining law gives him a certain length of time in which to do his assessment work, so that he may not be said to have appropriated that water by the mere fact that he has located a mining claim across the stream. Yet, if a man located a placer mining claim covering a stream with a view to working that placer mining claim with that stream, he should not be required to divert the water from the stream in order to give him title to it; but should be allowed to leave it in its natural channel until he is ready to use it for the purpose of working

that mine; and in the meantime no man should have the right to go above him in the gulch and take out a ditch for the express purpose of embarrassing that man in his future operations. We see that thing applied sometimes, and that thing done by men who can go above a mining claim when they know that eventually the miner is going to require that water to work his claim, and they locate a ditch right for the express purpose of compelling the miner to buy the water of them to his exclusion, and they set up the defense that he was not using the water, that he had not appropriated it, that the only act he had done had been simply to locate a mining claim on the gulch. And for the protection of that class of claims it is necessary to have some provision in this constitution, because the law of the United States gives a man a certain length of time in which to do his work, and this constitution should not abridge that by indirectly legislating that unless he did actually use that water he could have no title to it and that another man could acquire title to his exclusion.

Mr. GRAY. I will ask the gentleman if that is not the law anywhere as it stands?

Mr. HEYBURN. It will be the law unless we enact something to change it; it is the law now and I want it to remain the law in the organic law of this territory.

Mr. GRAY. Why put it in here then?

Mr. HEYBURN. The fact that it is the law now does not promise it will be the law after this constitutional convention gets through with its work. If we say without any qualification that prior appropriation or diversion of water, etc., I presume we will mean just that thing, and we don't want to leave that a thing of construction for the courts. The object of our action here is to establish these fundamental principles of law, and in this bill already we say that prior appropriation shall give a prior right, and that has been the battle cry of the gentleman from Ada throughout the consideration of this section. I simply want this con-

vention to say that the location of a mining claim or of a piece of property, which from the very nature of it contemplates the use of this water, shall be a prior appropriation. That is the object of the section.

Mr. GRAY. I don't see how we are defending the law.

Mr. HEYBURN. It is a declaration of a right.

Mr. GRAY. As I said before, we will have this constitution bigger than the Bible before we get through. It is just and clear, and a principle that has been decided before you and I were born, I expect—not before I was, but before you were—that a man cannot take and hold water without he does it for a useful purpose. He cannot hold it just because he has taken it; that does not give him a right; it does not give the factory a right, and if he is not using it, it must go below to the neighbor. It is not a *property*, it is only a *use*, that we have in this water, and I do think that we are lumbering up what we call a constitution with all these proceedings over a matter connected with it which should be for the statutes if we desire it at all.

Mr. HEYBURN. I would like to ask the gentleman a question. Does the gentleman understand me to take the position that a man acquires title to the water itself by reason of this section?

Mr. GRAY. That is the way I understand your contention.

Mr. HEYBURN. Then the gentleman fails to comprehend the meaning of the section. I am probably as familiar with the fact as the gentleman is that the courts have universally held that the title is not to the water itself, but to the use of it; it is not a principle that is peculiarly within the knowledge of the gentleman, notwithstanding his venerable age. The doctrine that the title is in the use of the water has nothing to do with the principle that is behind this section. This section is to protect the land owner in the right to use that water when he may see fit to use it, and when he is not using it it is open to the whole world to use it.

If there is an hour or a day or a month of any year that he is not using that water, it is subject to the rights of any other man who will comply with the provisions of the law as to the use of it; but when he is using it or has use for it in order to make the property he has selected with a view to using it valuable, he has the right to use it.

Mr. GRAY. That is the law, I say; I don't see any point in the amendment.

Mr. CLAGGETT. I do. I see a multitude of points that do not lie in the bill, they lie on the outside. We have sacrificed the doctrine of riparian ownership to the doctrine of appropriation for agricultural purposes. That is to say, that when a man takes up a piece of land over which a natural stream was running, and does run when it is not stopped, that the prior appropriator of that water may go above, take the water out and apply it for agricultural purposes upon his land. We have done that by the consent of the entire convention. Now what does my friend want? He wants to reserve and preserve the doctrine of riparian ownership as to mining claims, and cut off the right of anybody to go above and take out the water and leave the first locator of the mining claim, who has never dug a ditch for the use of a single foot of water, who has staid there for fifteen or twenty years, and when somebody has come along and taken the water to some beneficial use in the matter of mining, then by reason of the right of riparian ownership this original claim owner can demand that that water be turned on to him at any time. Now, I say that the doctrine of priority appropriation should govern in all particulars which are absolutely necessary and which we have provided for here. That is precisely what his amendment amounts to. Let us illustrate. On Pritchard gulch in Shoshone county, Mr. Pritchard came in there and located all those claims in twenty acre tracts, 40 rods wide and 80 rods long; in other words, each one of them a quarter of a mile in length. They never did anything about the water; if

they took any water out at all—there was quite a large stream—they were just taking out a sluice-head, and so they went along working in that way. Other men came to work and took out ditches to cover the hill ground, which cost thousands and thousands of dollars to construct, and after they had spent all this money, years afterwards this first appropriator concludes that he will use his ground in the same way, and he puts in a bed rock flume close in by those people to turn the water down to him. Now, I say the true rule with regard to the appropriation of water for mining purposes is this: that the man does not get title to the water by simply locating a mining claim over which the water runs; and every miner who has ever undertaken to do anything of the kind has generally got the worst of it, except up there in Shoshone county under the ruling of the distinguished jurist who presided over us, Judge Buck, who had quit and has left the territory since then. Now, what I say is this: when a man locates a mining claim over which water runs he should be allowed a reasonable length of time to go ahead and appropriate that water for mining purposes, and if he only appropriates a small quantity, then that the surplus should be left to be appropriated by somebody else on hill ground, and the original locator should be confined to the amount he has appropriated and used up to the time the other man takes the water out. It is to preserve that principle, which has been the theory of mining companies from the beginning, that I oppose the amendment offered by my friend from Shoshone.

Mr. AINSLIE. I have examined this section since it was read by the gentleman from Shoshone, and I view it in the same light that Mr. Claggett does, only it goes farther and says: 'locates upon a stream for any purpose;' it doesn't say mining purposes; it might be a ship canal or anything else. And in my opinion it is reintroducing this old claim of riparian proprietorship that is dead on the Pacific Coast and always will be. It does not limit the time; it says locate for any

purpose on any stream through which water runs, that no person can go up above him and take the water away if he wants to use it. It does not say when he wants to use it, whether he locates there today with the intention of using this water; doesn't say whether he uses it or shall use it, and his intention may last to eternity and he may never appropriate the water, and yet prevent anybody from using the water above him and appropriating it to a useful or beneficial purpose, such as mining or agricultural purposes. A man might say under that section, "I came here five or six years ago, and I am entitled to that water." I am opposed to an amendment of that character.

Mr. HEYBURN. I am willing to leave it to the legislature if we do not lock the door against the legislature, because I am satisfied that the legislature would deal with this matter better than this convention could. Its powers are of a rather different character, more in detail. But I do not want to see the door shut, and my object in introducing this section was that the convention's attention should be called to that effect, and the door not entirely shut against the legislature providing for these matters. I am just as well aware of the possibility of working an injustice in this section, perhaps, as the gentlemen who have so plainly and specifically stated such possibilities. A man might do a great many unjust things if he is clothed with this right, and if the right is absolutely taken away from him he might be deprived of a great many very plain and just rights. I am not going to bring the case of Mr. Pritchard and his mining claims into this convention. It has been brought into almost every other body that has assembled in North Idaho. It makes no difference what he did or did not do. And inasmuch as the only right such a locator could acquire under the provisions of that proposed section is the right to use the water, if he does not use it then there is no harm done to anyone else; anyone else might take it, divert it and use it. It only preserves to him the right to use it, not to use it simply

for the purpose of using it, but to use it for some useful purpose necessary to the enjoyment of the right to his claim by virtue of location of the land, that is all; to preserve that right to him. The first thing the modern prospector, a certain class of prospectors, does when he goes into the mountains is to acquire all the water in the canyons, and when he has got it the gulches are worth nothing for mining purposes; but it is an evil that has grown up in the mining camps of the northern part of the territory so that the location of water rights is a profession. Walking up and down those streams you will find every few rods a location notice of a water right, upon which they had predicated nothing except to blackmail the owners of mining claims on the gulch. That is what it amounts to. I had occasion on one stream less than six miles in length to investigate the problem of water, and I found thirty-two locations inside of ten miles, and there wasn't a ditch in connection with one of them, and they were all posted and recorded in that county. Now, instead of a locator in this mining district staking out his claim and putting up four posts and a notice, which implies considerable work, he does that which is much easier, he nails up a notice of water location on the tract and then he has located every claim on that gulch to all intents and purposes, because he has placed every other man at his mercy. He will go to a large stream and locate it, and then go down until he thinks the accumulation of water justifies him sufficiently to make another location, and so he will go on down that stream to the mouth of it; and when that water locator gets through the country is not worth prospecting, because if you find gold at any place on bed rock you could not pan it without the consent and assistance of this man who owns the water which you need to wash it out. That is what I am aiming to strike at by this provision, and aside from any particular case, because I had none in view when I made this proposition to the convention. It is one that has a very considerable amount of merit in it and ought

not lightly to be passed over, in view of the fact that it is so much less work to locate a water right than it is to locate a mining claim.

Mr. ALLEN. I certainly shall oppose this amendment. It seems that the entire agricultural interests are to be sacrificed or made subordinate to every mining gulch in the Coeur d'Alenes, and this is not the first instance in which we find a majority of the material interests of the territory are to be subordinated, and by a pretentious introduction of an amendment or section the whole fundamental principle and theory of the irrigation system of the government has been struck out and cast aside, or such is the intention, as I understand it. I certainly should oppose that amendment or the section being added at this time.

Mr. SWEET. One question I want to ask.

The CHAIR. The gentleman has taken his seat.

Mr. SWEET. I see he has. I would just as soon ask him when he is sitting down. About this additional section. I want to know if this is the condition meant: that if A locates a placer mining claim in a gulch, and, after doing perhaps a little assessment work year after year, and holds it, say five years, on such assessment work; and then B comes along and locates a claim farther up the gulch and proposes using water to the extent that if A should desire to work his mine he can make B yield the water; whether or not he can do that?

Mr. CLAGGETT. Certainly.

Mr. HEYBURN. Under no circumstances, for the simple reason that all the appropriator has to do is to return the water to this man's property, to its original channel. Persons above this claim are not interfering with the use of this water then, from the fact that it must be returned to its natural channel, because that is the rule prevalent in every mining camp, that after you use the water you must return it before it reaches the proprietor next below you. That is equitable, and it protects the proprietor above from any injury at the hands of the proprietor below. But the suggestion of

Mr. Allen of Logan county, that we attempt to subordinate the agricultural interests to mining interests seems to be a rather wild proposition, with due deference to the gentleman's intelligence. If it affects the agricultural interests, I have confidence enough in the gentleman's ability to protect them, and I will accept an amendment simply to except agricultural claims from the operation of this section, because I am not here in the interest of agriculture, and I do not want to see any clash between mining and agriculture. Whenever you raise these questions in these new states then you have the old question of the miners against the cow counties and resulting in the lines being very strictly drawn between parties. If the gentleman thinks the agricultural interests of that new county are going to be affected, just except them out of it.

Mr. ALLEN. It was the general interest I had reference to. I say that is one of a number of amendments which have that object; and the gentleman already admits that the same principle is embodied in our wisest statutes, and for that purpose—

Mr. HEYBURN. Oh, no, I do not admit it at all.

Mr. ALLEN. I understood the gentleman to say a short while ago that the amendment proposed was already provided for.

Mr. HEYBURN. It is in the laws of the United States.

Mr. ALLEN. Then the legislature has the power to regulate these details, and that is why I object.

Mr. CLAGGETT. I respectfully submit that my colleague has not answered the real question which was in the amendment offered by the gentleman from Latah. If A should locate a claim on a gulch, and anyone should go above that claim in the gulch and improve it, and the man down below should not appropriate the water or use it in any shape or form, of course the upper man could go ahead and use it and let it go down stream. But suppose the upper man finds claim diggings up on the hillside, and takes the water out of the gulch

so that when he releases it it does not go back to the first claim located. Then the man who locates the first mining claim can stay there and do a little trifling work from year to year forever, and if he gets his claim located at the right place he can exercise a blackmail power over the entire gulch in the use of the water, because he had it in his power, if those mines pay, to say at any time to any person, who is taking the water out of the natural channel and diverting it on to the hill land, "you must turn this water down to me, because I am now ready to use it." That is the construction of the amendment. I do not mean to say that up in the virtuous regions of the Coeur d'Alene country any of those kind of people live, but still at the same time I have a little sort of suspicion that I have seen the shadow of three or four of them in that section of the country.

Now, Mr. Chairman, with regard to this other proposition of my colleague, of men going and monopolizing water by sticking up location notices, that is something new. No man ever got title to any water in the wide world by sticking up a notice. He may stick up his notices, but inside of sixty days, within a reasonable time, according to the decisions of the courts, he has got to begin the construction of that ditch, and he has got to push that construction on with all reasonable diligence until it is completed; and then he has got to turn the water through it and then he has got to use it. Then, for the first time he gets title, and his title dates back to the date of the notice. I know that men are sticking up notices all over the streams; but what do they amount to? A man finds a quartz lead and there is a stream adjacent to it. He does not know what the value of the lead is. In order to guard against somebody coming in against him and taking up the water he posts notices on the stream and then goes to work on his lead. If he finds his claim is not good for anything, he lets his water right lapse at the end of thirty days, and there is no trouble about it at all to the sub-

sequent locator except a little labor to hunt up the records.

Mr. SWEET. I do not see my way clear to support the additional section offered by Mr. Heyburn, because I do not see that the person who takes up the land is compelled to use it. I do not believe in any law that permits a man to appropriate a stream of water or a mining claim or anything else and do nothing with it, and at the same time prevent other people from using their property adjoining it by simply appropriating the land or the water or anything else. Perhaps that might be treated by the legislature in such a way that if a person were to take up a tract of land as suggested by Mr. Heyburn, and did not utilize the water within a certain time he should lose it. But on the broad proposition that he can take this land and hold it as long as he pleases and practically, if not absolutely, prevent men from making improvements farther up the gulch, it strikes me as bad policy.

("Question, question.")

The vote was taken on Mr. Heyburn's proposed section and the motion was lost.

Mr. CLAGGETT. I move the adoption of Section 3 as amended. (Seconded. Vote and carried).

SECTION STRICKEN OUT.

Section 4 was read, and it was moved and seconded that it be adopted.

Mr. CLAGGETT. I move to strike it out for the reason that it is all embodied in the Bill of Rights which we had up the other day. It is a duplication. (Seconded.)

Mr. STANDROD. I will state further that the section in the Bill of Rights, the gentleman will remember, was prepared as a substitute and offered after these reports had been prepared by the joint committee on Agriculture and Mining. ("Question.") (Vote.)

The CHAIR. The chair is in doubt. (On the rising vote, ayes 24, nays 3; and Section 4 is stricken out!)

SECTION. 4.

Section 5 (4) was read.

Mr. CLAGGETT. Mr. Chairman, in the fourth line there is a typographical error. Strike out the word "have" and insert the word "once."

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

Mr. HAMPTON. I have an amendment, Mr. Chairman. If amended it will read like this: "Whenever any waters have been or shall be used for agricultural purposes, under an appropriation, sale, rental, or distribution thereof, such appropriation, sale, rental or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law." It will be seen that the rights granted in the latter part of the section, do not appear to read, as it appears, to apply to appropriations, but only to such rights as may be granted or sold.

Mr. GRAY. Mr. Chairman, I cannot see that it should be a dedication to such use. Suppose I hire water for a year. Is that a dedication to that use? I cannot understand this.

SECRETARY reads: I move to amend section 3 by striking out the words "appropriated or" in the first line, and by inserting after the word "under" in the second line the words "an appropriation" and after the word "such" in the second line the word "appropriation." Hampton.

Mr. GRAY. Then shall it be deemed an exclusive dedication to such use. If I have a ditch I may sell it to a man for a year, and if he doesn't want it any longer, I won't sell it to him; but it seems by this it would make it a dedication for that particular use. Perhaps somebody can explain it to me.

Mr. CLAGGETT. It is easy enough explained.

Mr. GRAY. Thank you.

Mr CLAGGETT. I will state to the committee that the heart of this bill lies in sections 5 (4) and 6 (5) as a practical measure. This portion of section 5 (4) amounts to this: that whenever these canal owners—if the gentleman will see “for agricultural purposes under a sale, rental or distribution thereof”—whenever one of these large canals is taken out for the purpose of selling, renting or distributing water, or the appropriation is made hereafter for that purpose, and that after that has once been done, inasmuch as priorities will immediately spring up along the line of that canal, even before the canal is located; for instance, if a company should start in here to take a large quantity of water out to supply a given section of country, and should appropriate or give notice to the world that they were appropriating it for agricultural purposes “under a sale, rental or distribution thereof,” then immediately, just as soon as the ditch was surveyed, people would come in and begin to locate farms and improve them right along the line of the ditch; and therefore it is necessary in order to protect them, inasmuch as they have spent this money in settling there under a promise, which was made by the company that the water should be used for agricultural purposes—that the water should not be allowed to be diverted from that purpose and applied to the running of manufactories or anything else of that sort.

Mr. GRAY. Suppose he won't pay for it.

Mr CLAGGETT. It is dedicated to the use, and when it has once been sold to any one particular party

in one year, then he shall have the right to demand it annually thereafter upon paying for it.

Mr. GRAY. Put that in.

Mr. CLAGGETT. It is in. You don't suppose the committee was going to give a man the right to take water from a canal without paying therefor? "Upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law."

("Question, question.")

The chair put the question upon the adoption of the amendment offered by Mr. Hampton. (Vote and lost.)

Mr. GRAY. I move that the section be stricken out.

Mr. POE. I move to amend that by adopting the section as it is.

The CHAIR. The motion to strike out met with no second.

Mr. CLAGGETT. I move the adoption of the section.

The chair put the question on the adoption of section 5 (4). (Vote and carried.)

Mr. SWEET. I would like to ask if that word "have" in the fourth line is changed?

Mr. CLAGGETT. That is corrected to the word "once."

SECTION 5.

Section 6 (5) was read.

Moved and seconded that Section 6 (5) be adopted.

Mr. ALLEN. I call attention to a clerical error; the word "proceeding" in line 3 should be "preceding."

Mr. GRAY. (After reading the section.) I have a farm away down here; I sell water when I have a plenty, but I want to use it if I need it all. Now, what effect does this have on it? In the event I have more than I need for my own use I sell it. Have I got to sell it all the time? What is the view of this committee on that? This bill is a puzzling bill, I will admit that right here, and it will puzzle both the legislatures and the people after they have got it into practical use.

I believe the statute as it now stands should be corrected; that is, if a ditch is built for the purpose of selling water, that they should have it from the head down that you could not cross a man's land without giving it to him; it makes no difference when his location was; and that it should be used as it comes down, the first man has the first right, provided he pays for the water. When he complies with the requirements he is the man that shall have it first; and so it shall go down, without saying any time of location of lands; I don't believe that should have anything to do with it.

Mr. CLAGGETT. Mr. Chairman, both of these sections apply to the same condition of things. Neither one of them applies to a case of a water right where a man takes water out and puts it upon his own farm. It applies to cases only as both sections specify, saying to those cases where waters are "appropriated or used for agricultural purposes under a sale, rental or distribution." The first section protects the person who comes in, by making it "an exclusive dedication" to agricultural uses after it has been so appropriated and so used. But then the question come in with regard to where there is more than one person who settles beneath the line of one of those agricultural ditches, which are constructed for the purpose of selling the water or renting it or distributing it, or which are used for that purpose, although they may not originally have been so constructed. Now, when these two or three or four or five or six or seven parties come in, what are you going to do? Are you going to give the first man the right to the water? Suppose the first man comes along and the first year he breaks up and calls for water for twenty acres of land. The next year he calls for water for forty acres, and the next year for sixty acres, and the next year for two or three hundred acres, enough to practically exhaust it. Anyone can see that by recognizing absolute priority of right in that way, that the first person settling under the line of the ditch would have the first call on the water to the extent that he

might be able to go ahead and improve the land afterwards. This thing has got to be regulated by statute, and the constitution proposes simply to point out the line of the principles within which legislation must be carried on; that is to say, to recognize the right of priority in the order of time of settlement or improvement, as the case may be; and then when the water runs short or anything of that kind, it has got to be regulated from time to time and from year to year as the legislatures meet, and as experience shall suggest, in such manner as to promote the greatest good to the greatest number, bearing in mind constantly the fact of the prior right of the first man as well as the necessities of the second, and you cannot get it any closer than that.

("Question, question.")

The question was put upon the adoption of section 6 (5). Vote and carried.

SECTION 6.

Section 7 (6) was read.

Mr. SHOUP. Mr. Chairman, I would like to call attention to section 4, if it is in order, which was stricken out, and which I have been reading again. When the article on Bill of Rights was under discussion you yourself called the attention of the committee in regard to a single person owning a piece of land below everybody else, and asked, "Do you think it is true as to its giving him the right to bring water across to his land?" It was then stated that this section 4 covered that, and now, in committee of the Whole it was agreed it should be adopted. But now this very section has been stricken out.

Mr. MORGAN. It appeared so to me at the time. I thought this section was necessary, as also the section in the Bill of Rights.

Mr. AINSLIE. Well, I think the section was read awhile ago from the Bill of Rights that covers what is in this section.

Mr. CLAGGETT. Well, we must be very careful that it does.

Mr. AINSLIE. I will call for the reading of section 14 in the Bill of Rights.

Mr. CLAGGETT. The inquiry of the gentleman from Custer is with regard to an individual having the right to go across another's land?

Mr. SHOUP. Yes, the right of way across a farm above him.

Mr. CLAGGETT. I am satisfied that is broad enough to cover it in the Bill of Rights. "Any useful or beneficial purpose."

SECRETARY reads section 14 of the Bill of Rights.

Mr. CLAGGETT. That clearly covers it. There is no limit on the character of ditches or the number of people who may have them dug.

The CHAIR. (Mr. Morgan.) It occurs to me it could only come in that section by inference or implication. It certainly does not mean that one person shall take the property of another for the purpose of constructing his ditch over the land.

Mr. STANDROD. It certainly provides a right of way for an individual or number of persons or corporations. It is a broad clause. It does not confine it to an individual or any number of persons; it is intended to cover the whole ground, and I think it does.

Mr. CLAGGETT. (After reading section 14 as amended.) It is as broad as the English language can be made, and covers every case that the legislature does not see fit to except; or rather, it covers every case the legislature might see fit to embrace.

SECRETARY again reads section 7 (6).

Moved and seconded that section 7 (6) be adopted. Vote and carried.

Mr. AINSLIE. I move that the article as amended now be adopted. (Seconded. Vote and carried).

The CHAIR. What is the pleasure of the committee?

Mr. McCONNELL. I move the committee now rise, report progress and recommend the adoption of the

article as adopted by committee of the Whole. (Seconded. Vote and carried).

CONVENTION IN SESSION.

Mr. McConnell in the chair.

Mr. MORGAN. Mr. President, your committee of the Whole House having under consideration the report of the committee on Manufactures, Agriculture and Irrigation, have adopted and recommend for adoption sections 1 and 2 and 4, as amended in committee of the Whole, and recommend the adoption of the article as amended.

The CHAIR. The question is now upon the adoption of the article as amended. The secretary will read it as amended, section by section.

Mr. AINSLIE. I move that it lay on the table and that the convention now adjourn until tomorrow morning at nine o'clock.

Mr. CLAGGETT. I would like to suggest to the gentleman from Boise that I do not think it will take very long to get through with this. We have an engrossing clerk, and it is a good deal of work to do it, and if we pass this now in ten or fifteen minutes, she can do the work in the meantime.

Mr. AINSLIE. Very well, I will withdraw my motion.

SECTION 1.

Section 1 was read, and it was moved and seconded that it be adopted. (Vote and carried.)

SECTION 2.

Section 2 was read, and it was moved and seconded that it be adopted. (Vote and carried.)

SECTION 3.

Section 3 was read by the secretary as amended. Moved and seconded that section 3 as amended be adopted. (Vote and carried.)

SECTION STRICKEN OUT.

Section 4 was read by the secretary.

Mr. HASBROUCK. That section was stricken out.

Mr. SHOUP. I understand that has been stricken out, but I am not satisfied with it. The provision in the Bill of Rights reads that "private property may be taken for public use, but not until a just compensation," etc., and then goes on and says what a public use is. Now, I don't understand that that can be construed that one may use all the water belonging to one man for a public use; and therefore I think it is necessary to have section 4 in the constitution in order to give an individual the right to use the water. I think it is important that that section should be in the constitution. I move that section 4 be adopted. (Seconded.)

Mr. AINSLIE. Mr. President, I do not see any use of repeating in this constitution the same thing twice. That article in the Bill of Rights, section 14, as the president says, is as broad as the English language can put it, and I do not see that we can put it any stronger, and it would be foolish to repeat the same thing in these articles of the constitution. I think it is strong enough for any use on earth, and I do not see any need of repeating it.

("Question, question.")

The question was put upon the adoption of section 4 heretofore stricken out in committee of the Whole.

Vote and lost, and Section 4 is stricken out in convention.

SECTION 4.

Section 5 (4) was read, and it was moved and seconded that Section 5 (4) be adopted. Vote and carried.

SECTION 5.

Section 6 (5) was read, and it was moved and seconded that Section 6 (5) be adopted. Vote and carried.

SECTION 6.

Section 7 (6) was read and it was moved and seconded that Section 7 (6) be adopted. Vote and carried.

The CHAIR. What is now the pleasure of this convention with regard to this matter?

ARTICLE XV. ADOPTED.

Mr. HEYBURN. I move that we adopt the entire article. (Motion seconded. Vote and carried).

Mr. HEYBURN. I move that the article be engrossed, passed to third reading and set for tomorrow at 2 o'clock. (Seconded. Vote and carried).

Mr. HEYBURN. Mr. President, I move now that we go into committee of the Whole for the further consideration of the report of the committee on Public and Private Corporations. We have but one section left, and I think we can dispose of it and have it engrossed.

The CHAIR. I will swear in the young lady who was elected as engrossing clerk.

The motion was then put that the convention resolve itself into committee of the Whole for further consideration of the report of the committee on Public and Private Corporations. (Vote and carried.)

COMMITTEE OF THE WHOLE IN SESSION.

Mr. McConnell in the chair.

ARTICLE XI., SECTION 18.—PUBLIC AND PRIVATE CORPORATIONS.

The CHAIR. Gentlemen of the committee, the subject of your consideration is section 21 (18) of the report of the committee on Public and Private Corporations.

Mr. REID. Mr. Chairman, who offered this amendment?

Mr. MORGAN. Mr. Mayhew presented it.

Mr. REID. I would ask unanimous consent that the matter go over until he can be present.

Mr. WILSON. Judge Mayhew went out of town about an hour ago.

Mr. HEYBURN. I think we had better proceed. I call for the reading of the section.

SECTION 18.

Section 21 (18) was read by the secretary.

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

Mr. CLAGGETT. I understand this language is aimed at what are called trusts. The legislature will have absolute and complete control over that question of trusts without any provision being incorporated in the constitution. This whole matter has been brought up here so recently, and the operation of these "trusts," as they are called, ramify into so large a section of the matters which relate to the ordinary affairs of life, that for us to put it in the constitution before the matter has really got to be understood thoroughly by the people (for I confess I do not understand it), seems to me to be bad policy. If this were an old matter, if it was a matter that had been up for a long time it would be different; but it is only the last few months that it has come up at all. And to what extent these trusts affect the interests of the country injuriously, or to what extent they ought to be restrained, is a question which up to date we know nothing or very little about. Any action taken on this provision of the constitution will necessarily have to be taken by the legislature anyway, and as the legislature has complete control independent of this section, it seems to me we ought not to act hastily in putting it in the constitution. It is a matter that ought to be debated in the legislature a long time, and the practical effect of the law which might be passed considered in every view. It frequently happens that you can get up nice theories, and everything of the kind, but they will not work out in practical legislation. Right up here in our county lead ore or lead is an article of commerce, and it might be necessary for those producers in the mining regions and also in Wood

River to enter into some sort of combination to stop production for the time being when the price gets to such a point that the whole or a large share of the profits are eaten up by the railroad corporations. It might be necessary in a good many ways to form combinations for the protection of legitimate industries, and I don't think we ought to put this thing in the constitution. I am not opposed to the theory, neither am I in favor of the theory, because as yet I have not the necessary amount of knowledge to pass upon it intelligently. If the legislature did not have the power unless it gave them the power, it might be another question, but the legislature has the power.

Mr. HEYBURN. Mr. Chairman, that is just the working of this exactly. It is very probable that within a reasonable length of time it will be necessary for mining companies to make some arrangement or agreement among themselves by which they will agree that they will ship only a certain amount of their product; and the railroad companies would naturally resist any such combination as that because it would decrease the tonnage that would be shipped out of those camps. It is very probable that is just about where this will strike. I suppose it is a proper thing to attack trusts, perfectly safe, because we haven't any in the territory, and in the absence of them we can attack them with impunity.

Mr. REID. I move the matter be not disposed of until after the gentleman who offered the amendment can be in the hall.

Mr. CLAGGETT. I think that is fair, too.

Mr. REID. I have no doubt he has studied the matter pretty thoroughly. As the gentleman from Shoshone suggests, it is a new question, but it is a very important one in the east, and as all other evils reach us in time, this will come on. I have no doubt he had the importance of this matter in view when he drew an additional section. He left the building thinking this other matter would take until evening. It is nearly adjourning time, and I move the committee rise, report progress and ask to sit again. (Seconded and carried).

CONVENTION IN SESSION.

Mr. President in the chair.

Mr McCONNELL. Mr. President, your committee of the Whole having under consideration the report of the committee on Public and Private Corporations, desire to report that they have come to no conclusion and ask leave to sit again.

The CHAIR. The report of the committee will be received and lie on the table. What is your pleasure?

Mr. REID. I move that we take a recess until 8 o'clock this evening.

Mr. AINSLIE. I move to amend, and that we adjourn until 9 o'clock tomorrow morning. This matter of holding three sessions a day and tiring the members all out, will have the result of having no quorum in one more day. I swear I will not come here for anybody and work at night.

The question was put upon the motion to amend the original motion to adjourn until 9 o'clock A. M.. (Vote. Division demanded. Rising vote taken, resulting, ayes 20, nays 13.)

Whereupon the convention adjourned until 9 o'clock A. M., Saturday, July 27, 1889.

TWENTIETH DAY.

SATURDAY, *July 27th, 1889*, 9 O'CLOCK A. M.

Convention called to order by the president.

Prayer by the chaplain.

Roll call.

Present: Ainslie, Allen, Anderson, Armstrong, Ballentine, Bevan, Blake, Brigham, Campbell, Chaney, Clark, Coston, Crutcher, Glidden, Gray, Hampton, Harkness, Harris, Hasbrouck, Hays, Heyburn, Hogan, Jewell, King, Lamoreaux, Lewis, Maxey, Mayhew, Melder, Myer, Morgan, Moss, Parker, Pierce, Pinkham, Poe, Pyeatt, Reid, Robbins, Shoup, Standrod, Underwood, Vineyard, Whitton.

Absent: Andrews, Batten, Beane, Beatty, Cavanah, Crook, Hagan, Hammell, Hendryx, Howe, Kinport, Lemp, McConnell,