

rendered after the going into effect of the Act of 1916, and was only reviewable by certiorari, as provided in that act. The writ of error, therefore, must be and it is

Dismissed for want of jurisdiction.

MISSOURI PACIFIC RAILWAY COMPANY *v.*
STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 14. Submitted November 13, 1918.—Decided January 7, 1919.

The provision of the Constitution requiring a vote of two-thirds of each house to pass a bill over a veto (Art. I, § 7, cl. 2), means two-thirds of a quorum of each house (*i. e.*, of a majority of its members, Art. I, § 5), not two-thirds of all the members of the body. P. 280.

This conclusion results from the context, proceedings in the Convention, and the early and consistent practice of Congress, especially under the similar provision made for submitting constitutional amendments. It is further confirmed by the practice of the States before and since the adoption of the Constitution. *Id.*

Webb-Kenyon Liquor Act sustained.

96 Kansas, 609, affirmed.

THE case is stated in the opinion.

Mr. W. P. Waggener and *Mr. J. M. Challiss* for plaintiff in error:

In view of the nature of the veto power and the extraordinary importance which must be attached to the function of the President in exercising it, it may well be assumed that the framers of the Constitution meant that a veto should challenge the attention of the members of the Congress and bring about a full and careful reconsideration of the matter affected; and, on the face of it, it would

seem that a considerably larger proportion of the members should be required to reënact a measure when so condemned than the number needed for its original enactment in the ordinary way. Hence we find the Constitution distinctly stating that to pass the bill upon such reconsideration there shall be an affirmative vote of two-thirds of "that house," *i. e.*, two-thirds of the members who compose the house in which the action is being taken. Had any less majority been intended, the Constitution would have said so. A Senator or Representative, upon election, becomes a member of the Senate or House and is accredited as such. He is not accredited to the majority, or to a constitutional quorum; in referring to "that house," the Constitution must refer not to a majority of the members, or to a quorum authorized to transact ordinary business, but to the membership in its entirety.

This part of the Constitution was evidently modeled upon the New York Constitution of 1777 (see *United States v. Weil*, 29 Ct. Clms. 538), in every respect save that there it was provided expressly that two-thirds of the members present could override a veto. The failure to follow the New York precedent in this respect is significant of an intention to require two-thirds of the entire membership, as the words used in the Constitution naturally imply.

Compare § 3 of Art. I, which requires only "two-thirds of the members present" in impeachment cases, and § 2 of Art. II, empowering the President to make treaties "provided two-thirds of the Senators present concur." On the other hand, Art. V provides against hasty amendment of the Constitution by requiring a vote of two-thirds of both houses. A reduced vote is allowed for treaties, notwithstanding their solemn character, because in their enactment the President and the Senators are working together. But the overriding of a veto, and the proposal of amendments to the Constitution, are of such extraordinary importance as to require the larger vote. It would have

made the intention no stronger or clearer if two-thirds of all the members of the house had been specified in so many words.

The remarks made by Gouverneur Morris in the Convention, as reported by Madison (Documentary History of the Constitution of the United States, vol. 3, pp. 721-723), support our contention.

Should it be held that an act may be passed over the Presidential veto by two-thirds of a quorum, it is possible for a bill to become a law notwithstanding expressed executive disapproval by a markedly less vote than it received upon its original passage.

Mr. Jas. P. Coleman, Mr. S. M. Brewster, Attorney General of the State of Kansas, and Mr. Wayne B. Wheeler for defendant in error.

Mr. Everett P. Wheeler and Mr. Eliot Tuckerman, by leave of court, filed a brief as *amici curiæ*, in support of the construction rejected in this case. See *post*, p. 599.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

To avoid penalties sought to be imposed upon it for illegally carrying intoxicating liquors from another State into Kansas, the defendant railroad, plaintiff in error, asserted as follows: (1) That the state law was void as an attempt by the State to regulate commerce and thus usurp the authority alone possessed by Congress; (2) that if such result was sought to be avoided because of power seemingly conferred upon the State by the Act of Congress known as the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699), such act was void for repugnancy to the Constitution of the United States because in excess of the power of Congress to regulate commerce and as a usurpation of rights reserved by the Constitution to the

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States; (3) because, even if the Webb-Kenyon Law was held not to be repugnant to the Constitution for the reasons stated, nevertheless, that assumed law afforded no basis for the exertion of the state power in question, because it had never been enacted by Congress conformably to the Constitution, and therefore, in legal intendment, must be treated as non-existing.

It is conceded that the ruling of this court, sustaining the Webb-Kenyon Law as a valid exercise by Congress of its power to regulate commerce (*Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 325), disposes of the first two contentions and leaves only the third for consideration. In fact, in argument it is admitted that such question alone is relied upon. The proposition is this: That as the provision of the Constitution exacting a two-thirds vote of each house to pass a bill over a veto means a two-thirds vote, not of a quorum of each house, but of all the members of the body, the Webb-Kenyon Act was never enacted into law, because after its veto by the President it received in the Senate only a two-thirds vote of the Senators present (a quorum), which was less than two-thirds of all the members elected to and entitled to sit in that body.

Granting the premise of fact as to what the face of the journal discloses, and assuming for the sake of the argument (*Flint v. Stone Tracy Co.*, 220 U. S. 107, 143; *Rainey v. United States*, 232 U. S. 310, 317,) that the resulting question would be justiciable, we might adversely dispose of it by merely referring to the practice to the contrary which has prevailed from the beginning. In view, however, of the importance of the subject, and with the purpose not to leave unnoticed the grave misconceptions involved in the arguments by which the proposition relied upon is sought to be supported, we come briefly to dispose of the subject.

The proposition concerns clause 2 of § 7 of Article I of

the Constitution, providing that in case a bill passed by Congress is disapproved by the President—" . . . he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. . . ."

The extent of the vote exacted being certain, the question depends upon the significance of the words "that house;" that is, whether those words relate to the two houses by which the bill was passed and upon which full legislative power is conferred by the Constitution in case of the presence of a quorum, (a majority of the members of each house; § 5, Art. I); or whether they refer to a body which must be assumed to embrace, not a majority, but all its members, for the purpose of estimating the two-thirds vote required. As the context leaves no doubt that the provision was dealing with the two houses as organized and entitled to exert legislative power, it follows that to state the contention is to adversely dispose of it.

But, in addition, the erroneous assumption upon which the contention proceeds is plainly demonstrated by a consideration of the course of proceedings in the convention which framed the Constitution, since, as pointed out by Curtis (*History of the Constitution*, vol. 2, p. 267, note), it appears from those proceedings that the veto provision as originally offered was changed into the form in which it now stands after the adoption of the Article fixing the quorum of the two houses for the purpose of exerting legislative power and with the object of giving the power to override a veto to the bodies as thus organized. A further confirmation of this view is afforded by the fact that there is no indication in the constitutions and laws

of the several States existing before the Constitution of the United States was framed that it was deemed that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law for the purpose of enacting legislation, and hence that the majority fixed as necessary to override a veto was the required majority of the body in whom the power to legislate was lodged. Indeed, the absolute identity between the body having authority to pass legislation and the body having the power in case of a veto to override it, was clearly shown by the constitution of New York, [1777] since that constitution, in providing for the exercise of the right to veto by the council, directed that the objections to the bill be transmitted for reconsideration to the Senate or House in which it originated, "but if after such re-consideration, two thirds of the said senate or house of assembly, shall, notwithstanding the said objections, agree to pass the same, it shall . . . be sent to the other branch of the legislature, where it shall also be re-considered, and if approved by two thirds of the members present, shall be a law," thus identifying the bodies embraced by the words "senate" and "house" and definitely fixing the two-thirds majority required in each as two-thirds of the members present.

The identity between the provision of Article V of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto, makes the practice as to the one applicable to the other.

At the first session of the first Congress in 1789, a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution embodying a bill of rights. They were all adopted and submitted by each house organized as a legislative body

pursuant to the Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it. Indeed, the resolutions by which the action of the two houses was recorded demonstrate that they were formulated with the purpose of refuting the contention now made. The Senate record was as follows:

“Resolved: That the Senate do concur in the resolve of the House of Representatives, on ‘Articles to be proposed to the legislatures of the states, as amendments to the constitution of the United States,’ with amendments; two-thirds of the Senators present concurring therein.” 1st Cong., 1st sess., September 9, 1789, Senate Journal, 77.

And the course of action in the House and the record made in that body is shown by a message from the House to the Senate which was spread on the Senate Journal as follows:

“A message from the House of Representatives. Mr. Beckley, their clerk, brought up a resolve of the House of this date, to agree to the . . . amendments, proposed by the Senate, to ‘Articles of amendment to be proposed to the legislatures of the several states, as amendments to the constitution of the United States,’ . . . ; two-thirds of the members present concurring on each vote; . . . ” 1st Cong., 1st sess., September 21, 1789, Senate Journal, 83.

When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated.

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But this is not all, for the Journal of the Senate contains further evidence that the character of the two-thirds vote exacted by the Constitution (that is, two-thirds of a quorum) could not have been overlooked, since that Journal shows that at the very time the amendments just referred to were under consideration there were also pending other proposed amendments, dealing with the treaty and law-making power. Those concerning the treaty-making power provided that a two-thirds vote of all the members (instead of that proportion of a quorum) should be necessary to ratify a treaty dealing with enumerated subjects, and exacted even a larger proportionate vote of all the members in order to ratify a treaty dealing with other mentioned subjects; and those dealing with the law-making power required that a two-thirds (instead of a majority) vote of a quorum should be necessary to pass a law concerning specified subjects.

The construction which was thus given to the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the States and all the people, has governed as to every amendment to the Constitution submitted from that day to this. This is not disputed and we need not stop to refer to the precedents demonstrating its accuracy. The settled rule, however, was so clearly and aptly stated by the Speaker, Mr. Reed, in the House, on the passage in 1898 of the amendment to the Constitution providing for the election of Senators by vote of the people, that we quote it. The ruling was made under these circumstances. When the vote was announced, yeas, 184, and nays, 11, in reply to an inquiry from the floor as to whether such vote was a compliance with the two-thirds rule fixed by the Constitution, as it did not constitute a two-thirds vote of all the members elected, the Speaker said:

“The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision

of the Constitution says 'two-thirds of both Houses.' What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. . . . " Hinds' Precedents of the House of Representatives, vol. 5, pp. 1009-1010.

This occurrence demonstrates that there is no ground for saying that the adherence to the practice settled in both houses in 1789 resulted from a mere blind application of an existing rule; a conclusion which is also clearly manifested, as to the Senate, by proceedings in that body in 1861 where, on the passage of a pending amendment to the Constitution, as the result of an inquiry made by Mr. Trumbull relative to the vote required to pass it, it was determined by the Senate by a vote of 33 to 1 that two-thirds of a quorum only was essential. 36th Cong., 2nd sess., March 2, 1861, Senate Journal, 383.

In consequence of the identity in principle between the rule applicable to amendments to the Constitution and that controlling in passing a bill over a veto, the rule of two-thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto. In passing from the subject, however, we again direct attention to the fact that in both cases the continued application of the rule was the result of no mere formal following of what had gone before but came from conviction expressed, after deliberation, as to its correctness by many illustrious men.

While there is no decision of this court covering the sub-

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ject, in the state courts of last resort the question has arisen and been passed upon, resulting in every case in the recognition of the principle, that in the absence of an express command to the contrary the two-thirds vote of the house required to pass a bill over a veto is the two-thirds of a quorum of the body as empowered to perform other legislative duties. *Farmers Union Warehouse Co. v. McIntoch*, 1 Ala. App. 407; *State v. McBride*, 4 Missouri, 303; *Southworth v. Palmyra & Jackson R. R. Co.*, 2 Michigan, 287; *Smith v. Jennings*, 67 S. Car. 324; *Green v. Weller*, 32 Mississippi, 650. We say that the decisions have been without difference, for the insistence that the ruling in *Minnesota ex rel. Eastland v. Gould*, 31 Minnesota, 189, is to the contrary, is a wholly mistaken one, since the decision in that case was that as the state constitution required a vote of the majority of all the members elected to the house to pass a law, the two-thirds vote necessary to override a veto was a two-thirds vote of the same body.

Any further consideration of the subject is unnecessary, and our order must be, and is

Judgment affirmed.

WEIGLE v. CURTICE BROTHERS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 83. Argued December 17, 1918.—Decided January 7, 1919.

As respects domestic retail sales of secondary packages, or the contents thereof, out of the original packages in which they were imported in interstate commerce, state laws forbidding sale of food articles containing benzoate of soda are not inconsistent with the commerce