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

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favored a provision that not only should a candidate for judge be well grounded in the law, but that he should have continued in it for twenty-five years, which would have excluded all danger that might have been apprehended from the colored man. He would go as far as anyone in presuming the purity and ability of the judiciary, but was utterly opposed to the substitute.

MR. MCKINNEY, of Walker, said it was necessary for certain districts in the State to be protected from a certain class of voters.

JUDGE REAGAN disclaimed the construction placed upon the substitute by Mr. Flanagan.

MR. WEAVER spoke in favor of the elective system.

MR. RUSSELL, of Wood, opposed the substitute.

MR. WAELDER opposed it on several grounds.

GENERAL WHITFIELD struck out the salary of the judges in his substitute, leaving it blank.

### FIFTY-THIRD DAY

FRIDAY, NOVEMBER 5, 1875<sup>103</sup>

#### *The Judiciary Article*

GENERAL WHITFIELD denied the charge of "gerrymandering" made by Mr. Flanagan with reference to his substitute, but said he believed if his plan could be adopted it would be a good thing for Texas. He said he would not give a fig for a party which would not take care of itself.

MR. SCOTT moved to print 200 copies of the majority report, including Judge Reagan's substituted sections, and the substitutes of General Whitfield and Mr. Davis, of Brazos, and to postpone consideration until the next day. His motion was carried.

#### *Railroads—Third Reading*

PRESIDENT PICKETT moved to strike out of Section 2: "Railroads heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways and railroad companies public carriers." It had occurred to him that the declaration that

<sup>103</sup>The proceedings for this day were taken from the *State Gazette* (Austin), November 6, 1875.

railroads were public highways ought not to remain there, as future legislation might use such declaration injuriously to the people. Taking that declaration in connection with the other declaration in the Constitution, that "taxation shall be for public purposes only," it might not prevent the Legislature from building railroads for private individuals at the public expense. Take the first declaration out of the organic law and it would be harmless.

MR. ROBERTSON, of Bell, said he considered railroads as public highways, and in another sense they were private, but he deemed it essential that the government should declare them public highways so it could control them in the interests of the country.

MR. FERRIS said that since railroads had to carry the cars of other companies they must be public highways. He did not see that it would affect the article at all either to strike it out or keep it in, but they could not compel roads to carry the cars of other companies without that clause.

JUDGE REAGAN said he was indifferent as to whether or not it should be retained, but would support the report of the committee.

MR. DEMORSE said he understood it to be public policy to consider railroads to be public highways partially but not wholly so. He thought it was a dangerous expression, and in that agreed with President Pickett. He thought it should either be stricken out or modified.

MR. FLOURNOY said he considered railroads as public highways and not private, except as to the ownership of property, which could not be controlled by law.

MR. STOCKDALE said he thought the proposition to strike out was the correct one, unless the language ought to be revised. He moved to insert after "highways," "to the extent provided in this Constitution and the laws of the State."

MR. FERRIS, Chairman of the Committee on Railroads, said he had no objection to Mr. Stockdale's amendment.

COLONEL CRAWFORD said he favored President Pickett's amendment. The Constitution of Illinois qualified the statement that railroads were public highways.

MR. DEMORSE offered to amend the section by striking out "declared public highways" and inserting "declared to be subject to public use."

MR. FLOURNOY said the clause complained of was a literal copy from the new Constitution of Pennsylvania, which was considered one of the best, if not the best, of the new Constitutions.

President Pickett's motion to strike out was lost by a vote of 35 to 33, lacking a two-thirds vote.

PRESIDENT PICKETT offered a substitute to both pending amendments, to insert after "highways" the words "so far only as to authorize the State to regulate and control them."

JUDGE BALLINGER opposed this as likely to interfere with the rights of individuals. If the Legislature only were to control them what right would an individual have who was injured or aggrieved by a railroad company? A large system of jurisprudence depended upon the fact that they were public highways, but if the Constitution said they were so only so far as the Legislature acted, then it might tend to restrain, abridge, or restrict the rights of the public as individuals. He thought Mr. Stockdale's amendment was open to the same objections.

Mr. Stockdale's amendment was lost.

Mr. DeMorse's amendment was lost.

MR. STOCKDALE offered to amend the last part of the section by striking out "from time to time pass laws establishing" and insert "in the laws creating railway companies, or authorizing the construction of railways prescribed." Under the Constitution of the State and the Constitution of the United States the charters of existing roads, so far as they were completed, could not be interfered with by the Convention, except to regulate their charges and freights within the maximum limits. It was not within the power of the Convention or the Legislature to say that companies should charge less than when their charters were established. He had been told in private conversation that a charter was not a contract, but the court of last resort, with opinions from such eminent authorities as Chief Justice Marshall and others, was against that opinion. The construction of roads thereafter would depend upon whether or not the State could interfere and regulate their charges. Did it stand to reason that men would invest their money and allow the Legislature to come in and say what profit they should receive, and virtually to control the whole property? If so, they had foreclosed the future construction of railroads in Texas, and rung their death knell. His

amendment advocated the same line of policy that had prevailed since Texas had become a state. They might—to use a homely illustration—as well say what profit the Capital Ice Company should make, as say what profit should be derived by railroad corporations. In the chartering of future roads the maximum rates should be fixed in an equitable manner, so that there should be a fair and honest understanding, so that when men put their money into an enterprise they should have the rights agreed upon. Without that guarantee there would be no further construction of railroads in Texas.

Mr. Stockdale's amendment was lost.

MR. ABERNATHY moved to close the debate.

MR. FLANAGAN said he desired to make a few patriotic remarks before the last nail was driven into the coffin, and hoped Mr. Abernathy would withdraw his motion. It was withdrawn.

MR. MARTIN, of Navarro, moved to amend by striking out all after "states" in Section 1, and inserting, "and every railroad in this State shall receive and transport the passengers, tonnage, and cars, loaded or empty, without delay or discrimination, of every other railway connected with it, directly, or through other railroad or railroads, for reasonable compensation, to be ascertained by agreement of said railroad companies, or in a manner provided by law. Every incorporated town and city in this State shall have the right to construct and operate a railway from a point in or near said town, to connect with any railroad in this State, with all the rolling stock thereon." He said he had consulted the chairman of the committee, and he understood there was no objection to his amendment.

JUDGE BALLINGER said he thought the amendment involved a sound and necessary principle. He was for cheap transportation in the State and not for doing injustice to any company, or for the exercise of doubtful power, for which, as a lawyer, he had great distrust. There had been a provision in the laws of Texas since 1854, providing that railroad companies should haul the cars of other companies at a price to be decided by agreement or by umpirage. If this could be incorporated in the organic law, he thought it would be a good thing. It was a great improvement upon the original clause.

MR. FERRIS said the proposition of Judge Ballinger had been submitted to the committee at the early part of the session. It had been

favorably considered, and he thought it was provided for in the first part of the article. He should vote for the amendment, and hoped the rest of the committee should do so.

MR. FLANAGAN said if the gentleman from Navarro would turn to the first section of the Missouri Constitution he would find that it would probably cover the case, and was couched in more appropriate language. It provided that a larger amount should not be charged for a shorter distance than for a longer distance. He thought it would cover the case better than the proposition before them, and that it would be better and easier understood.

MR. ROBERTSON, of Bell, said the amendment went beyond the law of 1854. He was not opposed to restricting railroads as much as public necessity required, but did not think they had a right to impose on them obligations not contemplated in their charters or the law of 1854, and which were not essential to the public welfare. The provision in the amendment, and especially the last part of the clause, went beyond the old law, and he should oppose it.

MR. MARTIN, of Navarro, said his amendment was not intended as a restriction of the rights of railroad companies, as could be seen by a moment's consideration.

MR. STOCKDALE said if he had been more of a live railroad man than a sleepy patriot he should have been in time to defend his amendment from assault. As it was, he asked the poor privilege of having his name recorded as having voted for it. He did not apprehend that the State would be troubled with any more new railroads.

JUDGE BALLINGER said the amendment grew out of the Galveston Wharf Company matter, and was intended to cheapen transportation. It was not expected to fix arbitrary rates, but to allow reasonable rates to be paid.

JUDGE REAGAN said he feared that he did not understand the amendment, but as it appeared to him there would not be many towns and cities that would go into the building of railroads.

MR. STAYTON said he thought the first clause of the substitute should be adopted, but objected to the last part, in regard to towns and cities embarking upon railroad building enterprises. It did not even limit them to connecting with the nearest railroads. It was inconsistent, too, with the previous action of the Convention in limiting cities and towns in expenditures and the creation of debt. If they

gave cities and towns the right to create railways, would it not also convey with it the power incidental to raise money for the purpose of paying for them?

MR. MARTIN, of Navarro, disclaimed any idea of allowing cities and towns to go into the work of building railroads, and said the amendment was merely designed to insure the carrying of their cars at a reasonable rate. Lest there should be any misapprehension concerning the matter, he would strike out the clause referring to cities and towns.

The amendment was put to a vote.

MR. FLANAGAN: "I ask the gentleman from Navarro a question. Does his amendment mean this: if you build a car and load it and put it on the track, you mean that it shall be carried to its destination by the company at a reasonable compensation to be agreed upon between the company and yourself?"

MR. MARTIN, of Navarro: "Yes, sir."

MR. FLANAGAN: "Then I shall vote 'yea.'"

The amendment was lost by a vote of 42 to 26, lacking a two-thirds majority.

MR. ABERNATHY moved the previous question on the passage of the article, and was sustained.

The article was then engrossed by a vote of 51 to 18.

MR. FLANAGAN spoke at length on a question of privilege<sup>104</sup>

He said: "Mr. President, it is a privileged question upon which I propose to address this body, and I was going on to say that moving the previous question frequently furnishes gentlemen with an argument who would otherwise be without one, and is of course very useful. In their wisdom, these gentlemen have chosen to cut off all discussion on this question, one which I foolishly think the State of Texas has a vital interest in. Several gentlemen approached me while the vote was being taken on a call of the previous question, and said that I might have the privilege of addressing the Convention after the vote had been taken. I dislike very much to board any vessel after she has left the port. She is gone, forever gone, and the lost opportunity is gone and cannot be recalled. Gentlemen, you have killed and buried all future internal improvement in the State. Not only has a ten-penny nail been driven in your coffin here, but a twenty-penny nail has been driven in and clinched inside the coffin. When that article passed here, you virtually said to the railroads of the State, 'unless you come to the Legislature and accept the terms of this Constitution, you are forever barred from the privilege of

<sup>104</sup>His remarks are taken from the *State Gazette* (Austin), November 6, 1875.

general and special legislation.' On the other hand, how magnanimous you are. You say to them when you do accept the terms, you surrender all the charter rights which past Legislatures have ever made here under the Constitutions of the proudest State in the Union—charters which Texas in 1845 guaranteed to them, giving all the privileges they exercise today—you say to them when you come in you virtually surrender your charters. I ask you if this is the invitation and the feast you have prepared for the railroads of the State of Texas?

"I say, Mr. President, that when I came here as an humble member of this body, when I permitted myself to be elected a delegate to this Convention—for if I may be excused the term I was ravished into it, and that is the truth of the matter—I came here honestly and truthfully, for the purpose of voting for an organic law for all the people of the State of Texas, of supporting all measures that would make a good Constitution, looking to the interests of the whole people, and not of either one party or the other. I have on no question looked to the right or the left, have not asked if this thing or that is to the benefit of a Republican or a Democratic constituency, but simply is it for the best interest of the glorious and proud State of Texas. Our object was to reform the organic law of the State. All of us admitted that there were objections to the Constitution of 1869, and I was as honest as any of you in my desire to correct them. Will gentlemen please recall the speeches they made in the hustings? In the first place, they were for submitting amendments to the Constitution, and then your leaders thought it would be better to call a Convention, and it was called. Certain promises of reform were made in the following canvass, which gentlemen seem to have wholly forgotten. The result of your labors is not such as will tend to perpetuate your work.

"In comparison with the Constitution I hold in my hand—that of 1869—there are three monuments erected to the greatness and wisdom of that body which created it. The first is the article which provides for immigration, inviting those of other lands and countries to come to Texas, not only inviting them, but giving them a home when they get here and telling them that they should never be oppressed. Was that all? No, sir. You not only invited them here in that manner, but guaranteed that when they got here with their families that their children within certain ages should be educated, assured him that his children should be sent to school, and that the laws of the State provided ample means for the education of every child in the State within scholastic age. Was that all? No, sir. You said to that same immigrant and to that same father, after you have reached here and your children are educated we will furnish you with a railroad system that will not only furnish you easy transportation

all over the State, but will carry you out of the State of Texas, and from thence to your native home.

“This is the proud monument, gentlemen, you are seeking to destroy, nay have destroyed, for you have taken it section by section and have destroyed the only bulwark of the Republican party. The last nail has been driven into the coffin which destroys internal improvements in the State of Texas. Have you acted like statesmen? I say you have not. I say that no man who has an idea above that of a swine, who reads of your doings here, but will say that instead of bringing capital here for the building up of your State, you have said to all the world north of parallel 32, you must seek another market besides Galveston, for we will not encourage you here. Tell me that discrimination is not allowed under the article, and I tell you that you are mistaken. I did not desire to see any article passed through this body that I could not go to the ballot box and freely and honestly vote for. But now I may say with the poet,

“Take thou no scorn of fiction born,  
Fair fiction’s muse to woo,  
Old Homer’s theme was but a dream,  
Himself was fiction too.”

and your action will prove the truth of it when the Constitution you have made goes to the ballot box, and we get the sense of the people of this State upon it. Try it and see if your humble servant is not right.”

#### FIFTY-FOURTH DAY

SATURDAY, NOVEMBER 6, 1875<sup>105</sup>

#### *Public Schools—on Final Passage*

MR. GERMAN moved to strike out the first clause of Section 4, which reads as follows: “The lands herein set apart to the public free school fund, shall be sold under regulations, at such times and on such terms as may be prescribed by law,” and insert “lands herein set apart to the public free school fund, which are located in any county now organized, and whenever any new county may be organized, shall be placed upon the market and sold upon such terms as may be prescribed by law.”

MR. RUSSELL, of Wood, moved to amend by adding to the section, “provided, that lands shall not be disposed of at a less minimum price than \$1 per acre.” Mr. German accepted the addition.

<sup>105</sup>The proceedings for this day were taken from the *State Gazette* (Austin), November 7, 1875.