

TEXAS LAW | Tarlton Law Library Jamail Center for Legal Research

Citation: *Debates in the Texas Constitutional Convention of 1875 Texas. Constitutional Convention (1875). Austin: Published by the University of Texas, c1930.*

Content downloaded from

Tarlton Constitutions 1824-1876 (<http://tarlton.law.utexas.edu/constitutions/>)

The text of these documents is in the public domain. That is, the original words and content are freely usable.

The images of the documents are copyrighted material; the copyright is held by the Tarlton Law Library. The copyrighted images may be used only with permission. Permission is granted to use the copyrighted materials in the classroom for educational purposes. Downloading, printing, publication, public display or otherwise using any of the copyrighted images, including on the web or in a forum other than a classroom, requires permission from Tarlton. Requests for permission to use these materials should be submitted online to rarebooks@law.utexas.edu.

If you are uncertain whether you need permission to use these materials, please contact us at rarebooks@law.utexas.edu.

had various financial difficulties, and were not in a condition to attempt too much.

The motion of Mr. Nunn, to refer to the subject matter of free schools to a committee of seven, prevailed.

THIRTY-THIRD DAY

WEDNESDAY, OCTOBER 13, 1875⁷⁰

Bill of Rights

MR. DEMORSE moved to amend Section 10 by inserting after the word "favor," "and shall have the right to make a declaration of his acts and the motives therefor, the truth and weight of which may be considered by the jury in connection with other evidence." He said it was now the system used in the State of New York. There had been cases when men had lost their lives from circumstantial evidence, when had they been allowed to explain the circumstances their lives would have been saved.

MR. WEAVER said he was against it as an innovation. He said that in civil cases it led to more hung juries than anything else.

MR. DEMORSE said there was no parallel between civil and criminal cases. His proposition merely allowed the jury to take the man's explanation at its own worth, and which, taken into consideration with outside circumstances, might be the means of saving his life.

MR. RUSSELL, of Harrison, said if it was of importance that such a principle should be adopted in civil cases, how much more was it so where a man's life was endangered. In civil cases it had the weight of evidence, in a criminal case it would be a statement only.

MR. DAVIS, of Brazos, regarded the amendment as a dangerous innovation. As the law stood, a man could not be convicted where there was a reasonable doubt, and in cases of circumstantial evidence, there must be such a train of circumstances as could lead to absolute certainty before conviction could take place. A plausible defendant could always get up a plea that would raise a doubt of guilt in the minds of the jury. It was an unnecessary departure from the old landmarks.

⁷⁰The proceedings for this day were taken from the *State Gazette* (Austin), October 14, 1875.

MR. DEMORSE said there had been cases within the last few years where innocent men had been convicted and executed on circumstantial evidence, when their innocence had been avowed by the guilty parties on their deathbed.

MR. MOORE said he thought the amendment would work unjustly to the prisoner, as an unjust inference might be drawn by the jury where he refused to speak.

COLONEL CRAWFORD regarded the amendment as an unwarrantable innovation and injurious to the prisoner. It would fill the court houses with perjurers. It ought not to be introduced into the Constitution, as it was within the power of the Legislature now.

MR. WRIGHT said that if any one had, six years ago, proposed to allow a man to testify in his own behalf in civil cases, the matter would have been received with holy horror, and now two-thirds of the profession could not be prevailed upon to repeal it. It was said that this amendment would lead to false swearing. For the same reason the father or the brother of dependents could be prohibited from testifying. Whilst he would not be willing to go as far as Mr. DeMorse, he thought it would be well to allow the Legislature to permit parties to testify in cases where the prosecutor alone fixed the guilt upon the defendant, lest the latter be the victim of his malice. This would also be very serviceable in bringing the declaration of a party home to himself. For instance—when parties declare certain things to one man, which distorted by malice would convict a prisoner, but which if explained would reveal the malice.

MR. DAVIS, of Brazos, said the Legislature had such power now.

MR. WRIGHT said he would make it the duty of the Legislature to provide such a law.

MR. WEAVER said he was mistaken and thought Mr. DeMorse's amendment applied only to civil cases, but he endorsed all that was said against the amendment as applied to criminal cases. Place a man's veracity by the side of his life and it would in most cases weigh down the scales.

MR. RUSSELL, of Wood, said he thought Mr. Crawford had changed his tactics since yesterday, when he made an eloquent appeal relieving parties charged with slander.

COLONEL CRAWFORD said he denied this. He had merely defended such when the libel was true and published with good motives.

MR. STOCKDALE proposed as a substitute for the amendment: "In civil cases no party thereto, if he have an interest, shall testify, unless called to testify by the other party, and in criminal cases no defendant shall testify."

MR. STOCKDALE said that the amendment of Mr. DeMorse was an innovation on the old common law rules of evidence. When the law allowing the defendant to testify in civil cases was proposed, he was a member of the Senate Judiciary Committee and protested against it, giving the same reasons as those advanced by Colonel Crawford, that to call on witnesses who were parties to the litigation, was an endorsement of perjury. His own experience and observation corresponded precisely with this. It was extremely difficult and almost impossible to get at the truth by cross-examination, where the parties giving evidence were interested. With reference to criminal cases if the amendment prevailed and a prisoner declined to avail himself of the privilege to testify, then the inference would be against him. Gentlemen said that inference could not be drawn by juries. On the contrary, he said that inference was the law of circumstantial evidence. The district attorney, if a prisoner declined to speak, would simply have to say, "if he is innocent why does he not speak?" And the jury would draw the inference immediately. The corrupt or guilty man would always declare his innocence and would create and fabricate such facts as would establish his innocence, nay, in the interim, between arrest and trial, he could with the assistance of counsel, supposing counsel would lend himself to such a thing, prepare a statement of facts in such a manner that would defy contradiction and acquit him entirely. He (Mr. Stockdale) in the thirty years he had practiced law in Texas, had never seen an innocent man convicted, and those who would be benefited under the DeMorse amendment would be guilty, but to the innocent it would be a sword to injure them. He might be an old fogey but had been taught to believe that the common law was the perfection of wisdom and he was opposed to change unless endorsed and recommended by judicial sanction. In fact, he had rather go back and not allow parties on defense in civil cases to testify, except as to the evidence of the opposite party, and to prohibit their testimony altogether in criminal cases.

JUDGE BALLINGER said that the law did work well as applied to civil cases for the ascertainment of truth, as far as he was able to judge. With regard to criminal cases, it had been tried in Connecticut, but failed, and he thought the law had been abolished. He did not think such changes should be made which experience had to work out to a satisfactory result. To establish a constitutional provision of this sort would be very wrong, and he moved to table the amendment.

MR. STOCKDALE moved to add after "other court of record," "or district judge," making the writ of habeas corpus returnable to district judges as the others.

MR. STAYTON opposed the amendment.

MR. GERMAN moved to strike out "court of record" and insert "or district court."

This was accepted by Mr. Stockdale.

MR. STOCKDALE said exigencies might arise when it would be necessary to suspend the writ of habeas corpus. It would be suspended by arbitrary power as they had seen it in too many instances during the last fifteen years. He spoke, too, of the case of General Jackson arresting a judge in New Orleans, who, having fined him for contempt, was ordered to return the fine. Mr. Stockdale's idea was that if they wanted to give protection to personal liberty, they should go as far as was necessary in giving power to the Government to defend itself. He had prepared an amendment to cover this subject, but which he could not reach at that time, which he would present hereafter for the consideration of the Convention.

MR. REYNOLDS (colored) moved the following as a new section to come after Section 16: "No form of slavery shall ever exist in this State and involuntary servitude of any character whatever is hereby forbidden except as a punishment for crime when the party shall have been duly convicted."

It was explained that this was utterly unnecessary and it was tabled on the motion of Mr. Nugent by a vote of 35 to 32.

MR. NUGENT moved to insert the word "or" after "destroy" and "for" after "applied" so as to make Section 17 read as follows: "No person's property shall be taken, damaged or destroyed or applied for public use without adequate compensation being made."

JUDGE BALLINGER said that there was a provision in the Constitution of 1845 that required that compensation should first be made. Writers and courts held to this opinion also.

MR. STOCKDALE moved to strike out all of Section 17 down to the word "money," and insert, "provided property shall not be taken except for public use, nor shall it be so taken without just compensation being made to the owner, if taken for public use to be applied by any corporation, except the State, the compensation shall first be made therefor."

MR. FLOURNOY said a case never would arise when the State would take personal property for her own uses, but counties and incorporated cities would be cut off from making roads or taking any property for public use without payment in advance.

MR. STOCKDALE inserted the word "county," but declined to insert "incorporated cities." He objected to the latter, that whole blocks might be taken to open streets, and the homes of people pulled down over their heads, without previous compensation, as was done in New York City.

MR. ROBERTSON, of Bell, said he objected to the word "county" for the same reason that Mr. Stockdale urged against "city." The roads should have been laid out before they were settled, and it was unjust to cut through a man's plantation and occasion him the expense of erecting long strings of fences, without first having compensated him for the damage. This was already a question in his county. He moved to strike out the word "county." His motion was adopted.

THIRTY-FOURTH DAY

THURSDAY, OCTOBER 14, 1875⁷¹

MR. NUGENT moved to reconsider an amendment to Section 11 of the Bill of Rights, passed the preceding day, with reference to granting bail on the writ of habeas corpus in capital offenses after indictment was found. It was reconsidered and voted down.

JUDGE BALLINGER moved to amend by inserting the words "in such manner as prescribed by law," which was adopted.

⁷¹The proceedings for this day were taken from the *State Gazette* (Austin), October 15, 1875.