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He protested against the proviso. A man might build a magnificent hotel worth \$50,000 and being a home it would be exempt. But if he built a house and rented a portion of it, living in the back part of it himself, the sheriff and creditors would come in. He thought the Convention had been deceived in adopting the amendment.

MR. STOCKDALE said it was at his suggestion that the provision was made, and there was no deception in it. He explained the provision at length.

MR. WRIGHT said he agreed with Mr. West. He spoke of a case which had come under his own observation, where a man had been accustomed to raise vegetables for his family. Thinking he could achieve the same object better by putting up a little store, he did so, and his creditors came in on him immediately.

MR. WEST said the section was rascally.

MR. STOCKDALE asked if the term was intended to apply to him.

MR. WEST said it was intended to apply to the section, and not intended personally. He also strongly condemned the difference between the town and county homestead.

The amendment was lost.

The article was passed by a vote of 50 to 13.

SIXTY-SEVENTH DAY

TUESDAY, NOVEMBER 23, 1875¹²⁴

GENERAL WHITFIELD presented a supplementary report from the Committee on Education. It recommended that the Legislature provide for the maintenance and establishment of a university of the first class, to be located at or near the city of Austin, and to be styled "The University of Texas," for the promotion of literature and the arts and sciences, including an agricultural and mechanical department. The Agricultural and Mechanical College at Bryan was made a branch of the university, and the Legislature was directed at its next session to appropriate \$40,000 for completing and placing it in successful operation. The report also provided for a branch university to be situated near Austin, for the benefit of the colored youth of the State. In addition to lands theretofore granted, the bill set

¹²⁴The proceedings for this day were taken from the *State Gazette (Austin)*, November 24, 1875.

apart 1,000,000 acres of the public domain for the endowment of "The University of Texas" and its branches, and for their support and maintenance.

MR. LOCKETT moved to strike out "Austin," with regard to the colored university, and insert "Brenham."

MR. WEST said he had no objection.

GENERAL WHITFIELD made no objection to the change, and the amendment was accepted.

MR. ROBERTSON, of Bell, moved to insert "or Salado" after the word "Austin."

The amendment was lost.

MR. SCOTT moved to strike out "near the city of Austin" and to insert "to be located by a vote of the people."

GENERAL WHITFIELD said that Mr. Scott might as well write the obituary of the University of Texas for the public press

Mr. Scott's amendment was adopted.

MR. McCORMICK moved to strike out "college or" and insert "a" in Section 5, and to insert after "Brenham," "which shall receive its equal share of the University fund of this State." He said the object was to place the colored university on the same footing as the others.

MR. STOCKDALE said they were not entitled by number to an equal share.

MR. McCORMICK said he had estimated the negro population as about one-third as many as the white.

MR. STOCKDALE said that in a few years the colored population would not amount to one-fifth of the total.

MR. McCORMICK said he meant in equal proportion, and finally withdrew that part of his amendment. The other part of his amendment was lost.

MR. MOORE moved to amend by adding after "locate" in line 19 the words "by commissioners to be appointed by the Governor as may be provided by law." He objected that the mode provided by Mr. Scott's amendment was not practicable.

MR. WEST said he would vote for Mr. Moore's amendment, as it was infinitely preferable to Mr. Scott's, but neither would meet the object the Convention had in view to provide for the establishment of a State university. He said he was not speaking in the interest of Austin, the main object being to locate the university

somewhere. He called attention to the history of the university from its inception until 1875, and said it was impossible to contemplate it with satisfaction. As early as 1837 provision had been made for the university, and yet forty years had elapsed and time was still rolling over their heads, and not one stone of that university had been laid or even a site selected. In 1838 a magnificent site had been selected just beyond the capitol there, and if Texans had been true to themselves they would have had a university on that height years ago, and their youths would have been educated there instead of being sent to the North. Why did they not have a university? It was because of the petty squabbles that had been going on over its location. If they left the location to a vote of the people they would have forty or fifty locations proposed and none would get it. If it were left to the commissioners they would raise the same squabble and ill feeling that had been engendered over the penitentiaries. They should not lose their golden opportunity. If it could not be located at Austin, let it be put at Waco or Bryan. As long as it was left open they would have the eternal squabble, and they would have no university. He was one of the commissioners appointed in 1866, and they spent four days in discussion and then separated without having come to any conclusion. He trusted the amendment would prevail, to get rid of that of the gentleman from Cass (Mr. Scott), and that either the seat of government or some other site would be selected by the Convention.

Mr. Moore's amendment was lost by a vote of 27 to 35.

The bill was then engrossed by a vote of 32 to 31.

University Bill—Third Reading

Under the suspension of the rules the university question was taken up on its third reading.

MR. CLINE moved to strike out all of the section after "location" in line 19, and to insert "to be located near the capital of the State." He said that the people did not want to be troubled with an election over a university any more than over the site of a Supreme Court or a penitentiary. They had referred too many things to the people already, taking them from their business and putting questions before them to be voted on in which they had no interest. He thought the capital of the State the proper place for a university of

the first class, for it was not to be a little high school or academy, but like those of Oxford, London, Cambridge, or Heidelberg, with museum and library attached. It would be of vast benefit to the Legislature and other public bodies assembling at the capital. They had felt the want of it in the Convention, and the Legislature always wanted works of reference. The railroads, when completed, would all center in Austin. It was the place where the public buildings were and where the interests of the public centered, where people came to look after their interests before the Supreme Court, the Land Office, and other public buildings. The point was healthy, one of the most beautiful in the State, reminding one of the Juanita Valley of Pennsylvania. It was above the reach of malaria and yellow fever. The fathers had selected that site above the capitol, and it was known as College Hill. Crown that hill with a seat of learning, and it would rise like crown of glory encircling the State. If left to the jealousies of different portions of the State there would be no university as long as they were on earth. The people of the State did not want it left to them to locate, and the amendment leaving it to them was a stab that would kill the university forever.

Mr. Cline's amendment was lost by a vote of 37 to 20.

The article was passed finally by a vote of 35 to 30.

Private Corporations

MR. NUGENT offered the following additional section:

"Nothing in this article shall be construed to divest or affect rights granted by any existing grant or statute of this State or of the Republic of Texas."

MR. FLOURNOY opposed Mr. Nugent's amendment.

MR. STOCKDALE supported the amendment.

MR. WRIGHT opposed the amendment, somewhat at length. He argued that when the State granted a charter to a private corporation and gave them the right to charge tolls without specifying the maximum or minimum rate, it reserved the right to control its rate of charges. If the corporation abused its privilege, the State had the right to step in, and as a matter of public policy control the rates. The rule was that the law should always be construed strictly for the grantees, and all grants not expressly given were reserved expressly for the State. On this hinged his whole argument. If the State

mentioned the maximum and minimum rates of charges, a corporation could, under such provision, go to the full extent, however oppressive it might be; but when they were not expressed, the State reserved her full power. If this were not so, Texas would be tied down to the chariot wheels of corporations; hence, when the charges were not specified, they were reserved to the State. If the Legislature authorized a railroad company by charter to charge 25 cents a mile, the State would not have the right to say to her, "you shall charge only so much"; but if it was not so expressed in the charter, the State could interfere in the interests of the people. The amendment struck at the very life of the second clause, which covered all these grounds. He referred to the Galveston Wharf Company. By its charter there was no express authority to charge tolls, but it was authorized to carry on business. No limit was specified, and hence he claimed that the State had the right to regulate its rates. Suppose they charged \$50 for a bale of cotton, or \$10 for a barrel of flour, leaving the port; would any one pretend that the State had not the right, in the interest of the people to interfere, where there was no provision in the charter saying how much they should have? A man, though owning both banks of a river, could not carry on business without a license. Even private mills, in some states, were regulated as to their tolls, and it was useless to say that the rates of a private corporation could not be regulated by the government when it had no specific powers in its charter.

Some gentlemen went further than he and claimed the right of the State under any consideration to interfere in the interest of the people, but he confined himself to the limits specified in the charter. Some of the Supreme Court and district judges were going back on the Dartmouth College case. Even their own distinguished chief justice, Judge Roberts, believed that that case went too far. He reiterated his position. Without the right he claimed, the State would be at the mercy of any blighting, blasting corporation which had a hold on the liberties and the business of the people.

The wharf company held its site from the Republic of Texas. But when by establishing its wharves it opened a public highway, it was as much amenable to the police power of the State, as would be a ferry, which by reason of its establishment opened a highway

across a river; or as would be a bridge constructed across the Colorado. If constructed by individuals without a charter there could be no doubt of the State's right to interfere, and so they could with respect to charters, where the State reserved powers of sovereignty to itself. Instead of Galveston being the "Beautiful Isle of the Sea" of which all Texas felt proud, it would be a curse, and Texas would suffer from the enjoyment of such powers by the corporation. If it claimed to levy this toll at all, it must be by express charter, and if the right was given—it could not be presumed—it must be securely specified and set forth in the act of incorporation. Did it do it? It did not do it in a single instance, in his candid opinion. As far as the railroads were concerned, they asserted the right to interfere and to regulate where they had no power to prevent it. They simply claimed the same right and power in private corporations to interfere for the public good unless expressly prevented by the terms of their charter. If a corporation undertook to tax the people—for it was a tax—and had no express authority to tax, it was preeminently a question of interference by the State to preserve her integrity, the rights and principles of liberty. Yield up this, and they yielded up the State of Texas, bound and chained, to a corporation. Texas was a great State—great in future contemplation—embracing a variety of soil and climate, and, as had been observed by him before, the sources of whose rivers were amid perpetual snows and whose outlets were amid perennial flowers. This outrage on the rights of the citizens would be a strange anomaly in the history of a great nation, and of a sovereign State, if it could be said that an incorporated company could bear down the courts of the people, yet when the people complained humbly to the law-making power and asked them to help them, that it would be unable to help them because its hands were tied.

JUDGE BALLINGER replied to Mr. Wright. He urged that the latter had disproved to a very large degree the soundness, the lawfulness, and truth of the report. He referred to Sections 3 and 5. The last clause especially, had been controverted by Mr. Wright. It claimed that "all laws granting the right to demand and collect freights, fares, tolls, or wharfage, shall at all times be subject to repeal by the Legislature." This was not the argument of the gentleman. He had

said that in railroads where the rates were expressed they were beyond control of the State. Was that true? Then this report and his argument did not agree. Again he might say they had already gone the extent of the report in respect to railroads. Railroads, it was said, could be compelled to establish reasonable maximum rates for passengers and freight. This was a judicial question, not for a Legislature to decide, but to be decided on proof of truth in a court of law. He referred to Cooley's *Constitutional Limitations* in support of his argument. He claimed that where general power was given it was not subject to regulation by the State. The charter to a private company could not well be resumed, or its benefits diminished or impaired, unless the right was expressly reserved. Was the Legislature going to make these judicial functions apply to the rights and grants in existence at this time? If the Convention so declared, it would do what it had not the power to do; and it would, in his opinion, be a lawless, reckless usurpation of power, for it would be in violation of constitutional rights and respect for law. They had no power in the guise of making a Constitution to trample on the power of the general government and of universal right. The Supreme Court, in 1859, declared that the Galveston Wharf Company grant gave them a right to the fee simple of the land, just the same as a man had to the lot he occupied and used. It might be devoted to wharves, stores, cotton presses, or anything the owner of the soil desired, in which a man had the right to build wharves or anything else he liked. The reference to railroad bridges and ferries had no similarity to this case. It might refer to wharfage, if a man obtained a charter especially for wharfage; but the right of the Galveston Wharf Company was the right of fee simple to the soil, and for which they had the right to charge for a bale of cotton or aught else as a man had to charge for any other service. Was wharfage a franchise? Not in this case. If chartered as a wharf company then they had all the powers which were implied in a company to be subject thereto. The gist of the argument was that the company was private property and had a right to conduct its own business, on its own land, and to regulate its own charges, which if excessive would regulate themselves by the withdrawal of patronage.

MR. FLOURNOY said that they were not there to pass upon facts. Principles were what they had to settle. If the wharf company had

right and principle on her side they were powerless to hurt her, but if she had not, then she came in not as a wharf company but as one of the persons described in this bill, and that was all there was in it. The bill said nothing about the wharf company. It was a mere declaration of the broad principles of law, a mere declaration that the Legislature should provide the mode procedure by the county and district attorneys and the Attorney-General, to ascertain if the charges were made by the authority of law. It was not to divest any man of his rights, to injure widows and orphans, or to strike down the prosperity of the leading city of the State. They asserted merely the right to inquire into the authority of any company to levy a tax—for it was a tax when they charged toll upon anything of public use. A man might open a highway across his own land, but once opened it could not be closed by a gate, nor could he charge for it or run a stream through it, or bridge it over. He had not intended to go into a discussion of the rights and wrongs of the wharf company, in which he had not a cent's interest either way. All he had done was, when, at the request of the mayor of Galveston, he had endeavored to arrange an amicable agreement between them and the city of Galveston, and failed and published an opinion thereon. The law was not the science of principles, but the science of exceptions. The great feature of the common law was its flexibility and adaptability to the wants of the time, and all that was desired in this bill was to make it conform to the present elements of society and the needs and requirements of the State. He held that the bill was not retroactive and was intended to guard the interests of the State in the future rather than affect the past. He thought there was nothing in it calculated to have brought out this discussion, and he was sorry so much time had been wasted on it.

MR. STEWART opposed the views of Mr. Flournoy.

Mr. Nugent's amendment was adopted, and the bill engrossed.

SIXTY-EIGHTH DAY

WEDNESDAY, NOVEMBER 24, 1875¹²⁵

The last day of the Convention was free from debating, and was taken up with the necessary routine matters.

¹²⁵The proceedings for this day were taken from the *State Gazette* (Austin), November 25, 1875.