

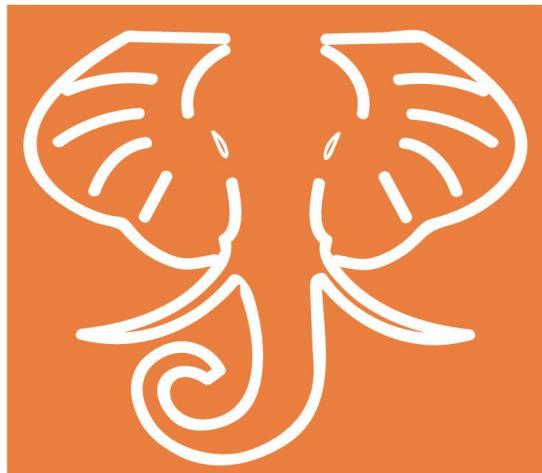
Official report of the debates and proceedings in the Nebraska Constitutional Convention assembled in Lincoln, June thirteenth, 1871. From the original shorthand notes of John T. Bell, John Hall, Dan Brown and John Gray. Prepared for printer (1871) by Guy A. Brown, clerk of the Supreme Court of Nebraska. Revised, edited and indexed for publication (1905 [-1907]) by Addison E. Sheldon. Published by the Nebraska State Historical Society pursuant to resolution of the twenty-ninth session of the Nebraska Legislature.

Nebraska.

York, Neb., T.E. Sedgwick [1906-13]

<http://hdl.handle.net/2027/yale.39002070864633>

HathiTrust



www.hathitrust.org

Public Domain

http://www.hathitrust.org/access_use#pd

We have determined this work to be in the public domain, meaning that it is not subject to copyright. Users are free to copy, use, and redistribute the work in part or in whole. It is possible that current copyright holders, heirs or the estate of the authors of individual portions of the work, such as illustrations or photographs, assert copyrights over these portions. Depending on the nature of subsequent use that is made, additional rights may need to be obtained independently of anything we can address.

Thursday]

MAJORS—WAKELEY—THOMAS

[July 13

out of the state for any offense committed within the same, nor shall cruel and unusual punishment be inflicted.

Mr STRICKLAND. I move its adoption.

The motion was agreed to.

The Secretary read section twelve, as follows:

¶ 12. No person shall be imprisoned for debt, arising out of, or founded on a contract express or implied, except in cases where there is strong presumption of fraud.

Mr. MAJORS. I move its adoption.

The motion was agreed to.

The Secretary read section thirteen, as follows:

¶ 13 Private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the state, shall be ascertained by a jury as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it was taken.

Mr. MASON. I desire to amend so as to require, in every instance, that the actual value of the property shall be paid for in money without any deductions for supposed benefits.

Mr. WAKELEY. I would like to say a word upon the subject. I understand that to be an unquestionable rule of the law at this time. I believe it to be well settled by the courts in construing precisely such provisions as this, that no supposed benefits can be offset against the value of lands taken. And I do not believe the provision to be necessary. It seems to me to be rather admitted that without such a provision the contrary rule might be adopted. If I can be satisfied of its necessity I will support

it.

Mr. MASON. I apprehend that the rule of law will be found to be that where property is taken the party derives peculiar benefit owing to the improvement for which it is taken, over and above that which immediate owners or parties do derive—that in that instance the peculiar benefit may be offset against the damages. I move to insert "previously paid in money" after the word "compensation," where it first occurs.

Mr. THOMAS. I think there are two questions here. One whether it be paid partly in money or in benefits. And the other is whether it shall be paid before the property is taken or damaged. I like the 19th section, Article I in the Ohio Constitution, which reads as follows:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall be first made in money; and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner.

Now I desire to see this amendment introduced, so that the possession shall be first paid or first secured; and then that it be secured in money and not in benefits.

Mr. LAKE. It seems to me that the entire section will have to be changed in order that great mischief may not accrue. The section under consider-

Thursday]

LAKE—THOMAS—MASON

[July 13

ation, with the amendment proposed by the gentleman from Otoe, without any other change, would require compensation in all cases before private property could be taken. Now, there are many cases that could be conceived of where private property ought to be taken. For instance, in the making of a highway, or the building of a bridge. For the purpose of securing these repairs before the money can be raised by taxation or some other mode—in all such cases public officers ought to have the right to take private property for such uses. If a just compensation in money, in these cases, is secured for the property, that ought to be sufficient. The entire section ought to be modified so that private property can be taken by public officers in certain cases without compensation first being made. I see no objection to the clause being amended so that in certain cases this can be done. In all cases where it can be done—where the owner can be ascertained, etc., I am in favor of compensation being first made where it can be done without great embarrassment to the public. I am opposed to modifying this section with the understanding that no other amendment is to be made and that it is to be applied to all cases. In this new country, it frequently occurs that roads are to be opened for public travel, before the money can be raised by the ordinary modes of taxation. Now where the entire public faith is pledged for the payment of a just compensation, is it a great hardship for the owner of property taken to wait until he is paid in the way laid down by law? I can

see many cases where this would work great injury to the public, with no great advantage to the owner of the property. I am in favor of this principle being applied to Railroad companies, where the land of individuals is taken for railroad purposes. Individuals compose the company and they should be prepared to pay money in such cases. Where the property of individuals is taken for their benefit, I believe that the principle should be applied, but where the public is under the necessity of using private property—it may be stone for bridges, abutments, etc., timber and the like it may take private property without first paying therefor.

Mr. THOMAS. Mr. Chairman, I agree entirely with the gentleman who has just spoken. It did not occur to me at the time I drew up the amendment. Where the public faith is pledged, I think it would be all that is necessary. I propose to substitute the corresponding section in the Ohio Constitution for our section.

Mr. MASON. Mr. Chairman, I move to strike out the section now under consideration and substitute section 19 in the Bill of Rights of the Ohio Constitution, as follows:

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner, in money and in all other cases where private property shall be taken for public use a compensation therefor shall be first made in money, or first secured by a deposit of money; and

Thursday]

WAKELEY—ESTABROOK

[July 13

such compensation shall be assessed by a jury, without deduction for benefit to any property of the owner."

Mr. WAKELEY. Mr. Chairman, while I don't disagree materially with the gentleman with regard to the general structure of this section, I don't like the Ohio provision just read. It seems to me it is long and cumbersome. I think it is defective too, for instance, it does not include the word "damaged." Their Constitution provided simply, that private property shall not be taken for public use without just compensation. That is the provision of the section just read, then again the Ohio section does not include the last provision of this section, to-wit:

"The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it was taken."

I regard this a very valuable provision and it is not found in the corresponding section of the Ohio Bill of Rights. It seems to me this section should be re-committed to the Committee on Bill of Rights. I will make that motion, at the proper time.

Mr. MASON. Mr. Chairman, I withdraw my motion.

Mr. ESTABROOK. I think the proper course is this; that this section (13) be reported to the house with the recommendation that it be referred to the Committee on Bill of Rights, and make a motion to that effect.

The motion was agreed to.

The CHAIRMAN. The Secretary will read section fourteen.

The Secretary reads as follows:

¶ 14. No ex post facto law, or law

impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

Mr. SCOFIELD. Mr. Chairman I move the section be adopted.

Motion agreed to.

The CHAIRMAN. The Secretary will read section 15.

The Secretary read as follows:

"¶ 15. The military shall be in strict subordination to the civil power."

The CHAIRMAN. No objections being heard, the section will be considered adopted. The Secretary will read section 16.

The Secretary read as follows:

¶ 16. No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war except in the manner prescribed by law.

The CHAIRMAN. No objections being heard the section will be considered adopted.

The Secretary will read section 17.

The Secretary read as follows:

¶ 17. The people have a right to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of grievances.

The CHAIRMAN. No objections being heard, the section will be considered adopted.

The Secretary will read section 18.

The Secretary read as follows:

¶ 18. All elections shall be free and there shall be no hindrance or impediment to the right of a qualified voter to exercise his franchise.

Mr. HASCALL. Mr. Chairman, I move to amend by adding "but laws may be made to ascertain by proper proofs the citizens who are entitled

Friday]

CURTIS—TOWLE

[July 14

this franchise. I think this is an absurdity in itself. If sir, the sense of the women of Nebraska can be taken in a way which will not offend their sense of delicacy and propriety, I will give every influence here to afford them the opportunity. Now sir, I hope this resolution will not be indefinitely postponed. I hope it will go to the Committee of the Whole. When this question of female suffrage comes up in the Convention, as it will come up, and give it a fair and impartial consideration.

Mr. CURTIS. Mr. President: I would like to have a word to say, if I may be allowed.

("Leave." "Leave.")

I ask that this resolution be referred to a proper Committee, leaving it to the Convention what Committee that shall be.

The PRESIDENT. The question is upon the indefinite postponement.

Mr. TOWLE. Mr. President: I withdraw my motion to postpone with the consent of my second.

The PRESIDENT. The question now is upon the motion to refer the resolution—

Mr. MASON. Mr. President: I am requested by the mover of this resolution to say that he prefers to have it referred to the committee of the Whole house.

Mr. TOWLE. Mr. President: I renew my motion to indefinitely postpone the resolution.

The PRESIDENT. The question is upon the motion to indefinitely postpone the resolution.

The yeas and nays were ordered, and being taken, resulted—yeas 20,

nays, 27—as follows:

YEAS—20.

Abbott,	Newsom,
Boyd,	Parchen,
Campbell,	Scofield,
Eaton,	Sprague,
Gibbs,	Stevenson,
Granger,	Thummel,
Gray,	Towle,
Griggs,	Vifquain,
Hinman,	Weaver,
Myers,	

NAYS—27.

Ballard,	Maxwell,
Cassell,	Moore,
Curtis,	Neligh,
Estabrook,	Philpott,
Hascall,	Price,
Kenaston,	Reynolds,
Kilburn,	Shaff.
Kirkpatrick,	Spiece,
Lake,	Stewart,
Lyon,	Thomas,
McCann,	Tisdel,
Majors,	Wakeley,
Mason.	Wilson,
Manderson,	

ABSENT OR NOT VOTING.

Grenell,	Woolworth,
Parker,	Mr. President,
Robinson,	

So the motion of Mr. Towle to indefinitely postpone the resolution of Mr. Curtis, was not agreed to.

The PRESIDENT. The question now is upon the motion to refer to the Committee on Rights of Suffrage.

The Secretary will read the resolution.

The Secretary read the resolution again.

The Convention divided and the motion was agreed to.

Mr. CASSELL. Mr. Chairman: I desire to offer two resolutions.

The Secretary reads the resolutions as follows:

Friday]

CASSELL—PARCHEN—THOMAS

[July 14

RESOLVED: That convicts shall not be employed on work out-side the prison walls.

RESOLVED: That it shall not be lawful for any members of this Convention to be a candidate for any of the offices created or provided for in this Convention, for the period of one year.

Mr. CASSELL. Mr. Chairman: I desire to have the first of those resolutions referred to the Committee on Reformatory Institutions.

The PRESIDENT. It will be so referred unless some gentleman objects.

Mr. MASON. Mr. President: I move to refer the opinion asked for by the Committee on Education, etc., be referred to that Committee.

The PRESIDENT. It will be so referred unless some gentleman objects.

Mr. PARCHEN. Mr. President: I wish to offer a resolution.

The Secretary read the resolution as follows:

RESOLVED: That the Constitution of Nebraska be so construed as to strike out the word "male" and insert "female" in the Article on Suffrage.

Mr. PARCHEN. Mr. President: I move to refer the resolution to a special committee consisting of George Francis Train and Victoria Woodhull.

Mr. MANDERSON. Mr. President: I move that the gentleman who moves the reference be added to the committee.

Mr. ESTABROOK. As chairman of course.

Mr. MASON. Mr. President: I rise to a point of order, I suppose it is not in order for this Convention to refer a motion improperly.

The PRESIDENT. I think it is out of order.

Mr. MYERS. I move that the President declare the whole thing out of order. I object to these proceedings.

The PRESIDENT. I think the objections of the gentleman are well taken.

Mr. HASCALL. Mr. President: I move that it be indefinitely postponed.

Mr. PARCHEN. Mr. President: I ask leave to withdraw the resolution.

The PRESIDENT. No objection being made leave is granted and the resolution is withdrawn.

Section 13 of Bill of Rights.

Mr. THOMAS. Mr. President: If there is no objection I desire to offer a report from one of the Committees.

By request of the Chairman I will offer the following report:

Your Committee on Bill of Rights to whom was re-committed Section 13 of the Article entitled the Bill of Rights would respectfully report the following Section, the adoption of which they recommend, in lieu of Section 13, originally reported.

The Secretary read the report as follows:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken or damaged for public use in time of war or other exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be opened to the public without charge, a compensation shall be made to the owner in money and in all other cases a compensation shall be first made in money, or first secured by a deposit of money. Such compensation shall in every case be without deduction for the benefits to any property owner, and when not

Friday]

THOMAS—MANDERSON

[July 14

made by the State, shall be assessed by a jury in such manner as shall be prescribed by law. The fee of land taken for railroad tracks without the consent of the owner thereto, shall remain in such owner subject to the use for which it was taken.

Mr. THOMAS. Mr. President: I move that the report be referred to the Committee of the Whole.

The motion was agreed to.

Mr. MANDERSON. Mr. President: I move that the Convention resolve itself into a Committee of the Whole on this report from the Committee on Bill of Rights.

The motion was agreed to.

So the Convention in the Committee of the Whole—Mr. Griggs in the Chair—proceeded to consider the report of the Committee on Bill of Rights.

The CHAIRMAN. The question will be on the adoption of the substitute for section thirteen of the Bill of Rights.

Mr. THOMAS. Mr. Chairman: I will state that the first part of this section is almost a literal copy of that in the Ohio Constitution with the change that the money shall be paid first where property is taken for other purposes than for public roads and we have inserted the word damages. The latter part of the section is copied literally from a similar section in the Illinois Constitution. I believe as it is now drawn it embraces the opinions expressed by the majority of the Convention.

Mr. MANDERSON. Mr. Chairman, I don't know that I am satisfied with the report of the Committee. There is one thing that should be considered in this report. While

practicing in the State of Ohio, I had occasion to look into the Constitution of Ohio and examine the section referred to, where the question of damages are left out. Now this section submitted here says "taken or damaged." Let us inquire what that word "damaged" means. Persons or corporations taking property under the Ohio section are compelled to make oath that the damages shall be paid in money without any deduction for benefits. For instance, let us suppose that 100 feet is taken off of a man's property for railroad purposes, no benefits can be deducted from damages to the property and taken, no matter if it increases double what it was before it was taken, but the decision in the courts of Ohio was that in considering the damages of the balance of the property, not taken, the benefits may be deducted from it.

Now suppose that a party owns a town lot 200 feet square, on one corner of that lot he has a valuable building, a private corporation in the exercise of that domain delegated to it proposes to take a corner off his lot, and takes the corner upon which the building stands, it goes through his valuable building. Now under the law as it stands in Ohio, from the amount of compensation that should be paid to him for the taking of that corner, no benefits would be deducted, but suppose he had said, you have not only taken from me my corner, but damaged the balance of my lot, that is to say, you have rendered this building uninhabitable, we shall have to tear it down and rebuild in some other part of the lot; well and good,

Friday]

MASON

[July 14

but the balance of your lot is greatly increased in value; true it is damaged by the destruction of this building but the ground left you is increased ten fold in value by the location of this railway. It seems to me it would be unfair to pay him for the land taken, without deducting for benefits he received. That has been the rule in Ohio under their law. If we adopt this section as it reads it would not be the rule here. A jury would first have to pay compensation for the corner taken, his building might be damaged to the extent of a thousand dollars, but his lot left might be benefited ten thousand dollars, yet as against that incidental damage there could be no offset of benefits if we adopt the section as reported. I would like to hear from the Chairman of the Committee on Bill of Rights on that question.

Mr. MASON. It was the purpose and design of the committee to avoid that very thing. The railroad company damages a man's property without taking it, ought not the owner to have his damages the same as though they did? Under what rule should he withhold his damage because his property was not taken and perverted, it may be as effectually destroyed as though it was completely taken. Gentlemen of the committee consider the very case put by the gentleman from Douglas (Mr. Manderson). A railroad company comes through a valuable building four hundred feet long and may take two hundred feet off the land and ruin the balance, ought he not to have damages for the ruin just as honestly and fairly

as damages for the property taken. Why, the committee did consider the fact of that particular damage, and it was put there with the purpose and design to give to the man whose property is taken an honest compensation. Let us consider this abstract question, if Mr. A damages the property of B, he finds a secure and perfect remedy under the law, and Mr. A must pay to B the full amount of damages done. Yet if a railroad corporation commits this damage, the gentleman from Douglas would place over and above the individual man, a man that had a soul to save, or a heaven to attain, eyes to see and ears to hear. He would put him below the corporation that has neither and place them above the individual. Your committee would put both on a level so far as the question of compensation and damages are concerned, in other words, gentlemen of the Convention, If I damage the property of a citizen, they may offset supposed or imaginary benefits against the damage they commit. The individual cannot do it, and yet it is proposed to let all corporations do so. Now, Mr. Chairman, I for one have carefully considered the whole scope and tenor of this phraseology and it does just what the gentleman from Douglas claims it does, holds the corporation which takes property for public use, to make actual compensation in money for the injury which they do without offset against that damage, any supposed benefits which they confer upon the individual. Now let us see whether this is just or not, and eminently practical in the consideration of this proposition. Here

Friday]

MASON

[July 14

comes a railroad sweeping by the border of this town, it takes a hundred feet off a lot of any gentleman of this Convention and damages and ruins the balance. Another gentleman of the Convention, if you please myself, owns a lot adjoining which it just misses. It is just as much benefit to me as to my neighbor whose lot is ruined, and yet you make the man whose lot is ruined pay for the benefits he receives and me none at all. Is this honest? If it is, it is a school of honesty in which I took no lessons and which I hope I may ever be withheld from taking lessons. The object of this proposed amendment was to give to the private citizen full, perfect and complete compensation, not only for the property taken but for the damage done and the injury sustained to the balance of his property. Let me put another case. A member of this Convention who owns a farm in the country has a valuable stream, which to him is actually worth for practical and stock purposes more than the land itself, if he owns the land. A railroad comes along and runs between the spring and his house, cutting him off from water, the gentleman says he ought to offset the benefits which the railroad confers upon him as against the damages done to him by cutting him off from water. Is that honest? Is that what the Convention desires? Ought he not to have the actual damage done to the balance of his estate, independent of any supposed benefit? I conceive it does just what he says it does, and I for one insist that it is but the rule of honesty between man and man. Suppose I commit a

trespass on my neighbor's land, and confer upon him a great benefit thereby. He sues me, what court would enunciate the rule that I can offset the benefits done him against the actual damages? It never was conceived until it was conceived in the interest of consolidated and overriding capital, and the rule finds no just support in sound reason or logic. Besides, gentlemen, this is the rule that was established in the Constitutional Convention of Illinois and they there have had considerable experience in these matters, and it may be that the word was inserted for this very purpose, and I desire to call the attention of the Convention to the Constitution of Illinois, first to the Article as found in the Bill of Rights in Ohio; second the Article as found in the Constitution of Illinois. Section thirteen reads "Private property shall not be taken for damage for public use, without just compensation." Now let us turn to the section in Ohio "Private property shall be held inviolate, but subservient to the public welfare when taken for public use." The word "damage" being omitted in the Constitution of Ohio. If this Convention desires to offset supposed benefits against actual damage done, you should strike out that word damage. If you desire to continue the unjust rule that has prevailed in Ohio, against—in my opinion—every sense of equity and right and regard for private property then the gentleman should receive the approbation of this convention. If on the contrary you desire to give to the railroad company and to the State the same rule of law which you

Friday]

MASON

[July 14

[hold] between individual man and man, then the Article should be adopted as it now is. Now which is right? Let me not be misunderstood, I would not assail a corporation or take one dollar from it, I would give it the same law to govern it that I gave to the individual man, but I would not give a single cent beyond but put them both on the same level. This is what your Committee had in view, and to attain this end, this word damage was specially inserted. Besides it is true, that while they were paid under the Ohio rule for the property taken, yet for the damage done to the balance they may offset benefits. Where is the justice in this? Why, if an individual came along to buy a strip of land one hundred feet wide through the farm of any member of the Convention, before you sold it you would consider the damage done to the balance of the estate, how much would it be worth? When the railroad takes the land of the individual, when they take it by the supreme law right of eminent domain, ought not the individual have the same rule of damages that he would if he sold by voluntary consent? Ought he not to have the actual damages which are done to the balance of the estate as well as the actual cash value of the land taken? This is my view of honesty. This is my rule of justice between man and man. This is the rule that your Committee saw fit to adopt. And I believe, in respect to this rule, there was not one dissenting voice. And I desire to meet this question squarely, and that the Convention may understand. If you strike out

that word "damage," then the rule, as laid down by the gentleman from Douglas, may prevail—that you deduct the benefits made to the remainder of the estate, the benefits made to the individual by the construction of the road. If you leave it standing, then the actual damages done to the remainder of the estate in consideration of the benefits; and the Convention is to say which is the right rule to adopt. And I ought to say, on behalf of the Committee that we did amply consider that the word "damage" was omitted from the article in the Ohio Constitution. We turned to the Illinois Constitution; and, as an evidence of progress we found the word "damage" was inserted. What for? To meet the very evil which had existed in Ohio and other states; and we inserted the words "taken" and "damage" the same as in the Illinois Constitution. And I sincerely hope the Convention may concur in the views entertained by the Committee, giving to the owner of the property the actual cash value of the land taken, together with the actual damage to the remainder of the estate which is not taken, and not allowing the railroad company to set off any supposed benefits against the damages supposed to be done to the remainder of the estate. I think, as the article now reads, you leave the railroad company and the individual whose property is taken in precisely the same situation that two individual men would be after the property was taken, holding the company to pay the value of the property taken and the damage done to the remainder

Friday]

MASON

[July 14

of the property without deducting any benefits. And one case more. A has an eighty acre tract of land. The railroad strikes it in the north east corner and goes out at the opposite corner, cutting it into two parts, leaving a right angle triangle of each piece. They take, if you please, 160 rods through the tract, or a little more, leaving a piece on each side. The actual loss the owner sustains is first the value of the land taken; second, the damage done to the remaining portion of the estate. Now, the gentleman from Douglas says he would give to the land owner the actual value of the land taken without deducting anything for benefits, but when he comes to consider the damage done to the remainder he would deduct the benefits and apply them against damage to the remainder. Is that honest? According to my rule of right that is no better than legal highway robbery. If a man builds a mill and makes a market for my wheat, he benefits me. Suppose the dam he constructs overflows, and damages my property, whoever heard of deducting the benefits I derive from the erection of the mill against the damages I sustain from the overflow! And yet it is to be done in behalf of a corporation and not in the behalf of an individual. And, on the same proposition of law, we regard the mill as we do the railroad; and it is not upon any well grounded principle of exact justice as between man and man, that this amendment is sought to be obtained, and it was to avoid this construction which courts have been compelled to put upon the ar-

ticle in the Ohio Constitution that this word "damage" was inserted. I might stand here and illustrate the practical workings of this thing, if you strike out the word "damage," still further. But enough, it seems to me, has been said to recommend this to the sense and justice of the Convention. Why, if a railroad damages your property without taking an inch of it, and it may do it, ought it not to pay the damage just as much as if it took that property? And yet in one case you deduct the benefits, and in another you do not. Let us hear in what book the gentleman learned his doctrine that in the one case the compensation should be made, and not in the other. It certainly was not by any rule which commends itself to my judgment. And it was I conceive a matter which troubled the committee somewhat to frame this article, so as to cover the one case and the other alike. We did frame it so that the legal gentlemen on that committee saw that it covered both branches of the case. We put it in there because we meant it should be there. It was no accident. It was pure design, and designed to meet equal and exact justice between the citizen, the individual property holder, the State, the corporation and the counties; and we left them standing side by side. And the same rule applied to the one and the other. One other illustration: Suppose I am living on the border, and, by the exigency of the times, the Indians make a raid upon me, and the colonel is compelled to seize my property to protect me; and my horses are taken, and

Friday]

LAKE—MANDERSON

[July 14

also my plow, with the furrow left unturned, would you expect me to ask damages for the protection I secured? If you would not apply this just rule to the State, or your property, why do it in the other case? But, gentlemen of the Convention, I do not deem it necessary to go further. Much more might be said, but I think the committee fully understand; and I think it must commend itself to their judgment, and indeed has.

Mr. LAKE. Mr. Chairman, I have a word or two to say on this question. I understand the proposition is to strike out the word "damage."

Mr. CHAIRMAN. There is no such proposition offered.

Mr. MANDERSON. I merely wish to direct the attention of the Committee in this channel. At the proper time I propose, not to strike out the word "damage," but to add to the section this idea—that from property merely damaged, not taken we direct that special benefits might be deducted.

The CHAIRMAN. The question is upon the adoption of the section, as reported by the Committee on the Bill of Rights.

Mr. MANDERSON. I propose to insert, where the Article reads "such compensation shall in every case," the words "Such compensation for property taken shall, in every case, be without deduction for benefits to any property of the owner."

Mr. LAKE. Mr. Chairman, I believe every member of this Committee is anxious to attain one end, and the same end in this Constitutional provision now under consideration—

that the owner of the property taken by rail road corporations, or otherwise, shall receive just compensation for his property, and that he shall be made good for all damages he shall sustain by reason of his property being taken for this quasi public use. It will hardly do to say that property taken for a railroad track is taken for private uses. It is true that railroad companies are private individuals organized together for the purpose of securing sufficient capital to carry out their projects and enabling them to do what private individuals cannot do. Now how is it that the Legislature can acquire the right to take the property of private individuals for the purpose of constructing, or enabling others to construct railroads across the country; how is it that the Legislature can say that a corporation may take the property of A, B and C for the purpose of constructing a rail road track—how is it that the State can exercise this right of eminent domain in favor of corporations? It is by reason of the quasi public character of these roads? The state, or the United States may take the land belonging to the people for the purpose of constructing a military road. The State can take private property for the purpose of building roads from village to village, from town to town, and from city to city, and it is by virtue of the same principle that railroads are constructed throughout the country; but for this quasi public character, railroads would have no right to take the property of private citizens to construct railroads. We all agree that it is

Friday]

LAKE

[July 14

a great public benefit to any state to have roads constructed within its borders, but in this case the same rule should obtain to-wit: a full compensation should be given for all land taken or damaged by reason thereof. I don't believe any member of this Convention desires to subject a railroad corporation, simply because it has means, to any unnecessary burdens. It would be unjust to do so. It would be unjust for the state, or individuals to insist upon what is unfair against railroad corporations. I would throw no unnecessary impediment in the way of any enterprise they undertake, I would not say they should pay A, B or C more than for damages actually sustained. I would give just and full compensation for damages sustained thereby, and nothing more. Now what are these damages? The gentleman from Otoe (Mr. Mason) has stated them to be, first: the value of the land taken. Upon that there will be no dispute—the value of the land, that is the land taken in the first instance. Second: the damages to the land adjoining which was not taken, but yet the corporation is to be allowed nothing as an offset although through its having taken this land, it may have increased the value of the portion not taken, very much. Is that just? Why it seems to me that the rule which has been adopted in this State under our present Constitution, is a wise and just one, to-wit: that in addition to the value of the land taken you must estimate how much less valuable is the remaining portion of the land, of course not taking into account those

general benefits which accrue to the whole community, but considering and giving credit for, any special benefits which the owner of the land may have received. I would not have the railroad company benefited by reason of any benefits which may accrue to the entire community. I would not have deducted from the value of the land remaining, such benefits. I have found, in practice that in 99 cases out of 100, the value of the land taken together with the damages sustained to the land remaining, are the only questions to be considered. So that it may be laid down as a general rule that the damage to be considered, is this; in addition to the value of the land actually taken, you estimate how much less the remaining portion of the land is worth. Now if a rail road should be run diagonally through a man's farm, it would be first the 100 feet strip through the land; next the value of the land remaining, not taking into consideration those general benefits which accrue to all. Would not that be just and right? Should not the rule be just, and bear on all alike? I think it should and therefore I am inclined to favor the proposition of my colleague (Mr. Manderson). I think it is an improvement upon the old Section, but for myself, I would be in favor of taking Sec. 13 of the Illinois constitution. It attains all that is necessary to be attained by this section of our constitution. I am willing to go further and include what is desired by the gentleman from Otoe, (Mr. Mason) that in this class of cases, money shall first be deposited for the benefit of the own-

Friday]

LAKE

[July 14

er of the land damaged or taken. When a man is damaged, for instance, by building public roads by reason of excavations or otherwise, when the land is not taken, it would be but just as between man and man, between the State and the individual and between the corporation and the individual that if [there were] any special benefits, not applicable to the community, it would be but just and right that these special benefits should be taken into consideration by the jury, in estimating the damages, if as I said before, the second part of the damages is taken into consideration—the loss on the remaining portion of the land.

The gentleman from Otoe (Mr. Mason) has referred to a case of trespass that I say is not in the question at all. Who ever heard of an individual trespasser profiting by his own wrong, or being permitted to claim benefits? Can railroad corporations be compared to trespassers when they go on a man's land under the special sanction of the law? Is it just to compare them so? I think not.

If a corporate body see fit in the opening of a road to go through a man's farm; or if, in the opening of a street of a city it is necessary to take a portion of a private individual's property, for the public use, how is it possible to take into account the damages in any other way than by deducting from the damages the special benefits? That is the rule laid down under our present Constitution and the one under which the gentleman from Otoe (Mr. Mason) in his official capacity is expected to act.

I am willing that so far as relates to the taking of the property the rule shall be applied that is contained in the provision under consideration and that the damages cannot be offset by the benefits to the land. In that I believe we all agree, but the kernel, the substance of the difference between the gentleman and myself is this, that where the rule only relates to damages, the benefits not felt by the community, but by the individual alone, may be taken into account by the jury in estimating the damages he sustains. It seems to me no gentleman can look at this question and take any other ground than that he is to allow justice to both sides, the party damaged and the party benefiting, you cannot reach a just conclusion or estimate by looking at only one side.

All should enjoy the general benefits which accrue from the building of a railroad, such as the rise in land, every one is entitled to in an undiminished and untarnished form. It is his inalienable right which he ought not to be deprived of, but when this one individual who claims damages is found to have received some peculiar advantage which the community has not received, such as the drainage of a swamp or otherwise useless morass, why should not these peculiar benefits be taken into account? I am anxious to arrive at what is just and right in respect to this provision proposed to be engrafted into our Constitution, and if I could be satisfied that the proposition was just, I would support it, but I believe that the amendment as proposed by my colleague (Mr.

Friday]

MANDERSON

[July 14

Manderson) is just and as it should be, and I shall support it."

Mr. MANDERSON. Mr. Chairman, I wish to acknowledge the valuable aid received by myself in the advocacy of this proposed amendment by my colleague (Mr. Lake); he has relieved me from much difficulty and I merely rise to reply to one or two propositions by the gentleman from Otoe (Mr. Mason) whom I conceive has strangely misconceived, or who is disposed to misrepresent the remarks I made in introducing this amendment. To a certain extent I would place railroad corporations above the private individual. The law does so. To no individual does any State give the right of eminent domain, as it does to railroad corporations. But when it comes to mere rights, I would not for an instant place the railroad corporation above the individual. Let us suppose a case. A comes to B, and says to him, "I propose to take one half of your property," say he has two hundred feet. He says he will place, on the one hundred feet he takes, that which will make it of immense value. The whole property is now worth one thousand dollars and the half that B shall keep A promises to make worth \$10,000, by putting up a hotel for instance, so that you can use it for purposes that you can never use it for as it is. Now what will A say to him? He says "Sir, I will give you the property if you will do as you propose." Now it seems to me that is rather the position of the railroad company that takes the land and the individual who purchases it. As my colleague from Douglas (Mr.

Lake) suggests, I do not propose that against the land taken there should be any deduction for benefits, but against the damage to that that is left, there should be deductions for special benefits. In what school of honesty, says the gentleman, have I learned this thing. The school in which I learned this thing, is the school of Redfield, of Cooley, whom the gentleman yesterday eulogised, the school which is presided over by these great intellects that have given us their views upon the common law. It is a view of the common law that is against these damages, direct and special benefits should be set off. I have here that that expresses it seems to me, in words as concise and plain as they can be expressed, the ideas suggested by the friends of this amendment. I read from the Chicago Tribune of June 17th, a leading editorial that in all its spirit is directed, as are many editorials of this paper against the railroad interest, and it gives in clear, concise language what is the law.

"It is certainly very unjust that, if two farms lie adjoining, and one only of them is bisected by a railroad, while another merely fronts on it but has none of its land taken, the farmer losing his land shall be told that his benefit offsets his damage, while his neighbor, who keeps his whole land, sustains equal benefit and no damage. Therefore it is that the rule of law which should be enforced in all such cases is, that no benefits shall be offset to the damage except that which is peculiar to the person whose land is taken, and not common to all adjacent proprietors. The peculiar, personal, and exceptional benefits sustained only by the owner of the land taken may be offset, but

Friday]

MANDERSON

[July 14

not the benefits accruing to him equally with the owners of land not taken, such as the nearness of depot, and the general advantages of having a road run within convenient distance for travel and transportation. These benefits being such as the whole community share, and have the right to share, by virtue of the building of the road, cannot be charged as an offset in payment to any owner for land taken. Any lawyer, by referring to Cooley's Constitutional Limitations, or Redfield on Railways, will see the soundness of this position. This being so it could only have been by a neglect to properly defend their rights in the courts that the practice could have grown up of "taking a man's property and telling him the taking is compensation."

Let me say to the gentlemen, this grew up in the courts of the City of Chicago, under that very constitution of 1870, he reads from, the constitution of Illinois which says, "private property shall not be taken for public uses without just compensation." They have sought in the courts of that State to deduct the benefits not only from damage, but compensation for land taken. They have raised this question there, and able attorneys have maintained the position in the lower courts of that State.

"In all cases the Commissioners appointed to condemn lands for railways should specify the increase of value given to the remaining land by virtue of the road running through it, over what it would have been had the road run through land of other owners, not over what it would be if no road ever were built. And, under a right construction of this rule, which might well be reinforced by a legislative interpretation, no injustice could be done even in particular cases. The rule should be that the general advantages accruing to all

land-owners near the route, and equally to those whose land the road does not run as to those whose land is taken, cannot be offset. Any other peculiar, personal, and special benefit which one land owner receives, by virtue of his own land being taken, and would not receive if his neighbor's land were taken instead, ought to be charged to him as special benefit, and he could not complain. Let the Legislature enact more plainly the rule of the common law, and all will be well, even in the obnoxious case of railroads.

Now Mr. Chairman, it seems to me that the last body of men who should be charged as being held under the whip of aggregated capital is the body of men who sat in Convention in 1850 and adopted the Constitution that has in it the clause that is to the gentleman objectionable. That Convention certainly was actuated by no desire to advance the interests of railroad corporations, they were rather enemies than friends, and in their zeal to protect private interests, to cripple railroad corporations I think they went too far. Looking through this Constitution they adopted we find all through it the evidences of this fact. They prohibited the giving of municipal aid to corporations, and as the result of that action, we are told, and I believe truthfully, that since the adoption of that Constitution, now twenty years ago, but one short railroad has been projected and constructed within the limits of the State of Ohio, because of their stringent rules against private corporations. The city of Cincinnati stands to-day upon her beautiful hills asleep and snoring, while other cities are

Friday]

MANDERSON

[July 14

passing her in the race for municipal wealth. Her great need is a railroad to the south east, she cannot aid it because of the Constitutional objections. Therefore I say it comes with bad grace from the gentleman to charge such a Convention as this with a desire to legislate for any railroad interests. I think too, it comes with bad grace from the gentleman to charge this as a dishonest amendment. I do not propose to impugn the motives of any gentleman on this floor. I certainly am not here wedded to any railroad interest. I do not own a dollar of interest, nor a bond of any railroad. I do not think that any one member of this Convention, no matter how large he may be physically, should claim to contain within his frame all the honesty that may be here. Now let us take one other case suggested by the gentleman from Otoe. He says, suppose A owns a farm, from one corner to another diagonally runs a railroad, what does the gentleman from Douglas propose? First he says, a compensation without deduction for benefits shall be paid for the strip of land taken. Correct, that is our position. But he says, he next proposes that for the damage done by obstructing this piece of land, no benefits shall be deducted, the land is ruined for farming purposes, and the gentleman would pay no damages. I would pay damages, but the question of ruin or helping is a question for a jury, to be determined by a legal tribunal, as any other issue that may arise. Let us run out this question. Here is a piece of land cut diagonally from corner to

corner, perhaps one side of it is appropriated by the railroad and there is left to the farmer simply this triangular strip, it is so small that it is rendered utterly and entirely worthless for farming purposes. What does the gentleman propose? That we should pay not only for that we have taken for a right of way, not only for the triangular piece we have taken but for what is left. I say we should pay for it if we have ruined it for all purposes. We may have condemned it for farming but rendered it valuable for town lots. We may have given it some peculiar advantage. Suppose a railroad taking this strip on one side of its track erect works in which they may manufacture machinery, they may aggregate capital there, and toiling millions may by the sweat of their brow make those ponderous machines that run in the interest of aggregated capital. Toiling millions might sweat for many generations in their work, and unless aggregated capital would lend its helping hand, they never would construct the ponderous machines; but the railroad company places there its valuable shops. This land that was perhaps worth ten dollars per acre before this triangular strip was left may be worth a thousand dollars an acre. Had he that strip taken by the railroad company he would have been glad to have given them the land. We do not propose to place the private corporation below A, and say that while it is true we have been willing to give the land to A, he shall not give it to you as against the land taken. You must not deduct benefits he has re-

Friday]

PHILPOTT

[July 14

ceived against that left that you have ruined for farming purposes, but make as valuable as though you could grow upon your fields green-backs instead of wheat. For that damage you shall deduct benefit. As I suggest, and as is suggested by this article, it is not proposed by this amendment, the general benefits shall be set off against the damage to the land left but merely special benefit, not even, perhaps the location of a depot. It seems to me, Mr. Chairman, much more might be said in favor of this proposed amendment. It is not one raised in all necessity, one that does justice to the citizen and private corporations, and therefore I hope it will be the sense of the Committee it should be adopted.

Mr. PHILPOTT. Mr. Chairman, I shall have but little to say on this subject. I see some things that should be brought to the attention of this Committee. I do not believe as has already been intimated, that railroad corporations are the representative to some extent of a sovereignty, that they possess that great public character which has been ascribed to them and that thereby they attained eminent domain.

I do not like to hear it in a Republican country like ours. I take the right under which the railroad takes by the law of necessity, by which any property anywhere in a Republican form of government can be taken. Suppose A has a farm that is surrounded by B, C, D, and E. They say to him, "This is our land, you cannot go to your land over ours." What is he to do? Why, that law of necessity, which says that

property, wherever it lies, should be for the benefit of the whole community, comes in and demands that he shall have right of way to his own land over any other that may surround him. Now, how is it in respect to taking right of way from one county to another. Where does the law of necessity come in? It is absolutely necessary the road be made from one county to another, that the business may be carried on; hence, by the law of necessity, it is right the State should make laws that will give them the right of way to any part of the State. Now where does this question of quasi public come in? There is no doubt railroads are lawful, and cannot exist without extension, and they must have the right to take property in order that they may be extended from one point to another. We can never take the property of any individual only by permission of the government and the State, and that is the only law I am willing to recognize. Suppose a number of men organize themselves into a company for the manufacture of shoes. They certainly would render the public a good by so doing, if they supplied the articles cheaper. But because they do good it does not make them a public institution, and so with railroads. What do railroads do? They may be organized in the eastern portion of the country and extend to the western portion; and when they come here they may charge perhaps three or four times more for way freight through your State than for through freight. Now these great public benefits are nothing more than bleeding the people. Generally they

Friday]

MANDERSON—PHILPOTT

[July 14

are private corporations in every sense of the word. They receive who they please and what freights they please. My object is to show that these corporations are private in their character, and I want them considered in this light. Let one of these private corporations pass over some individual's land, and suppose there is something which might be a pecuniary or special benefit to the individual. I want to know whether you will compel that individual to take advantage of that special benefit. How do you know it is a special advantage? I would like the gentlemen who have been discussing in favor of this amendment to show up those peculiar advantages, and show in what manner those advantages can be made profitable to the man. I certainly would be in favor of the section as reported by the Committee.

Mr. MANDERSON. Will the gentleman from Lancaster permit me to ask him, would not that question of damages, and benefits to be offset against damages be a question to be passed upon by a jury?

Mr. PHILPOTT. I have no doubt it would be a question for a jury, but I want it never to become a question for a jury to determine, there is no reason why we should put this matter in such a condition that it should ever go to a jury. If they open up that land it is for the man to take advantage or not as he pleases. How can you compel him to take advantage? And why would you allow, in this particular instance, to a private corporation, who are entirely for themselves? I cannot see

any philosophy or reason why a party should be put in that condition before a jury that he shall go and show whether he is able to take advantage or whether he will or will not take advantage. I want the man to receive for the amount of [the] tract taken and for damage, but if he gains any special advantage let him embrace it: it is his good luck.

The gentleman from Douglas (Mr. Manderson) has referred to a speech lately made in this town by an eminent gentleman from Ohio, in which he said that but one railroad has been projected in that state during the last twenty years. Now what is the reason of that? The reason gentlemen cannot be credited to this provision in the Ohio Constitution which prohibits railroad corporations from being allowed to put in, as an offset to damages private individuals sustained by reason of railroads, general benefits which are conferred upon the whole country by railroads.

Mr. TOWLE. Mr. Chairman. Although I am very favorable to railroad corporations, and although I believe them to be of a quasi public character; but I believe, further, that they have become very popular and consequently very powerful, and it is for Constitutional Conventions—it is for the people of the different States to see to it that railroad corporations are placed in proper bonds. It is the duty of the Legislatures to place about them such limitations that they cannot drive over the private interests wherever and whenever they see fit. I believe the wisdom and experience of the last thirty five years has demonstrated the nec-

Friday]

TOWLE—MAXWELL

[July 14

essity that there be damages given, not only for property taken, but for property damaged also. Now where can a claim for damages be made? It can be made where private property is partially, or wholly taken by the public officers, or corporations—where property is either used or injured. For instance take it as it was in a certain place in Kansas a few years ago. A railroad was projected and partially built. There was some question as to the location, at a particular point and two lines were constructed, for a short distance, running at right angles with each other. Then another line was run which formed the hypotenuse to this right angle. Large excavations were left and the parties owning the property brought suit for damages and the case has been dragging along in the courts, for years. If proper Constitutional provision had been made to regulate cases of this kind a great deal of expense could have been saved. But the special question here, is the question as to whether we will allow a deduction on damages for special advantages that may be conferred by a railroad corporation, or any other kind of a corporation that may choose to occupy your land or take your building. Why, sir, if a railroad company can say that by going through my land, they are conferring special advantages on me, and that these special advantages are to be considered as an offset, where would be the end of it? Why it would only be following out that proposition to say that any corporation might go out upon a farm and set out stakes and begin

work upon a hotel, for instance, and claim that as they propose to raise the price of the land adjoining, that this should be taken into consideration as an offset to damages.

Mr. MAXWELL. Mr. Chairman. I have no hostility to railroad corporations: on the contrary, I desire to encourage them in every possible way. I would place no obstructions whatever in their way, for I wish to see railroads built up throughout our State. I think the views of the gentleman from Douglas, (Mr. Lake) in regard to the rights of corporations, are, in the main, correct. From the necessity of the case, these corporations take private property from the owner without his consent, and use it. Now the question is, is this company to pay all the damages sustained? Now it is said by all, that they should pay for the land taken; but it is a question as to whether they should be permitted to assess any special benefits that have resulted to the owner. I think there will not be one case in a thousand, where any special benefits would accrue. I would say that where the chances are so few that special benefits accrue, that the party whose land is taken shall, in all cases, have full pay for all damages sustained. Now under our present law, it is provided that a jury shall go and make an estimate of the damages. The men composing this jury know nothing about land, [law] generally. They reason in this way; they say, "here this land is worth so much to-day; before the railroad run through, it was worth so much." So that they do actually take into account the general benefits

Friday]

MYERS

[July 14

which have resulted to the entire community by reason of this road being built. The Constitution should clearly state that these corporations should be required to pay all damages actually sustained. It is true that in most of the States these general benefits are put in as an offset to damages, because, in estimating damages, it is the rule to take into account the value of the land before the railroad ran through, and then consider the value of the land after.

Now that takes into account general benefits, that is, such as are shared in by the whole community, by men whose lands are not touched by these roads as well as those that are. If this is left to the Legislature their laws may be changed at any time and they might lay down another and different measure of damages than is now adopted, and is it not best to lay down as a fundamental principle in the Constitution that the general benefits shall not be considered against the measure of damages? Now, only for the color of law that allows railroads to go upon our land what are they but public trespassers, and this being the case I say that they should pay for all the damages that we sustain by their trespass.

Mr. MYERS. Mr. Chairman, where there is such a wide and marked difference in the minds of legal gentlemen on points of law, it is hard for others outside of the bar to come to a conclusion upon the difficulty. Now, sir, I do not propose to speak from a legal point of view, but simply as a farmer in regard to railroad improvements. If I understand the amendment of my col-

league (Mr. Manderson) it does not apply only to railroads but to municipal corporations and others. Now I have followed it as a principle in my mode of action that wherever there are reciprocal benefits that they ought to be taken into account in the measure of damages. I am always in favor of fair play. I have ever failed to recognize any difference between a man and a corporation in this matter. It is true as the gentleman from Otoe (Mr. Mason) said that a corporation has no eyes to see and no ears to hear, and I would [add] often no heart to feel.

The provisions in the Constitution of the State of Pennsylvania are very plain and simple and even that great State has always progressed in her improvements without inflicting serious damages upon private property. The late governor of Ohio delivered a speech here a few days ago from that wood pile there, that belongs to the State I believe, in which he said that on account of railroad restrictions in the Constitution of that State but one railroad had been projected and built for the last twenty years, and the city of Cincinnati sits idle to-day for want of railroad connections, her great hog trade crippled for want of transportation. The provision in the Pennsylvania Constitution is:

The Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property, or give adequate security therefor, before such property shall be taken.

Friday]

HASCALL—GRIGGS

[July 14

That is the Constitutional provision of the Key Stone State, and under it that great State has built thousands and thousands of miles of railroads through difficult places and paid for all the damages. Now, sir why should we restrict or embarrass the construction of railroads in this State? If I have a horse in my stable and attempt to feed him, but tie him up so short that he cannot eat, would I not be starving the horse just as much as if I would not give him anything? And if we say to these railroads "go on and improve our State," and yet restrict them by legislative enactment by saying you shall not go through here without first paying for all the damages you may do without deducting any benefits, so as to make it unprofitable to build any roads, do we not cripple our own interests? Who are the owners of the railroads? No King, no titled monarch, but we the people, and why should we prepare a halter for ourselves? I am in favor of the amendment of my friend from Douglas (Mr. Manderson), that we may leave at least one way open for the advance of these great improvements.

Mr. HASCALL. Mr. Chairman. I move that the Committee rise, report progress and ask leave to sit again.

The motion was agreed to.

Mr. GRIGGS. Mr. President. The Committee of the Whole having had under consideration the article entitled Bill of Rights beg leave to report progress and ask leave to sit again.

Mr. McCANN. I move that when this Convention adjourn to-morrow it adjourn at eleven o'clock to meet

Monday afternoon at two o'clock.

The Convention divided and the motion was agreed to.

Leave of Absence.

Mr. MASON. Mr. President. I desire leave of absence to-morrow.

Leave was granted NEM. CON.

Mr. HASCALL. I ask leave of absence for myself and Mr. Myers until Monday afternoon.

Leave was granted NEM. CON.

Adjournment.

Mr. BALLARD. I move we adjourn.

The motion was agreed to, so the Convention (at twelve o'clock and two minutes) adjourned.

Afternoon Session.

Convention met at two o'clock, and was called to order by the president.

Mr. WAKELEY. Mr. President, I move that the Convention go into Committee of the Whole on the Bill of Rights.

The motion was agreed to.

Committee of the Whole.

The Convention went into Committee of the Whole with Mr. Griggs in the chair.

Bill of Rights.

The CHAIRMAN. Gentlemen of the Committee the question is upon the amendment offered by the gentleman from Douglas (Mr. Manderson) to insert after the word "compensation," "for property taken." Are you ready for the question?

Mr. WAKELEY. Mr. Chairman. The moving of this amendment has occasioned some discussion in respect

Friday]

WAKELEY

[July 14

to the principles which control the compensations to be allowed for property taken or damaged for public use. It is an important question. It is a question merely of what is right and just, and ought to be discussed temperately, and not in the spirit of advocacy, or with any undue zeal, to carry the point either way. I have but few observations to make in reference to the merit of this amendment. In most of the Constitutions of the American States there is a simple provision that property shall not be taken for public use without just compensation. And under that mere general provision no very serious difficulties ever arose that I am aware of, or have become acquainted with in the course of legal investigation. But the provision has been modified in some of the later Constitutions, with the view of more effectually protecting the rights of the citizen whose property is taken for public use. In the Ohio Constitution there was added to the general provision "that property should not be taken until this compensation had been first made in money." That was a safeguard additional to what had been established in the Constitution of other States. In Illinois, by the recent Constitution, a further provision was made to obviate some doubts or difficulties which had arisen in the construction of that provision in the Bill of Rights in the old Constitution, to the effect that property not only should not be taken for public use without just compensation but it should not be damaged without just compensation. The section reported by the

Committee on the Bill of Rights embodies both these provisions and safeguards. It is well to see what is the effect of the amendment offered by my colleague, General Manderson, and to discuss this question with reference to that. As I understand it, Mr. Chairman, the object of the amendment is simply this: there is a general provision in the section as it now stands that compensation for property taken or damaged shall be estimated without reference to any benefits to the property of the owner. My colleague proposes to amend the section so that benefits to the property shall be excluded from consideration only in case where the property is taken. And the effect of the amendment would be to leave the provision in the shape that when a jury is called upon to assess the damages occasioned to his property by the construction of a work of internal improvement, the benefits to the property, as well as the injuries to it shall be considered. It does not affect the provision that when property is taken and appropriated for public use, that full compensation, in money shall be made. It is intended for that class of cases where the property of the citizen is not taken, but where some of his property not taken is yet damaged by the construction of the railroad or the highway or the street. Now, sir, we all agree that if the property of the citizen be taken for public use it must be paid for in money. It cannot be paid for by any benefit which the other property of the citizen receives, you cannot take away his property and pay him for it by bene-

Friday]

WAKELEY

[July 14

fiting some other property. You must pay him for it in money. But, sir, when he comes into court and claims compensation for damage done to property which you have not taken how are you to arrive at the amount of damage? Are you to determine the damage by looking only to those particulars in which the property is rendered less valuable, and excluding from consideration all particulars in which it is rendered more valuable? Is that the way to arrive at just compensation for property taken? For instance, if I have two lots in the city, and a railroad corporation or the city, for some municipal purpose, takes one of my lots, they pay me its money value. If I have another lot adjoining it, and I claim that that lot is damaged by the construction of the railroad or any other work of public improvement, how is the jury to arrive at my damage? The property is not taken but I assert that it is damaged, and I ask compensation for it. I will suppose that a railroad is constructed in front of that lot, so that it requires me to fill up the lot to bring it to the grade of the railroad; or, I will suppose that an excavation is made in front of the lot, which will require me to excavate from the surface of my lot. This is an expense to me, and if that loss is to be considered my lot would be damaged. But I will suppose that this adjoining lot has been taken for depot purposes; and I will suppose that by their construction of the railroad and the location of the depot directly adjoining that lot, that notwithstanding it requires to be filled up to bring it

to grade, or excavated to bring it down to grade, it is still worth more in the market since the construction of the railroad than it was before. Now, sir, have I been damaged or not? I deny that the building of that road or depot, has damaged that lot, but the jury that sits to estimate damages, are to entirely exclude the benefits which have resulted to my property. I say that this is not a just rule. I think that we ought to leave the Constitution in such form that the court would be compelled to instruct the jury to allow, as an offset to the damages I may have sustained, these great and peculiar benefits which have accrued to me, and by which the value of that portion of my property remaining, has been greatly enhanced in value. Gentlemen argue this question as if it were merely a question between citizens and the railroad corporations. This question is general. It controls all corporations by which private property is taken for public use—railroad corporations, municipal corporations, public parks, streets etc. What is just in one case, is just in all. If this amendment is adopted, it leaves the rule as it always has been—where the court always favors the citizen, and gives him full compensation in money for all property the public takes, and gives him all damage he has sustained to the other property.

Mr. LAKE. Mr. Chairman, There are one or two remarks I desire to make before the vote upon this question is taken. The gentleman from Cass (Mr. Maxwell) seems to think, after all, that the doctrine contended

Friday]

LAKE

[July 14

for by my colleague (Mr. Manderson) is right; at least I so understand him in his remarks before the Committee. He says that the rule which has been laid down by the courts of this State is an equitable and just rule. In this I entirely agree with him—that the rule is just and right, and yet one thing that seems strange is, that the gentleman should contend that there should be inserted in the Constitution, a provision which would not secure the very rule which he deems just and right. This is the position which the gentleman takes; he deems the rule laid down by our courts, relating to cases between railroad corporations, town corporations, etc., and private individuals, is an equitable and just one, and thinks, also, that the amendment offered by my colleague will, by a Constitutional provision, continue that very rule which he would be satisfied with. Now I would say to the honorable gentleman from Cass, (Mr. Maxwell) that we propose to guard him and his interests against any damages he may sustain by having his property taken by railroad or any other corporations—we propose to secure to him that very rule, in the estimation of damages which he so heartily applauds here to-day.

I am very sorry that the gentleman will sustain a rule—will sustain a principle which is sought to be incorporated in the fundamental law of our State, and at the same time declare himself opposed to the very thing which proposes to fix these principles permanently. I have known the gentleman many years. I have been in Legislative councils

with him. I have watched his course as a public man, for many years, with interest. I have had a high opinion of his abilities and sound judgment, and I am certain I never saw him take a position which is so untenable, and I do expect, before we get through with this provision, that he will place himself side by side with those who are contending for these valuable principles. We find the gentleman from Lancaster (Mr. Philpott) finding fault with the rule that has heretofore been used, but the principal burden of his argument, is this; he finds fault with the terms made use of and says that a term which has been used ever since the first settlement of this country, and not only here, but elsewhere, is wrong. He says that some gentlemen in arguing this principle, that in thus taking the property of individuals for these purposes; for highways, public parks, streets, railroads, etc., have declared that this was exercising the right of eminent domain, and here he disagrees with them. He thinks the right of eminent domain can be exercised only by the general government, or the State government. Now I find no fault with the views of the gentleman on this point; whether he calls it the exercise of the right of eminent domain, or the exercise of the right of necessity, or the exercise of any other power which gives the right to do these things. Now while they say the government may exercise this right in respect to roads, it cannot exercise it with respect to railroads. I say it has. If you find any distinction in our law books, you will find

Friday]

LAKE

[July 14

an exception. Let us see what an eminent jurist—one who is always on the alert for sustaining the rights of the people and against the encroachment of corporations—has to say upon this question. I refer to Judge Bartley, and I quote from the Fifth Vol. of the Ohio State Reports. I will say that I will place the wisdom of the Supreme Court of Ohio in juxtaposition with that of the gentleman from Lancaster (Mr Philpott).

"The right of eminent domain, to which the right of property is made incidentally subservient, is one of the highest attributes of sovereignty conferred upon the state. It was at one time contended with great force and plausibility, that this function of the civil power could only be exercised by the government, and that the exercise of it could not be delegated to individuals or private corporations, any more than the co-ordinate power of taxation, or power of enacting or repealing laws. Beekman v. the Saratoga & Chenectady Railroad Company 3 Paige's Rep. 45. Although I am not disposed, at this day, to question the delegation of this power to private corporations (even although for the construction of works which are private property, and controlled and used as such) sustained upon the ground of a resulting benefit or advantage to the public; yet I insist, that if there be any matter of truth or value in the settled rules of judicial interpretation, the Constitutional grant of this power must be strictly construed; and that such exercise of it by private corporations, which always is upon occasion, not of public emergency, but simply of public convenience, should be well guarded against infringements of the rights of private property."

So you see that this right of emi-

nent domain may be conferred upon individuals, or may be conferred upon corporations by the judicial authority of the State, and it is but right in the case of corporations that benefit the whole State as railroad corporations do, in building railroads which furnish means of ingress and egress to and from the State, and from one portion of the State to another—we say that the State, by reason of these resulting benefits, is justified in so doing—in granting to these great corporations, the right of eminent domain, and we think no one can question, successfully, the right of railroad corporations to exercise this privilege of taking the private property of individuals—under wholesome and proper restrictions—for the benefit of the entire State, and it matters not, whether the State exercise this right of eminent domain itself, or whether it delegates that power to a corporation which has for its object, not only private emolument, but as a necessary result, the benefit of the people of the entire State. It seems to me from anything that I have heard from the opposition, that there has been no reason offered against the rule laid down by the Supreme Court of our State, and why not, if it be just, continue that rule as a fundamental law. If the gentleman can lay down [one] that is better, or show where this bears one pennyweight's grain against the stern principles of equity, I will join them in the opposition to the principles sought to be laid down by my colleague. But if not, let us be satisfied with the rule which is admitted to be right. Then

Friday]

LAKE—PHILPOTT

[July 14

let us not quarrel over the mere use of terms. I wish to ask the gentleman from Lancaster (Mr. Philpott) what is the difference whether the land is taken as private, corporation, or in the name of eminent domain when the State requires it? The original section reaches out further and includes far more than railroad corporations. The argument seems to be that railroads only are included. Let us look at it and see. In the exercise of this right of eminent domain is contained towns, counties and other authorities, who may lay out a highway from one part of the State to another. The gentleman from Lancaster has said in no case are the damages charged to be offset by the benefits received. The gentleman certainly is mistaken. I have had some experience at the bar and on the bench and if I recollect right the rule is different from the one laid down by the gentleman. He is entitled to damages to his land, and then if he has received special benefits by the location of the road those may be taken into account, and should be. The gentleman says that railroad corporations are entirely private and to support that he says that they may refuse to take goods as common carriers. I am sorry that the gentleman has to take such a position as that to support his arguments, for if he consults the law he will find that they are common carriers and have to take goods as such. All the railroads in our State are subject to the action of our Legislature so entirely that it may control their speed, rate of charge, etc. They are entitled to

just such privileges as the Legislature sees fit to give them, and one of their rights is that of eminent domain, and just so long as they keep within the provisions of the law are they entitled to these rights. If no better reasons than what we have heard, can be urged against a rule that is so just why is it that we see this opposition? I hope the honorable gentlemen will so far forget their opposition to railroad corporations as to allow them to look with reason upon a rule that has received the sanction of the State. I trust this amendment will obtain.

Mr. PHILPOTT. Mr. Chairman, I first propose to reply to the gentleman last upon the floor. I did say that railroads cannot be made to carry passengers. The gentleman and others have ridiculed the idea, but what will you say when I still assert it? It is true that if they once become a common carrier by the receiving of goods or passengers then they are subject to the laws, but if they have withheld one portion of their road from the use of the public then there they are not common carriers. Now I don't object so much to those words eminent domain as to the manner in which it is attempted to be used here for a special purpose.

Railroad corporations when they take the private property of citizens are acting by virtue of authority conferred by the Legislature of the State. That Legislature, by virtue of the sovereignty of eminent domain, can delegate its property to private corporations, and they under the code of the eminent domain take the private property. I say the Legisla-

Friday]

PHILPOTT—LAKE—ROBINSON

[July 14

ture should not be clothed with that authority in order to take this private property. A railroad cannot exist unless it is allowed extension, and in obtaining that extension it may take private property of persons, but in so doing it is its duty to pay a just compensation. I willingly concede that after they have taken the land they should pay a just compensation for it; the next thing to be considered is how much is the land worth not taken and which has been damaged? They should also pay for that. So far we agree and where we disagree is in this. Gentlemen here desire to incorporate into the Constitution of this State such principles as that is, by virtue of taking the land for the benefit of corporations, they may offset that against the damages for the other land not taken. They come upon a man's land, take his property, and then say, "we have conferred upon you a favor and benefit, and the benefit we have given you, even contrary to your wishes, without your request, in counting up these damages we will offset that against the damage we have done you."

Mr. LAKE. Allow me to ask a question. Does not this principle you are contending for apply to the taking of land of individuals for highways, roads, streets, alleys, and so forth?

Mr. PHILPOTT. Yes sir, by virtue of the authority conferred on this railway corporation by the Legislature they take the land. If they take it by virtue of that authority I want them to treat the persons whose land they take in the same manner

as the State, which takes the highways. Suppose the State lay out a road. It condemns the land it passes over. Where did you ever hear of an instance in which the State said, "Mr. A, in taking your land we have doubtless benefited you and now we want you to allow us to deduct from such money as you might claim from us so much for the benefit we have given you?" I am willing these corporations should go as far as the State and no farther. The State never claims they will offset that against any damage. If they claim their damages by virtue of this eminent domain, let them do as the State does, and not offset for some imaginary benefit they may have conferred upon the property of the party whose land they have taken.

Mr. ROBINSON. Mr. Chairman, For my part I made up my mind long ago as to what the true rule of compensation was and I have been listening very patiently for some argument to shake the conviction. I have heard none. I am of the opinion that if a railroad company takes private property, it should pay for that and the whole of it. I think if there is any one thing that distinguishes and characterizes the civilization of this age from that of any other age, it is individual independence. I do not desire to see that individual independence trampled upon. I do not desire that the gentleman from Otoe (Mr. Mason) should trespass upon my property without paying me for it, and I am furthermore unwilling that he should undertake to set off, against an injury which he has done me, a benefit,

Friday]

ROBINSON—LAKE

[July 14

real or imaginary which he may have conferred upon me. I take it, Mr. Chairman, that every interference with the rights of an individual by another individual is in fact trespass. Now, sir, it strikes me it would be ridiculous if Mr. A, who has been alluded to several times, should desire to erect an hotel in this place, and should find it very convenient to his purpose to take my two lots to erect it upon. I say it would be rather a strange position to maintain. But sir, I can see no difference between the character of a railroad corporation and an hotel. I see no difference; in a certain measure they are both public or private. The hotel keeper cannot refuse to entertain his guests, nor the railroad refuse, if it be a common carrier, to transport passengers and freight. I care not what you call it, but sir, they are also private, they have certain rights extended to them and duties to perform. Now for every trespass a man commits he is bound to pay. He has no right to take my property and appropriate it without paying me fully for it. I ask gentlemen who argue on the other side: "What is it in the case of railroad corporations that a different rule should be adopted than in the case of private individuals?" Why did he take my land, is it because he is forced to, is it from some great public necessity, as is sometimes done in the State? Not at all! They take my property with all the consequences which the law maintains upon that taking, for their own benefit. I take it, that if any individual undertook to run such a road, that was not a corporation, he

would have to pay, he would be bound to pay me in full. It strikes me if it pays these corporations to build these roads, they will build them. I deny the right of the legislature and, morally, of this convention to pass any rule which shall compel the private individual to allow his property to be subjected, for any compensation whatsoever, to these corporations. Every man has a right to enjoy his own, and notwithstanding the authority which my learned friend from Douglas (Mr. Lake) has read, I am inclined to think the only person, the only thing, to use a general term, that can exercise this right to eminent domain is the State. I have no doubt about it. I did not hear clearly what the learned gentleman read, but I am confident it cannot be found in any respectable book.

Mr. LAKE. I read from fifth Ohio State reports. Chief Justice Bartlev of that State, considered very good authority.

Mr. ROBINSON. I care not, Mr. Chairman, the State must have this right. It is from a great necessity, without a provision specially looking to these corporations, without a mere provision that, the State should exercise this right of eminent domain, would confer upon the Legislature, the power to provide that corporations might appropriate private property to their uses. I care not where the authority is, it contradicts common sense. If we incorporate in this Constitution a provision that it may be exercised in such cases, it may, for the power established is superior to any other power.

Friday]

LAKE—ROBINSON—WAKELEY

[July 14

Mr. LAKE. If the State cannot confer the right upon the corporators, how in the world would you obtain the right of way against the consent of the owner of the soil.

Mr. ROBINSON. I think it could not be gained by virtue of any statutory provision, a public way I care not could be given—

Mr. LAKE. I am speaking of railroads.

Mr. ROBINSON. Well, sir, I look at it in this way. If the Constitution under which that Legislature acts, confers a power broad enough, I grant he can take away the rights of half the individuals of this state. But, sir, without a provision in the Constitution, conferring upon the Legislature the right to delegate this power to a corporation, I assert it cannot be done. And the point I make is this: that if we engrave into our Constitution simply the provision that the State shall have and exercise the right of eminent domain, it confers upon the Legislature no power to grant this right to a private corporation. I say this provision must be special. It does not reside in the right of eminent domain. This right can only be exercised for State purposes.

Mr. WAKELEY. May I ask the gentleman from Lancaster a question?

Mr. ROBINSON. Certainly.

Mr. WAKELEY. Is there a State in the Union which has ever conferred that power in the Constitution, and if so what?

Mr. ROBINSON. I do not know of any which has.

Mr. LAKE. One other question.

Does not all legislative power and authority reside in the people of the State entirely which is not delegated or taken from them by the Constitution, and cannot they exercise that right of eminent domain through their Legislature without express provision in the Constitution authorizing them to do so?

Mr. ROBINSON. I will answer the question of Judge Wakeley first. I said I knew of none. But I do know that in our own State, and in every other State, perhaps, there is a provision which provides that private property shall not be taken for these uses without just compensation, leaving it plainly to be seen that the Legislature has in certain cases, the power to take this private property. Now I will answer the gentleman from Douglas (Mr. Lake). I take it, sir, that the Legislature has no right to interfere with private rights except where that power is expressly conferred—no right without some provision which, either by necessary implication or special right, confers upon them the power to take away my individual rights, and it cannot confer such right upon a private corporation without it is expressed in this Constitution. Wherein are these public organizations? Are they public like a county? Is it for a benefit of the whole people? Not at all. These are private corporations, which carry their own capital and work for their own good. Where do I get the benefit except I pay them for it, and pay them pretty high, too? The rule as I understand it, and which has been referred to as just and applicable in this State is this—and I wish to state

Friday]

LAKE-ROBINSON-MANDERSON

[July 14

that it is a great stride above the rule in some States—if a company runs over a quarter section it shall pay the owner for the ten acres if it runs across, so that it injures that which remains of my farm, they have this right at least so says our Supreme Court, to set off in mitigation of the damages, the benefits which have accrued.

Mr. LAKE. That is not the rule. The rule is that there may be an offset in special damages to the individual, and the rest of the community do not share it alike with him.

Mr. ROBINSON. I do not understand the rule so. I understand that they must pay for the land actually taken, and if other damages arise then they may set off any special benefit. It must be a benefit conferred upon him which may not be conferred upon the whole of the community, and the benefit to the community is that it raises the value of the land in the vicinity.

Mr. MANDERSON. Will the gentleman permit me to trespass a question? Will you name the Convention a single State in the United States where, by the terms of its Constitution, or by the decisions of its courts, a contrary rule has obtained to that which is sought to be obtained by this proposed amendment?

Mr. ROBINSON. I do not think, Mr. Chairman that I could cite now, but, I will promise the gentleman a bottle of wine and a box of cigars if I do not produce them in a certain time. I think, Mr. Chairman, these railroads are a good thing; an excellent thing. I think they have changed the affairs of things in this coun-

try, and are destined yet to change them. But it strikes me they flourish where other things fail. Their power is to become enormous. They have become tyrannical in various ways, and trampled on the rights of individuals. I wish, to preserve, both for myself and fellow creatures, the right to assert my rights against any body as long as I live. I do not believe in conferring upon any corporation or body of men exclusive rights. I believe the good which they do is, in a great measure, offset by the evil they do. I would rather curtail them. If it can be shown that they are a part of the State organization, or bear in any degree, a governmental stamp, I am willing then that some more rights should be conceded to them. Mr. Chairman, I am not fond of personal allusions; Judge Mason is right in his proposition, when one member attempts to impugn the motives of another, I think it is time that the gentleman should be called to order. When he talks about our putting ourselves upon record, as though we were to be intimidated by this, he is mistaken. Every individual in this house has sufficient moral courage to place himself upon the record as having followed the promptings of his own judgment and good sense.

Mr. MAXWELL. Mr. Chairman, I certainly have no feeling of hostility against any member of this body, and while I will do every thing in my power to insure good feeling among the members of this Convention, yet I shall certainly endeavor to do my duty, and speak freely upon every question of importance which may

Friday]

MAXWELL—WAKELEY

[July 14

arise.

Now it is contended, very strangely, that parties not interested in special benefits may get pay for their property. This afternoon, I stated to this committee that it was the custom to offset general benefits accruing, against the damages allowed the party whose property was taken; that the course in this State was to allow damages for the land taken and then assess the damages against the land remaining; taking into consideration the increased value of the land as an offset. Now when the gentleman from Douglas (Mr. Lake) says that in not more than one case in a hundred, are special benefits conferred, he tells the truth. It is sought to incorporate an article in our Constitution which will permit any benefits which may accrue, as an offset to damages. They say first pay for the land taken. Suppose you take a strip 100 feet wide across a man's farm, across a quarter section, running diagonally. The owner is to receive, simply, the pay for the actual value of the land taken. This is a very small part of the damages. You take, say, six or seven acres, and the land is worth \$40 per acre. This would allow the owner \$240, or \$280 at the most. Has the owner been paid full damages? Suppose an embankment 20 feet high is left upon the farm; the owner has received \$280, and he has been damaged \$5,000; his farm is ruined. But there is a depot a short distance off, and they claim this is a special benefit, and the owner of the farm is compelled to pay for this imaginary benefit.

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

Mr. MAXWELL. Certainly.

Mr. WAKELEY. Suppose that depot has made the rest of the land worth \$5,000 more than it was before; how much is his land damaged?

Mr. MAXWELL. That is just where the rule of the courts has applied. They say, "this man's land has increased in value so much; it was worth twenty dollars per acre before the road was located, and it is worth forty dollars per acre now." But then, all the land around is worth forty dollars per acre, his neighbors have been benefited in this way just as much as he has, while their property has not been touched; must this man whose land has been taken, stand all this loss? The depot benefited the property for miles around,—it would be called a public benefit; so that this is nothing more than extending the principle of general benefit. I say we ought to insert a provision in our Constitution which will forever prevent general benefits being assessed against individuals. This would do away with a great deal of litigation now had. The Constitution would then say to a jury called to assess damages, "you are to assess this man's damages, without regard to benefits" the jury would then go on, and know just what to do.

My friend from Douglas (Mr. Lake) read the dissenting opinion of Judge Bartley. It is true that the Legislature does confer upon these corporations the right to take private property. In effect, this is the

Friday]

MAXWELL—STEVENSON

[July 14

Legislature reinvesting the public with the right of eminent domain. This right, as I understand it, exists only in the public, but the public confers it, if it can be conferred, upon these corporations. Now these corporations serve the public so far as this; they carry the public and they charge for it. They conduct their own business, make their own dividends, and are private corporations to all intents and purposes. Now I will read an extract from the same book from which Judge Lake read, page 149, 5th Ohio State Reports. I quote from Blackstone:

"So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road for instance, were to be made through the grounds of a private person, it might, perhaps, be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to the good of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights as modeled by the municipal law. In this and similar cases, the Legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification for the injury sustained. The public is now considered as an individual, treating with an individual for an exchange, all

that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the Legislature indulges with caution, and which nothing but the Legislature can perform."

Mr. STEVENSON. I believe it is an axiom acknowledged by Methodist class leaders that a person is always relieved by speaking. I do not want gentlemen to think that I am not in favor of railroad corporations, but, I believe that no corporation, whatever it may be, should have any advantage over the private individual. The gentlemen who sustain this question all argue that they are a public benefit, but that is no reason for giving them the right of way through my farm. As I have to pay for everything I get from them it is nothing more than right that they should pay for what they get. I hold that it is not right nor just that a man should not have damages for his property when taken either for public or private use, and if Judge Lake should array all the authorities of the country before me to the contrary I would not believe it. Is there any principle of law or equity in it? I think not. I say it benefits the man who is a half a mile away from the road without running through his land or damaging it as much or more sometimes than the man whose property is taken, but the one who sustains the loss is to be subjected to deduction for benefits. That is not just.

It is a fact that these corporations are becoming very powerful, and their powerful influence is permeating all our Legislatures. Although Judge Lake says we are not here for

Friday]

STEVENSON—MANDERSON

[July 14

the purpose of legislating, I must say we are here to draw up organic law for the government of legislators and we must guard well the interest of our constituents, and we must not give the corporation any better right or more than the man who erects a mill, or opens a stage line. If we are going to offset damages for one let us do it for all. Why should we be so lenient with these great corporations? How many of those who hold the stock of them are residents of our State. Very few. I believe if there had never been given a bit of aid to the railroads they would have been built. They are not only looking at the present, for every dollar they expend to-day they will receive double to-morrow. Mr. Myers spoke a great deal about the great State of Pennsylvania. I care not for the precedents of any other state—we are here to make laws for the people of the State of Nebraska, and laws applicable in Pennsylvania might not be practicable in this State. You might as well say because the heathen mother casts her child into the Ganges to be destroyed by the crocodile, therefore we should do so. I hold it is jumping right out of the frying pan into the fire. It is our sworn duty to ourselves and our constituents to make the law so that they can get the pay for the damages done them and their property by these corporations. Judge Lake speaks a great deal about public highways, but I hold there is a great difference between them and railroads, I do not know of a case where the benefit of a public road was made to offset the damages done by the open-

ing of that road. I hope this amendment will not prevail and I hope the members of this Convention will look well to the interests of our State and beware how they vote on this amendment.

[Judge Mason's speech on this subject—pp. 279-385 of MSS.—Sent to him for correction and not returned. Not found among Judge Mason's papers after his death.]

Mr. MANDERSON. Mr. Chairman. In my youthful days, when attending those traveling shows that pass through the country now and then, sometimes under the name of circuses and again under the name of menageries and which, when they adopt the latter name, are considered to be entertainments highly moral and instructive in their character, I have noticed that the moment of deepest interest and intensest enthusiasm, when the promiscuous audience gathers with the greatest emotion to gaze, open-mouthed and with hair on end, upon the scene, is when, the employes and keepers of the animals having by goads and sharp sticks introduced into the den of the caged lion, roused him fully the monarch of the forest paces to and fro in his confined limits, in fury lashes his tawny sides with his tail, shakes his shaggy mane, opens his throat and roars to the delight of the assembled and admiring crowd. And it is strange that but a moment ago this "dreamy reminiscence of my childhood days" should be presented so vividly and forcibly to my mind.

I would be content, Mr. Chairman, not to raise my voice again in advocacy of the proposed amendment,

Friday]

MANDERSON

[July 14

were it not for the peculiar character of the remarks of the gentleman from Otoe (Mr. Mason).

We have heard the deep bass of his trombone and his roar "full of sound and fury signifying nothing" in opposition to my amendment, and I cannot attempt, nor would I dare, to compete with him in any exhibition of the character he has given before this Convention. But being, as I claim, as honest and unbiased in my advocacy of this amendment as he can be of the original article, I do not propose to sit entirely silent. He has seen fit to criticise some of my argument in a manner it certainly does not deserve. He says he noticed a sneer upon my face when I made reference to the sons of toil; that I "held double quotation marks on each side of my mouth" when I used language of which I credited him as its author. True, there were quotation marks and perhaps a sneer. But that sneer was not intended for the sons of toil nor will they so appropriate it. The gentleman cannot exceed me in my regard and admiration for the laborer and toiler whose skilful hand or active brain blesses mankind by its creative power. I claim to be a "son of toil" and believe him to be one. We are all workers whether we labor with head or hand. The mind that conceives a great idea should receive as much grateful commendation as the laboring muscle that with executive force carries that idea to successful operation. The sneer, recognized by the gentleman, was rather directed to that class of individuals who from demagoguery, clap-trap and pure

buncombe wish to array interests in antagonism that should go hand in hand, who attempt to array labor against capital and say to the "sons of toil" "these men who have gathered wealth are your natural enemies, up! and at them!" He who does this and urges this antagonism deserves and should receive not only the sneer but the rebuke, open and expressed, of every man who does not wish to see our beloved country drift into such terrible scenes, such as we have so lately read as occurring at the coal mines in the State of Pennsylvania, or to see this broad land a Paris under a reign of terror more terrible than that of the bloody days of the French revolution. Let the arch demagogue take to himself my sneer rather than attempt to throw it upon those for whom I have simply regard and praise.

There were several propositions made by the gentleman from Otoe (Mr. Mason) that I will attempt to reply to. First let me take up that most labored of his argument. He says suppose a railroad corporation taking its way through the land of a farmer sees fit to enter the private burial grounds, tears down and destroys the monuments he has erected to the memory of some loved and dear one. This is an extreme case and one that could hardly occur. I do not know whether there exists in our statutes that law which finds its place in the legislation of so many States, that no burial ground or cemetery can be taken by any railroad corporation for its use. Against any such hardship there can be and is full protection in the law. He says

Friday]

MANDERSON

[July 14

a man may have upon his farm a stone quarry buried under the earth. He does not propose to use this quarry, but keep it as an inheritance for his children. No railroad existing near him, there is but a local demand for the stone and it is of little worth. It has for him no present value and is of but prospective benefit. A railroad is established through his farm. The corporation pays him in full for any land taken and he says "you have ruined my farm for agricultural purposes, pay me its full value as incidental damages." The gentleman from Otoe says he should be thus paid. I say no. If there is actual present damage he should be paid, if he is not damaged he should receive nothing, save payment for the land taken. Suppose the establishment of the road gives him a direct incidental benefit, that the stone quarry before having no practical value has now been called into paying existence to enrich the owner. Poor in his possessions before he is now enriched and yet the gentleman would pay him for an imagined damage he has never sustained. But we are told the farmer did not want the benefit, that he wished to live in quiet retirement upon his farm and not use the stone quarry during his life, but keep it as an inheritance for his children and that his wishes in this regard should be permitted to stand in the way of the public needs. I say again no! He has not the right to stand in the road of progress and block up the path that benefits the public and himself. But then the gentleman says, we have no right to take from the private individual

something that has to him peculiar value, for the use of a corporation. Let us look at this for an instant, and I advance the proposition that the privilege of taking private property, even that of peculiar value to the owner, is permitted by the law to private individuals and to the law, although it frequently works great hardship, we hear no objection made. Look at the working of the replevin law. My friend from Otoe may have at his home something which has to him great and peculiar value, but that as a marketable commodity is of no worth. It may be some precious article handed down in his family for generations from sire to son and if you were to weigh its value and place on the other side of the scale diamonds and gold, in his estimation the precious thing would out-weigh them all. Yet in open market if exposed for sale it would not bring five dollars. Does the law fully protect him in the holding of this property? No! If I see fit to make an affidavit in replevin that this property is mine, and that after demand he keeps me out of its possession and will give a bond in double its marketable or appraised value I can take from him this, to him, precious thing —valuable though it be to him and valueless perhaps to me. What is his remedy? It is found by the verdict of the jury which tries the right of property that it never was and is not mine. Yet I retain the property and if I am worth nothing the law leaves him to his suit for a money recovery upon the replevin bond and he recovers only the actual value of

Friday]

MANDERSON

[July 14

the article on the amount it would bring in the market. Thus it is a great hardship, it is true, yet the law frequently for the good of the greatest number works injustice in individual cases. There must be some sacrifice on the part of the person for the good of the whole.

Now a word Mr. Chairman on the question of prospective damages and benefits. Take the case of the man owning the stone quarry that he does not propose to use. It has to him no actual value but simply prospective. He may not want to have a railroad located near his home. Perhaps he says "I will be seriously damaged, the sparks from the locomotive may destroy my barn, or my house, or the trains may run over and destroy my stock." True, they may, they frequently do, but if the railroad is established and does him damage in this way he has his remedy at law when the act occurs and a jury passing on the questions raised under this section cannot take into account such prospective damage. The actual present damage is to be determined by the jury. It first asks "What is the land worth that is taken?" Suppose we say one thousand dollars then the railroad shall pay one thousand dollars. Next "how much less valuable is the land worth that is left to the owner." Suppose we say another thousand dollars. That is the actual not the prospective damage. Now what do we propose to offset against these actual damages, simply actual, direct and not prospective benefits—not benefits that may exist only in the future. Now, the gentleman from Otoe (Judge

Mason) in one part of his argument takes a very strange position, and one that is inconsistent with the position he seeks to maintain. In contending against the adoption of this proposed amendment he says that the original section as it comes from the hands of his committee permits special and direct benefits to be deducted from claims for lands damaged. I differ from him in this construction, but by this admission his entire argument loses its force. Why this is all we claim or want. We do not wish to drag general benefits forward as an offset, we desire that only directly consequential benefits should be considered by the jury. If the original section permitted this with it we would be content. We wish merely to carry into our Constitution the rule that obtains in every state in the Union. Either in the Constitution or in the decisions of the highest court of each state you will find that which we desire here to be the practice and I will win the bet from the gentleman from Lancaster (Mr. Robinson.)

Another argument advanced by the aggregated wisdom of Otoe county was based upon the grant of a charter to a street railway. I never heard of a street railway to which was granted the right to take private property for its use or right-of-way. They are chartered institutions and what is the right given them by their franchise? To run their track along the public streets. Can they take a lot belonging to any private individual and locate a stable upon it? No, sir; they must buy it as any private

Friday]

MANDERSON—MASON

[July 14

person would purchase it. I never heard and do not believe that any gentleman on this floor ever heard of an instance where it was necessary to take one inch of private ground for Street Railway purposes.

This doctrine applies with equal force to municipal corporations, and let us now apply the rule to the opening of streets in towns and cities. Suppose I own a piece of land two hundred feet in depth. The town corporation in the exercise of its granted rights of eminent domain opens a street one hundred feet in width through the center of my lot. I have desired to use my lot for residence purposes simply, but the street is opened and I am left with a strip of land fifty feet in width on each side of the new highway, instead of the full lot I owned before. What should be the rule? The corporation should first pay me for the ground actually taken for the street. The gentleman from Otoe (Mr. Mason) says it should go further and in any event pay me at the same rate for that which is left me. He would have me say, "I wanted this for a residence lot, I cannot use these strips for residence purposes, these pieces left me are useless for the purpose I designed them, pay me therefore to the extent of the value of the whole lot." "But," says the city, "we take but one half your lot and the two strips of fifty feet each left to you are worth four fold more than the entire lot was worth before the street was opened. These strips are now available for business purposes and you are enriched by the action of

which you complain." I say it would be very unjust for me to claim payment in the manner indicated. There has been no damage, there should be no payment. There has been no wrong, there should be no remedy. There should be no recompense where there has been no loss.

A word only, Mr. Chairman, in conclusion. The rule we advocate has received the sanction of years. Gentlemen are unable to point out a single instance where in any Court a contrary doctrine has obtained and been enforced than that which we contend for here. I see no reason why we should depart from that safe path which has been travelled by constitutional lawyers and jurists so many years before us.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Douglas, (Mr. Mander-
son.)

The Committee divided and the amendment was not agreed to.

Mr. MANDERSON. Mr. Chairman, I will make this motion, that we insert before the word "benefits" the word "general."

Mr. MASON. Mr. Chairman. I have no objection to the amendment myself, but desire the committee to understand what I consider will be the effect, for it will leave the rule without precedent; that is to say, that you should first pay for the land taken, then finding the damages you may deduct peculiar benefits. But when I am called to vote I will have to vote against it.

Mr. ESTABROOK. Mr. Chairman, I will simply say to-night as it is late,

Friday]

ESTABROOK—THOMAS

[July 14

I don't care whether this amendment is adopted or not, but before the section is adopted I hope that we may understand it better than we do now. If I understand the wording of the section, it is where property is not taken at all, but just damaged, no deduction can be had, you may keep the property in the one case and in the other you part with it. I take it that this section was put into the constitution of the state of Illinois without any reference to railroads. The Chief Justice (Mr. Mason) tells you that this has been the rule already, but this is additional and was made first. I believe in the constitution of Illinois and I think it was made to apply in Chicago, or where it was found necessary for the public good to destroy some buildings, as in the case of fire to keep it from spreading.

Mr. ESTABROOK. I cannot conceive that the committee has understood this thing, it seems to me the most ridiculous proposition in the world, to say in the estimation of damages done you shall be permitted to inquire whether there has been damages. If a corporation takes away our property, then we inquire what shall be the compensation. I have been trying to think of a case where the railroad corporation could fall within that provision, and I can think of only one case, it clearly is not where a man's farm is taken, you take his farm and award him a just compensation. The only case where I can imagine a railroad corporation comes within this law is where a man has a business house upon a street, a

railroad comes along and takes the street so as to stop travel, but does not take his land, there are damages for shutting up his door. What if it should result that the improvements in the vicinity are such as to make his land worth more, you leave him in possession of his property and do him a benefit.

Mr. THOMAS. Mr. Chairman. It seems to me that there cannot be very much danger in the provision referred to here and in the amendment offered. I understand that the law would be, even if this amendment were not adopted, that no deductions should be made for general damages. I understand the rule of law formerly was that no compensation at all was given unless the property was taken. I find in Chap. 23, page 603 of "Sedgwick on the Measure of Damage" the following:

It has been declared in New York, in relation to railroads running through cities, that the prohibition of the constitution is against taking private property, not against injuries to property, and that contingent future damages or incidental and consequential injuries of indefinite amount not capable of estimate, do not fall within the statute. So, when it is alleged that private property in the neighborhood of a railway will be injured by its vicinity, the claim is inadmissible. The same doctrine has also been applied to the grading of streets and highways, and it has been held that injury resulting from grading and leveling a street, either by cutting down or filling up so as to make the street either below or above the natural level of the adjacent land, is *damnum absque injuria*, for which no compensation can be had."

I understand that this provision in

Friday]

THOMAS—LAKE—STEVENSON

[July 14

the Illinois constitution concerning damages, is, "when taken or damaged for public use." This provision is understood to cover that very case, the matter of damage of property where the property is not taken. For instance, where a railroad is run directly in front of a man's dwelling in a city, the street in front of his house may be excavated, his property is damaged, but he is not touched. This provision is to cover such cases. It seems that would be eminently just. There should be a compensation for the damage sustained, not the value of the property because the property is not taken at all, that should be without deduction for general benefits, benefits shared by the owner of that property in common with the property around.

Mr. ESTABROOK. Say the lot is worth a thousand dollars, a railroad comes past and locates a depot there in front of him, cuts off his sidewalk, nevertheless the lot valued by an assessor is worth two thousand. How would that be?

Mr. THOMAS. If those general benefits, if all the lots around were worth as much more—

Mr. ESTABROOK. If you take that lot I admit then you only regard the general question, if you allow him to keep it, inasmuch as you have not damaged it, can you recover damages?

Mr. THOMAS. If there are any special benefits.

Mr. LAKE. Mr. Chairman. It seems to me that the insertion of this word "general" would make the Constitution in such a form, that it

would be beyond the power of the Legislature to adopt any other rule than that which the courts of this state, and several other states have adopted. I have not a doubt but that would be the result, that it would enforce the same construction, the same rule and decision as has been adopted by the courts of this state as referred to by the gentleman from Otoe (Mr. Mason.)

The rule has been stated two or three times by the gentleman from Otoe, that it would be in case of the taking of property first, the value of the property actually taken, then the damage done to the remaining portions of the property not taken, deducting, if there are special benefits accruing to that individual not enjoyed by the others in the community, adding it to the value of the property taken, which would make up the amount of damages sustained.

Mr. STEVENSON. Mr. Chairman. I think the insertion of that word "general" would leave that amendment where it was before Mr. Manderson moved it. I cannot see that it would make an iota of difference. I cannot conceive any case where there would be benefit so special to a particular party and not to others concerned. I claim the committee who got this article up got it up so that it will be satisfactory to the whole people without an amendment, and I think that word "general" would accomplish the very end these men have been fighting for.

Mr. MASON. Mr. Chairman. I desire to say that if the word "general" is inserted the rule of damages

Friday]

MASON

[July 14

will be fixed by the Constitution, and it will be as I have previously stated, and the Legislature cannot change it. I desire further to explain the reason of my earnest opposition to the amendment, so that if it had prevailed then the Legislature might under the lash of the whip, or spur of any of these corporations establish a rule by which general benefits could have been set off against the damage done to the remainder of the estate, and my own individual opinion is that the article is right without the word "general;" though I do not as I said before, deem it of that dangerous character that I did the first amendment. And I might say I desire to fully comprehend and understand the language that was used in the article which was re-committed to the committee, most of which was prepared by the gentleman from Douglas, Judge Wakeley. I think I do understand it; and the article fully commends itself to my judgment without amendment at all. And if the committee desire to adopt the rule which I contended for as just this afternoon this amendment should not prevail; and if they desire to fix the rule as laid down in Congress now—that is to say, to deduct special benefits, I think it ought to prevail. I have been at a loss to see what are special benefits. I am now and I would be if I were asked to state a case of special benefits conferred. It would trouble me much. I do not know that I can do better than to refer to the case I alluded to in Pennsylvania in the discussion this afternoon. It puts it

beyond question that benefits, special or general, can be considered. If the provision should prevail without amendment, of course the Legislature might say that particular benefits might be deducted from the damage done to the remaining portion of the land not taken. I think the Legislature might say that, if the section were adopted as it reads, that particular and special benefits might be deducted. If the word "general" should be inserted then there would be nothing left with the Legislature or anybody else. It would be fixed in the Constitution and be the same as that now laid down by the district courts of this state. If the amendment prevail then the Legislature may state that particular benefits to that portion which is not taken but damaged, that those particular benefits may be offset against the damages done. Now, for my own part, I have no very serious objections to this rule, while as an individual I never deviate from what I regard as a right course of policy. Now I can see some reasons, founded in policy, why the word "general" should be inserted, but that my views of the rights of property, that is private property, are that it is so sacred that no benefits, either special or general, which accrue to the individual, when the property is taken against his will, should ever be set off against the value of the property taken, or against the damage done to the remaining portion. I say I can see no reasons founded in policy why this should be done, but as a question of abstract right I might say it

Friday]

ESTABROOK—MASON

[July 14

ought not to be done.

Mr. ESTABROOK. I have listened with a good deal of interest to the statement of the views of my friend who has just sat down; and I would like to ask him if it was in fact increased in value should there be any damage allowed

Mr. MASON. I refer the gentleman to a case published in the Law Review of the City of Boston, which occurred in the City of Boston, I cannot place the case, nor the number of the Review, in which the property owner had a residence worth upward of \$160,000 overlooking the bay, situated on a high hill, and the railroad company, in the construction of their road made an embankment, some hundred feet high, and cut off from the road the property which was destroyed and ruined, without touching it, and the court held there was no remedy in the law, and when I prepared this argument I had this case in view.

Mr. ESTABROOK. You say he was injured and ruined. Suppose it was increased in value?

Mr. MASON. Who shall say? It was taken against his will.

Mr. ESTABROOK. Not taken at all.

Mr. MASON. It was damaged, damaged against his will. He did not want it; he said it was a nuisance.

Mr. ESTABROOK. I supposed a case where it was really ruined.

Mr. MASON. Now, I will put this case, while I answer the gentleman. I trust he will sit still and be

content to work in the harness for a single moment. Now, sir, property is taken or not taken, damaged or not damaged by the construction of the road. If not damaged there is no question here. Now what does he say? He says the property was damaged, but he received the benefits and I propose to offset the benefits against the damages. I think the committee understand me fully, and I do not know from the vote which was taken, that it is absolutely necessary that the gentleman from Douglas should understand me. I see what the struggle is, and so does every gentleman in this convention. The struggle is to say that because the property owner derives incidental or general benefits, that those benefits shall be offset against the damage done to the balance of the estate. If the gentleman objects to the word "general" he and I agree. All I desire to say now, so that the committee might understand if they vote down the word "general" until the Legislature say the particular benefits may be offset against the damage done to the estate which is untaken—it cannot be so settled. But if the word "general" is put in this rule is fixed and the particular benefits will have to be set off in every instance. And if the word "general" is inserted it leaves the rule fixed in the Constitution the same as in the courts. If the word "general" is left out no particular benefits, in my opinion, can be set off against the damage done to the property which is not taken until the Legislature says it may be; and they may say it

Friday]

THOMAS—MANDERSON—MASON

[July 14

may be if this section shall [go into] the Constitution without amendment. I shall cast my vote against the insertion of the word "general."

Mr. THOMAS. What I am afraid of in this provision is that if the State should open a street the provision should apply. If a city opens a street and goes through certain lots what compensation should the owner of these lots receive? Ought it not to be the difference between the value of the lots, and what the value of the lots may have been. I admit that where the railroad has brought benefits the reason which has been urged here, may apply. Now the county opens up a road, and a certain piece of property, not touched may receive certain benefits which actually increase the value of the property, and should not compensation be given? Now this is one reason why I fear this provision; if this principle applied only to railroad corporations, I would not have this objection, but it applies to all corporations.

Mr. MANDERSON. Mr. Chairman. I hope this discussion will not be pursued now. It is getting late and I move we now adjourn.

Mr. STRICKLAND. I favor that motion myself, Mr. Chairman, for the reason that I would like to look up this question.

Mr. BALLARD. Mr. Chairman. I hope this motion will not prevail, I hope the members of this committee will remain until we vote upon the question.

Mr. MASON. Mr. Chairman. I hope this motion will be voted down. I hope the committee will stand here

until the rising of tomorrow's sun, if we do not come to a vote upon this question before, unless the gentlemen upon the other side will promise that this matter shall not be taken up until Monday. I have to go to Nebraska City tomorrow, to attend to official business and I cannot be here to vote upon the question, as I desire to do.

Mr. MANDERSON. Mr. Chairman. If the gentleman had no other time to argue this question, I would not insist, but the question will come up again. The entire article is to be adopted, and we can debate it then. It is now after our usual hour for adjourning.

Mr. MASON. Mr. Chairman. I am willing to adjourn, and come back here tonight, or I am willing to pass this over until Monday, when the whole convention can be here. Tomorrow, I am compelled to be absent, and others are compelled to be absent. I am not willing to adjourn. I am willing to stay here until tomorrow morning.

Mr. STRICKLAND. I confess that I have listened to this discussion with more interest than to any other question which has come up. What I want is time.

Mr. ESTABROOK. Mr. Chairman. I don't know whether we are absolutely controlled by the embodied wisdom of one gentleman from Otoe. It is time to know who runs the machine.

Mr. MASON. Mr. Chairman. I regret most exceedingly that it should be deemed advisable, upon the part of particular gentlemen to direct their

Friday]

MASON—STRICKLAND—MANDERSON

[July 14

"buncombe" towards me. This has been done in more ways than one. It is a course of argument which I am opposed to. I desire to avoid it; but if it must be continued, open your batteries, and we will slay you with the guns yourselves have cast. I tell you gentlemen, I want to vote upon this question. I don't desire that gentlemen shall prevent me from voting, when my judicial duties call me away, at this time. I am charged with dictating. Instead of dictating, I stand here as an humble suppliant. If there has been a dictatorial voice in this convention, it has not been mine.

Mr. STRICKLAND. Will the gentleman consent to adjourn, if we say we will discuss this question, when the gentleman is ready.

Mr. MASON. Yes, sir. What I desire to do now, is to repel these assaults which have been made upon me, and to ask you that it go no further. If I fall, I will fall with my feet to the foe, and bear in mind, it is not I who have made these personal allusions; and never while I have breath, will I try to dictate to, or influence any man, except by logic and reason; I don't mass any secret assemblies to accomplish my designs. I stand upon what reason I can give, and now, an humble suppliant, ask that this convention shall votedown this motion to rise, but will take a vote now, unless the gentlemen will give me a chance to vote, at some other time, upon this question. It grieves me—yes sir, I am both pained and annoyed to hear the personal allusions that have been made.

I came to this convention with no preconceived notions to gratify or carry out. I regret that gentlemen deem it necessary to make assault after assault upon me. There is no uncaged lion here, but there may be one here who fears no danger, and trembles at no evil which inventive minds may suggest.

Mr. ROBINSON. Mr. Chairman. I move that the committee do now rise, report this article back to the convention, with the recommendation that it be made the special order of business for Tuesday afternoon. I offer this as a substitute motion.

Mr. MANDERSON. Mr. Chairman. I would accept the amendment but for one reason, and one only. It has been the practice of this convention, to take up no Article reported to the convention unless in the presence of the Chairman of the Committee. When I made the motion, I did it with no such base designs as the gentleman from Otoe (Mr. Mason) seems to think. I did it in good faith. I would certainly not be in favor of going into this question in the absence of the gentleman.

Mr. LAKE. Mr. Chairman. I don't think it is the disposition of any member of this convention to take up and consider an Article in the absence of the Chairman of the committee. If Judge Mason cannot be here tomorrow morning I certainly am opposed to taking the Article up.

Mr. ROBINSON. Mr. Chairman. I insist on my amendment.

Mr. LAKE. Mr. Chairman. I will object to this amendment, for the reason that we may have some matter