APPENDIX.

Following, in condensed form, is the argument submitted by *Mr. Everett P. Wheeler* and *Mr. Eliot Tuckerman*, as *amici curiæ*, in the case of *Missouri Pacific Railway Company* v. *State of Kansas*, *ante*, 276, touching the vote requisite in the houses of Congress for submission of amendments to the Constitution. This is inserted as an addendum to the report of that case.

The bill, upon its reconsideration, received one vote less than a two-thirds vote of the potential membership of the Senate; or one-third of one vote less a two-thirds vote of the actual membership of that body. It was presumably declared carried in accordance with the legislative precedent which has grown up in the Congress to the effect that each house is constituted as a "house," within the meaning of the Constitution, when a quorum of the membership is present; and that "two thirds of that house," as mentioned in the Constitution, signifies two-thirds of those voting on the measure. Cong. Globe, July 7, 1856, pp. 1543–1550; Hinds' Precedents, §§ 3537, 3538, note.

It is our contention that this precedent is at variance with the express words and the intention of the Constitution, and, therefore, does not represent the supreme law of the land, as defined in subdivision 2 of Article VI. We maintain that the "two thirds" vote required to pass a bill over the President's veto means a vote equal in number to two-thirds of all the members of each house, at least of the actual membership, if not of the potential membership, of that house. We therefore urge that the bill in question, having failed to receive a favorable vote amounting to two-thirds of the actual membership of the Senate, as then constituted, failed of passage in that house

over the President's veto, and never became a law. The question of the interpretation of these words of the Constitution is now presented for the first time to this court.

When the meaning of the clause in question was debated in the Senate, it was recognized, by both sides, that the question was ultimately judicial in character. [Colloquy between Mr. Benjamin and Mr. Bayard, Cong. Globe, July 7, 1856, p. 1546.]

The legislative branch of the Government was not in a disinterested position in relation to the question, and, not unnaturally, they voted to increase rather than to diminish their power. The precedents of Congress on this subject are not, therefore, of any assistance to this court.

We wish to emphasize the far-reaching effect the decision of the question as to the meaning of the words of the Constitution now before the court for interpretation will have, by pointing to the fact that Article V of the Constitution, prescribing the method of its amendment, contains similar wording.

The original draft of the Constitution was revised by a Committee on Style before its final adoption by the Convention; and its language is uniform and accurate, and has been considered a model of clear and simple English. Similar words and phrases will therefore reasonably be interpreted similarly in interpreting the instrument. Clearly, no higher power can exist in a nation than the power to change its organic law. It was recognized that the power to amend the Constitution was necessary to preserve its healthy life. The Confederation, under which the framers of the Constitution were living, permitted of its amendment only by a unanimous vote of the States forming its membership. The same requirement for the Constitution was urged upon the Convention by Roger Sherman; at first generally, (Madison's notes, Monday, Sept. 10, 1787, 2 Farrand, Records of the Federal Convention, 558); and later in regard to the internal police of the States and their equal suffrage in the Senate,

(Madison's notes, Sept. 15, 1787, 2 Farrand, 629–631). The final form of Article V, providing for the proposal of amendments by "two thirds of both houses," and the ratification by three-fourths of the States, however, seemed sufficiently conservative to the framers of the Constitution and was, therefore, adopted.

This fifth Article of the Constitution has, however, fared in Congress, as has the clause now under consideration. [Citing the ruling of Speaker Reed, referred to in the opinion, *ante*, p. 283, Hinds' Precedents, § 7027, and a like precedent in the Senate, *id.*, § 7028.]

In other words, in the existing Senate, having a membership of 96, if 49 Senators are present and two-thirds of those approve a proposed amendment to the Constitution the precedents of the Senate assume that the constitutional requirement of Article V is satisfied, so far as that house is concerned. It seems to us clear, from the language of the Constitution itself, that no such result could have been contemplated. It is evident that the Congress was expected to be on duty, with full ranks. In the House: "When vacancies happen in the representation from any State, the executive authority thereof *shall* issue writs of election to fill such vacancies." Art. 1, § 2, subd. 4. In the Senate (before the Seventeenth Amendment): "If vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which *shall* then fill such vacancies." Art. 1, § 3, subd. 2. "A majority of each [house] shall constitute a quorum to do business; but a smaller number . . . may be authorized to *compel the attendance of absent members*, in such manner, and under such penalties as each house may provide." Art. 1, § 5, subd. 1.

It thus seems clear that Congress was expected to be present or accounted for, and that on the matters of the highest importance, such as the passage of bills or resolutions over the veto of the President, or the proposition

of amendments to the Constitution, two-thirds of the whole number of members of each house was required.

The Constitution provides that if the President does not approve a bill "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. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively." Art. I, § 7, subd. 2. Nothing is said about "two thirds of those present" or "two thirds of those voting"; but simply, "two thirds of that house."

There are several provisions of the Constitution where the proportion of those present, or of those who vote, was intended to govern the result. For example, when the Senate sits to try impeachments, "no person shall be convicted without the concurrence of *two thirds of the members present.*" Art. I, § 3, subd. 6.

"The yeas and nays of the members of either house on any question shall, at the desire of *one fifth of those present,* be entered on the journal." Art. I, § 5, subd. 3.

The President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided *two thirds of the Senators present concur.*" Art. II, § 2, subd. 2.

Moreover, the meaning of the words "two thirds of that house" as used in the second subdivision of the seventh section of Article I is made doubly clear by the following (third) subdivision, governing orders, resolutions and votes other than bills. Such orders, resolutions and votes may be repassed, if disapproved by the President, "by two thirds of the Senate and House of Repre-

sentatives, according to the rules and limitations prescribed in the case of a bill."

This was not a different requirement from the requirement exacted in the instance of bills. It was the same requirement, differently expressed. Yet it may be clearer to some minds that "two thirds of the Senate" does not mean two-thirds of a quorum of the Senate, than that "two thirds of that house" does not mean two-thirds of such quorum. If the Convention had meant by the words "two thirds of that house" two-thirds of those present, the Committee on Style would have so expressed it, as they did in other instances.

Apparently the original resolution in the Constitutional Convention on the subject under discussion is thus recorded: Journal, Monday, June 4, 1787.

"A question was then taken on the resolution submitted by Mr. Gerry, namely, 'resolved that the national executive shall have a right to negative any legislative act which shall not be afterwards passed unless by two third parts of each branch of the national legislature.'" And on the question to agree to the same it passed in the affirmative. 1 Farrand, 94. The same resolution came up again and again in the debates. 1 Farrand, 226, 230; 2 *id.*, 71, 132, 146, 160–162, 167, 181, 294–295, 298, 568, 582, 585.

Rufus King's notes for Wednesday, June 6, 1787, record: "It will require as great Talents, Firmness & Abilities, to discharge the proper Duties of the Executive, as to interpose their veto, or negative which shall require $^{2}/_{3}$ of both Branches to remove." 1 Farrand, 145. Madison's notes state: "10. Resold. that the natl. Executive shall have a right to negative any Legislative Act, which shall not be afterwards passed unless by two thirds of each branch of the National Legislature." *Id.*, 236.

Nothing that we have found in the debates or records gives us any intimation that the Convention had in mind less than the full membership of each branch of the Congress, when they mentioned it as a house, or that by "two

thirds of that house" they meant less than two-thirds of all its members.

The legislative precedents, all made under the influence of a purely legislative atmosphere, are merely statements and applications of the familiar legislative doctrine and practice that, for purposes of ordinary legislative business, a "quorum" is a "house." Here, however, we are dealing with the Constitution of the United States, which in terms specifies a "quorum" (Art. I, § 5, first paragraph) or "those present" (Art. I, § 3, subd. 6, and § 5, subd. 3; and Art. II, § 2, subd. 2) when it intends a "quorum" or those "present"; and with equal emphasis specifies a "house" when it intends a "house" as the description of the whole body or legislative branch in question. (Art. I, § 7, subd. 2; Art. V, etc.)

Indeed the Constitution itself clearly defines these terms. "Each house shall be the judge of the elections, returns, and qualifications of its own members; and *a majority of each shall constitute a quorum* to do business." Art. I, § 5.

This is a definition in the instrument itself that a "house," as such, means all the members of the house, or the sentence means nothing.

It cannot be said that we are confronted by a conclusive, practical construction heretofore placed upon these terms in the Constitution, because, in such a case, it is only the action of the *parties* to the instrument which can possibly create such a practical construction, and such action must have been taken in the light of full knowledge of the *facts*. Here the "parties" to the instrument are the several *States* themselves.

Historically speaking, it may be said that no State, with the facts before it, has ever taken any action whatever bearing on this general question, except the State of New York, in 1918, in the case of the Prohibition Amendment, when the objection was made and the matter of the proposed amendment was dropped.

While it is understood that the question presented to

the Assembly of the State of New York under Article V of the Constitution is not now before this court, and that Article V may possibly receive a different interpretation from that given to the clause now under consideration, the wording of the two clauses is similar, and the attention of the court should be directed to the question arising under Article V, at this time.