AN ADDRESS

... TO THE .

PEOPLE OF KENTUCKY,

.. AND ..

OPINION

. OF .

Hon. J. Proctor Knott.

WHAT IS THE MEANING OF THE WORDS

"THE FINAL PASSAGE OF THE BILL?"

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AN ADDRESS

—TO THE—

PEOPLE OF KENTUCKY.

In order that you may know the facts and circumstances connected with and relating to the passage of the Revenue Bill (commonly called the McChord Bill), which was recently vetoed by the Governor, we deem it proper to make this statement.

This bill was reported to the House of Representatives by the Revisory Commission on the 7th day of January, 1892.

The House, either by its Committee on Revenue and Taxation, in the committee of the whole or in regular session, were engaged in the consideration of this bill until it finally passed it on the 24th of May. On the 27th of May it was reported to the Senate from the House, given its first reading and ordered printed in obedience to section 46 of the Constitution. On June the 3d it was

returned to the Senate from the Public Printer, was given its second reading, and in obedience to the requirements of section 46 of the Constitution was referred to the committee on Revenue and Taxation in the Senate, and that committee, at two sessions each day, exclusive of Sundays, engaged with energy and deliberation in the consideration of the bill. It was the opinion of the committee, after careful consideration and investigation, that the bill, as it came to the Senate, was materially defective and contained many very dangerous departures, and they, therefore, on the 8th of July reported it back to the Senate with about one hundred amendments, which the committee believed ought to be adopted. The Senate immediately begun the consideration of the bill and the committee amendments, and it was found that the proposed amendments were so clearly just and proper that nearly, if not quite, every one of them were adopted by a very decided majority of the Senate—the opposition consisting all the way through of four, five, to ten out of the thirty-eight Senators, and on the 14th ofJuly the vote was taken in the Senate on the bill as thus amended and resulted in its passage by a vote of 20 yeas to 6 nays. Thus amended and passed, the bill was returned to the House of Representatives that the Senate amendments, might be concurred in or non-concurred in, as to the House might seem proper. After the House had spent several days in the consideration of the Senate amendments, a few of the amendments were concurred in, and a large number were non-concurred in, and the bill and amendments were returned to the Senate on the — day of July. The next step in order in the due progress of the bill was for the Senate to either recede from such amendments as the House had refused to concur in, or to refuse to recede and ask for a Conference Committee to adjust the differences between the House and the Senate.

It will be observed that the House had spent near five months and the Senate had spent about six weeks in the work upon this bill, at a cost to the State for the time consumed at a conservative estimate, as we believe, of $75,000.

That this bill should be passed in time for the assessment to begin on September 15th was holding the Legislature in session at a cost of about $1,000 per day.

From four to six of the Senators who had opposed this bill throughout from the adoption of the Senate amendments now undertook to prevent any action by the Senate, and by delay tactics succeeded for that day, notwithstanding there were seventeen members of the Senate out of the twenty-one or twenty-two in attendance that were anxious to speedily conclude the work on this bill and adjourn.

Again, when the Senate met on the next day, the four or five Senators resumed their delay tactics, but in this engagement the seventeen Senators succeeded, notwithstanding the extreme tactics resorted to by the four or five, and refused to recede and named, by resolution, a conference committtee on the part of the Senate and asked the House to appoint a like committee.

The evident purpose of the minority was either to defeat the passage of the bill or eventually procure the appointment of a conference committee in the Senate that would be opposed to certain important amendments that a very large majority of the members of the Senate had voted for and some of which will be noticed later on in this statement.

It is a well settled proposition in parliamentary law that a conference committee must be appointed that will voice the views of the majority of the body from which they are appointed.

Mr. Cushing, in his "Law and Practice of Legislative Assemblies," says: "A committee of conference is not a

heterogeneous body, acting as one committee, but two committees, each of which acts by a majority. Every member of each committee is to represent the prevailing party of the house to which he belongs on the disagreeing vote in question."

There can not be found a respectable authority to the contrary.

The bill, as it came from the Revisory Commission, and as it passed the House, excepted railroads, fire, life and accident insurance companies and foreign building and loan associations from paying a tax upon their franchise, as other corporations were required to pay. The Senate adopted an amendment compelling these to pay a tax on their franchise just the same as other corporations. Gen. B. W. Duke, an attorney for the L. & N. R. R., stated that this change made by the Senate would increase the taxes payable by that railroad over $300,000 annually, and it is believed that this amendment was, and has been, the basis of the most formidable opposition made to this bill from the time the Senate adopted that amendment.

This amendment of the Senate imposes a tax on all railroad (including street railway) franchises which will be, beyond doubt, the most fruitful source of franchise taxes. We submit to you whether or not the Senate did right in this.

The bill, as it was framed by the Revisory Commission, and as it passed the House placed in the hands of the Railroad Commission, not merely the assessment of the tangible property of railroad corporations, but also the franchises of all the corporations of the State. It was believed that the power of assessing all the corporations of the State should not be concentrated in the hands of one authority. The Railroad Commissioners are the appointees of the Governor. In the future these Commissioners are, under the Constitution, to be elected by the people. The

result would be to combine all the corporate wealth and power of the Commonwealth to control the election of the Railroad Commissioners. For this reason the Senate amendments left to the Commission the assessment of only the tangible property of railroad corporations, as is now provided by law. In the United States there are twenty-nine States which have Railroad Commissions, and in no one of them is the Commission given power or authority over any thing other than railroads and railroad property.

The Commonwealth now has a well-settled system of law governing the taxation of railroads. The enforcement of this law was resisted in the courts and was litigated by the railroad corporations from the Franklin Circuit Court to Supreme Court of the United States. After years of time and the expenditure of many thousands of dollars by the Commonwealth the validity of the law was settled in the Federal Supreme Ceurt. This law brought annually a large increase of revenue to the State from the railroads.

The next attempt made to get rid of this law was made at the legislative session of 1887–'8, when the "Thomas Bill" was passed in the House but failed in the Senate, abolishing the Railroad Commission. Nothing further was done toward this end until, in the Revenue and Taxation Bill, as it came from the Revisory Commission and as it passed the House, it was provided that railroads should be valued for taxation at the price they would bring at a voluntary sale. It will be remembered that the existing law provides that railroads shall be valued for taxation at what they are worth as carriers of freight and passengers, and, under this law, the valuations made are considerably higher than the original cost of the railways.

Such a thing as a voluntary sale of a railroad never occurred in Kentucky. When railroads are sold at all it is by foreclosure proceedings. The control of railways frequently changes by a change in the ownership of the stock of the cor-

porations owning them. But this is something very different from a sale of the railway itself.

It was believed that the law governing the assessment of railway property, which had been settled after so long a struggle, which brought such a large increase of revenue and which the people did not ask should be repealed, should remain unchanged; and, therefore, the Senate amendments readopted the existing law upon that subject. A change in this system can bring only confusion, renewed litigation, loss to the State and benefit to the railway corporations.

These were the more important changes made in the bill by the Senate.

The report of the conference committee recommended substantially the adoption of the Senate amendments.

The veto message of the Governor raises first the question as to whether this bill was passed by the General Assembly in accordance with the requirements of the Constitution.

The bill passed the House, with an emergency section, by a vote of 67 to 0, and passed the Senate with the amendments by a vote of 20 to 6. None of the amendments proposed by the Senate, nor by the report of the Conference Committee, related to the emergency section. The conference report was adopted in the Senate by a vote of 16 to 10, and was adopted in the House by a vote of 41 to 31.

The Governor, to support his objection as to the manner of passing the bill by the General Assembly, quotes the last paragraph of section 46 and section 55 of the Constitution.

The last paragraph of section 46 reads thus: "No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays, and entered in the jour-

nal, provided any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House."

Section 55 of the Constitution provides that "no act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by the concurrence of a majority of the members elected to each House of the General Assembly, by a yea and nay vote entered on their journals, an act may become a law when approved by the Governor. But the reasons for the emergency that justifies this action must be set out at length in the journals of each House."

It will be seen that section 46 relates to the passage of bills, and section 55 relates only to the time when acts shall take effect. The latter section fixing the time when all bills shall take effect, but empowering the General Assembly to make them take effect earlier by the concurrence of a majority of the members elected to each House.

There is nothing in section 55 that requires the emergency clause to be a part of the bill; it may as well be in the form of a separate resolution adopted by the required number of votes. The gist of the section is, that to make a bill take effect upon the approval of the Governor a majority of the members elected to each House shall signify their intention to that effect by a yea and nay vote. As a majority of the members-elect of each House voted for the emergency section of the bill, and as that section was not amended in either House, nor by the conference report, it can not be denied that the two Houses concurred in expressing the legislative intention that the Revenue Law should take effect upon the approval of the Governor.

It will be observed that this section does not require, in order to make bills take effect on the approval of the Gov-

ernor, that the concurrence of the majority of the members-elect to each House should be had on the *vote on the final passage*. It seems quite manifest to us that such concurrence may be had within the meaning of section 55, as it was in this case, or a day or a week later, by a distinct order or resolution. The Governor, however, evidently labors under the misapprehension that the Constitution requires this concurrence as to the time the act shall take effect to be manifested by the vote on the final passage of the bill.

The only section of the Constitution that contains any thing as to the number of votes required to pass a bill is section 46, and this is the only section of the Constitution in which the words "on its final passage" occur, and it provides that no bill shall become a law unless "on its final passage" it receives the votes of at least two-fifths of the members elected to each house, and a majority of the members voting, the vote to be taken by yeas and nays and entered on the journal, &c.

The first question that here occurs is: What is the final passage of a bill within the meaning of this section of the Constitution? We think it clear that it is, as to each house, the vote upon the bill as an entirety, and not a vote upon a conference report, or upon an amendment.

But, for argument's sake, it may be conceded that the vote on the amendments, or on the conference report, was a vote on the final passage. Yet, in that state of case, as there was not in any of the amendments, or in the conference report, any thing that related to the matter of emergency, nor to the time when the act should take effect, it required only a vote of two-fifths of the members elect of each house to adopt the conference committee's report, and as 16 is two-fifths of the membership of the Senate, and as 41 is two-fifths of the membership of the House, the bill was regularly passed under the most extreme construction that can be given to the Constitution.

But it is a well settled legal proposition that the constitutional provisions concerning the final passage of bills do not relate to, nor govern votes upon, nor proceedings with, reference to amendments or conference reports.

In Sutherland on Statutory Construction, a standard legal work cited by the Kentucky Court of Appeals and other courts of last resort, the most recent work on the subject with which it deals, the law is thus stated in sections 48 and 49: "If the Constitution, however, requires a certain proceeding in the process of legislation to be entered in the journal, the entry is a condition on which the validity of the act will depend. The vital fact that on the final passage of a bill the required number of votes are given in its favor is extensively directed by Constitutions to be entered on the journals. Under the operation of these provisions there is no presumption that the required vote was given if the journal is silent. It must affirmatively appear by the journals that this constitutional requirement has been complied with.

* * * * * * * * * * *

Nor does concurrence by one House in amendments made by the other require the yeas and nays, and their entry on the journal, under the provisions for these things on the final passage of bills."

In McCulloch v. The State, 11 Ind. Reports, page 434, there was determined the validity of an important act, passed by the General Assembly of the State of Indiana. The Constitution of that State provides that no bill shall become a law unless it receives the votes of a majority of the members elected to each House, and the yeas and nays must be entered on the journal. In that case the court held: "But it is argued that the bill having been amended in the House—having passed that body—and being returned to the Senate, where it originated, should, with the amendments, have been passed in the Senate by a consti-

tutional majority; that it was not enough that the amendments were simply concurred in. In answer to this it might be said that, for aught that appears in the journal, the bill may have so passed the Senate. But suppose the journal in reference to the point thus made shows all that was done, still the proceeding would, in our opinion, be unobjectionable, because the bill, before it was sent to the House, had passed the Senate by a majority of all the members elected to that body, and it can not be assumed that the amendments of the House converted the original into a new bill. Indeed such construction might result in the necessity of the whole series of readings being commenced anew every time an amendment is made. We incline to the opinion that in this instance the mere concurrence in the amendments was sufficient without any further proceeding by the Senate.

"It is true where journals, on their face, show that a bill, on its final passage, did not receive in its favor the votes of a majority, as prescribed by the Constitution, the whole legislative proceeding would be a nullity, because, if the requisite number do not vote in the affirmative, upon such final passage there is a defect of power and no bill so passed can have the force of a law." The court then cites a number of cases to sustain this last proposition and concludes as follows, on page 435: "These decisions, in our opinion, announce a proper exposition of the law. For the purpose indicated, courts may resort to the journals. Still those cases are not applicable to the case at bar, because the bill in question passed both houses by the requisite vote." Thus it will be seen that in this case the court clearly decided that the vote on the final passage of the bill was had when each house voted on the bill as an entirety and before amendment by the other house.

In the case of Hull v. Miller, 4 Nebraska, 505-6, the following is the language of the court, in sustaining a leg-

islative act which was assailed: "It is disclosed that the bill for the act in question originated in the Senate where it was passed by the constitutional mojority, the yeas and nays being duly called and entered on the journal. In the House the bill was amended and there duly passed. Upon its return to the Senate all that the journal discloses with respect to it is that the amendments of the House were adopted, but by what majority or in what manner the vote was taken the journal of the Senate is silent. It is contended by counsel for plaintiff in error that the Constitution required the observance of the same formalities in the vote by which the amendments of the House were concurred in as was required on the *final passage of the bill before it left the Senate*, and that the journal of that body should show an observance of this requirement. As to the vote on the final passage of the bill in either house the position of counsel is clearly correct.

"Section 11, art. 2, of the Constitution of 1867 declares that, 'on the passage of every bill in either house the vote shall be taken by yeas and nays and entered on the journal, and no law shall be passed in either house without the concurrence of a majority of all the members elected thereto.' This provision is most clearly mandatory, and its non-observance in the passage of any bill will render the act absolutely void. * * * * * *

"But it will be observed that the provision of the Constitution above quoted refers only to the vote on the passage of bills."

The Constitution of Nebraska required that bills and all amendments thereto should be printed "before the vote is taken on the final passage." In the case of State vs. Liedtke, 9 Nebraska, page 494, the Supreme Court of that State use, in construing the words "final passage," this language:

"The words 'final passage,' as applied to matters of legis-

lation, were well known to the framers of the Constitution, and presumably so to the people who adopted it. And it is a part of the legislative and political history of the country that a large per cent. of the most important legislation of the States, as well as of the National government, consist of measures proposed as amendments to bills by committees of conference after such bills have gone through all the stages of legislation in the two houses, and only lack concurrence, often on trivial and unimportant points. The object of the constitutional provision is to insure more deliberate action, and to prevent haste in the maturing and passage of bills. This is a commendable object and one which should be upheld so far as possible by a sound construction of the Constitution.

* * * * * * * * * * *

"All of this was well known to the framers of the Constitution, and hence the section under consideration does not require the printing of amendments *after the bill has been put upon its final passage.* Any other line of construction, if followed in its necessary sequence, would lead to a condition of repeated printings and readings on different days, which would tend to becloud rather than enlighten the legislator, and would render it impossible to perform the necessary legislation within the forty days to which another section of the Constitution limits each session of the Legislature."

Either all mandatory constitutional requirements as to bills, or the passage of bills, apply to amendments, or none of them apply to amendments. Requirements that bills shall be read on three several days are, when the readings can be dispensed with only by a yea and nay vote entered on the journal, held to be not directory, but mandatory. Sutherland on Statutory Construction, section 45. So that it becomes material to inquire whether such requirements as to the reading of bills apply to amendments.

In Illinois the constitutional requirement as to the reading of bills on three several days is held to be mandatory. In the People v. Wallace, 70 Illinois Rep., page 681, the Supreme Court of that State said: "It is also objected that the 10th section of the act was not constitutionally adopted, because it was engrafted as an amendment whilst the bill was being considered, and was not read on three several days in the House adopting it as an amendment. We are clearly of opinion that the requirement does not apply to an amendment, and the objection can not prevail."

The same ruling was made in State v. Leidtke, 9 Nebraska, 462; Miller v. The State, 3 Ohio State, 475; and State v. Platt, 2 So. Car., 150. And the law is so declared to be in Sutherland on Statutory Construction, section 49; and in Cooley on Constitutional Limitations.

So that it will be seen that the line is clearly drawn in the judicial decisions and in the legal text-books between bills upon the one hand and amendments on the other; and the holding is, without exception, that constitutional requirements as to the former have no application to the latter.

The Governor in his message expresses grave and intense apprehension as to the supposititious evil consequences that will result to the Commonwealth and its people from the construction of the Constitution, that the courts and legal text-books, as above shown, say is the true construction.

His Excellency should not have forgotten that that same construction has obtained in Kentucky for almost half a century.

Section 40 of the Constitution of 1849 is in these words: "The General Assembly shall have no power to pass any act or resolution for the appropriation of any money, or the creation of any debt, exceeding the sum of one hundred dollars at any one time, unless the same, *on its final passage*, shall be voted for by a majority of all the members

then elected to each branch of the General Assembly, and the yeas and nays thereon entered on the journal."

It will be observed that as to bills appropriating money, or creating a debt, to an amount greater than one hundred dollars, the requirements of the Constitution of 1849 are in all respects identical with the requirements of the present Constitution, with reference to all bills, except as to the number of votes. In other words, the present Constitution applies to all bills passed by the General Assembly, the same requirements in the matter of legislative procedure that the Constitution of 1849 applied only to appropriation bills for more than one hundred dollars.

At the first session of the General Assembly under the Constitution of 1849, the bill appropriating money for the Kentucky Institution for the Blind passed the House December 23, 1851, by a yea and nay vote of a majority of all the members elect (House Journal, page 345). This bill passed the Senate, with amendments, by a yea and nay vote of a majority of all the members elect, on January 1, 1852. The House Journal of that session (page 434) shows what was done upon the return to the House of the bill, with the Senate amendments. "The amendments proposed by the Senate to the bill from the House of Representatives, entitled 'An act for the Education of the Blind,' were taken up and concurred in."

It would be useless here to cite from the Journals of the two Houses all the many instances in which, under the Constitution of 1849, amendments to bills appropriating more than $100 were concurred in by the House, other than the one proposing them, or in which conference reports with reference to such bills were adopted, without a call of the yeas and nays, and the entry thereof on the Journals. Suffice it to say that such was the legislative procedure at every session of the General Assembly, down to and including the session of 1889–'90. A notable instance is

that of the bill appropriating money for the Eddyville Penitentiary at the session of 1887–'8. The bill passed the Senate March 30, 1888, appropriating $100,000. (Senate Journal, page 1136). It passed the House April 24, 1888, with several important amendments, one increasing the appropriation to $200,000 (House Journal, page 1737). On April 26, 1888, the Senate concurred in those amendments, without a calling of the yeas and nays, or their entry on the journal. (Senate Journal, 1573.)

So that the fact is that from the time of the adoption of the Constitution of 1849 every Lieutenant-Governor who has presided in the Senate, every Speaker of the House of Representatives, every Governor of the Commonwealth, except the present Chief Executive, has construed and decided the words, "the final passage," as used in the Constitution with reference to a bill to be inapplicable to amendments and to reports of conference committees. And that construction has been followed by every department of the government of the Commonwealth, except the head of the present Executive department.

This usage and contemporaneous construction of the constitutional provision in question would be entitled to controlling weight if there were any doubt involved.

"A contemporaneous construction is that which it receives soon after its enactment. This, after the lapse of time, without change of that construction by legislation or judicial decision, has been declared to be generally the best construction. It gives the sense of the community as to the terms made use of by the Legislature. If there is ambiguity in the language the understanding of the application of it when the statute first goes into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction

under such circumstances becomes established law." Sutherland on Statutory Construction, section 307.

"The uniform legislative interpretation of doubtful constitutional provisions, running through many years, and a similar construction of statutes, has great weight." Sutherland on Statutory Construction, 311.

If it were true, as claimed by the Governor, that every amendment makes a new bill, and that the constitutional requirement as to the entry upon the journal of the yeas and nays upon the passage of bills applies to amendments, then, obviously, the constitutional requirements in reference to bills that they shall be referred to, and reported from, a committee; that they shall be printed, and that they shall be read on three several days, are also applicable to all amendments. Such a construction would lead to interminable confusion, and would inevitably lead to a total blockading of all legislation. No one acquainted with parliamentary procedure and practice will doubt that, under such a construction of the Constitution, any two men having a fair knowledge of parliamentary practice and methods could, within the limits of a sixty days' session, if they so desired, prevent the passage of any bill whatever. Such a construction would entail upon the people incalculable expense in the conduct of legislative proceedings without, possibly, affording them any of the benefits desired and derived from legislation. It is believed that no fair-minded person can entertain the thought that the framers of the Constitution, or the people, when they adopted it, contemplated or intended that the Constitution should be so construed, or that such a result should follow from its operation. The Governor's construction of the Constitution leads inevitably to the destruction of the primary object for which the people adopted the Constitution and established their government.

The next objection urged by the Governor to the bill is to section 8, article 3, of the bill, which is as follows:

"Article 3, section 8. The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that when legally called on the chief officer shall report a full statement of the property of such corporation for taxation, and for a failure shall be subject to the penalties in this article provided, and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

Sections 8 and 9 of article 4 of chapter 92, of the General Statutes (the present revenue law), are in these words:

"§ 8. That the individual stockholders of the companies which are, by this article, required to report and pay tax upon the value of their property shall not be required to list their shares in such companies for taxation."

"§ 9. The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and for a failure shall be subject to the penalties in this article provided."

It will be seen that the vetoed revenue bill simply combined into one section these two sections which are now the law, without changing their legal effect in any particular whatever. So that what the Governor, in his message, denominates "a startling proposition" is now the law of the land, has been so for years and will remain so till a different law on the subject is enacted.

Under the Constitution, if all the property of a corporation be taxed to the corporation, as provided in the vetoed bill and in the present revenue law, then the stock of the

stockholder can not be taxed in his hands, because the doing so would be double taxation. This sufficiently appears from the opinion of the Court of Appeals, in Louisville, &c., Mail Co. v. Barbour, sheriff, 88 Ky. Rep., 73, decided November, 1888, opinion by Judge Lewis.

Under the vetoed bill corporations are required to list for taxation their tangible property with the assessor like natural persons. The board charged with the duty of assessing corporate franchises must ascertain the market value of the capital stock of the corporation; and from this sum is deducted the value of the tangible property listed with the assessor by the corporation, and the difference is by the bill made the value of the corporate franchise, upon which the corporation must pay taxes at the same rate as natural persons. So that it will be seen that under the provisions of the bill every thing that the corporation has, including the capital stock, is taxed to the corporation, whether the stockholder resides in or out of Kentucky.

The market value of the stock of the L. & N. Railroad Company, which is owned principally by non-residents of Kentucky, is worth in the market, in round numbers, $65,000,000. The value of its tangible property listed with the Railroad Commission, and on which they now pay taxes, is $20,000,000. So that under this vetoed bill, as amended in the Senate and by the conference report, that corporation would have been required to pay taxes on $45,000,000 as the value of its franchise, upon which no taxes have ever heretofore been paid; and all other corporations, having any franchise or privilege not enjoyed by natural persons, would be similarly affected by the vetoed Revenue Bill.

The complaint in the veto message that the bill does not apply the system by it provided for the taxation of the franchises of domestic corporations to the franchises

of foreign corporations is unfounded, for the reason that a foreign corporation, like a non-resident natural person, can be taxed in this State only upon property that it has in this State, or upon business done in this State by it.

As to the method of ascertaining from the corporation the facts upon which an assessment is to be based, it is the same that has for years been employed in the assessment of railroad property and distilled spirits, against which no complaint has been made by the people, has been upheld in the courts, and has largely increased the State revenue from these sources.

The Governor also complains that the bill inaugurates no reform in the system of collecting the revenue. In view of the fact that for the last fiscal year not a single sheriff in the Commonwealth failed to account for the revenue collected by him, except in the county of Clay, where the sheriff defaulted for $2,000, for which the State has a judgment against his sureties, who are amply good for that sum, it was deemed unwise to make any change in the existing system on that subject.

The Governor objects to the bill because it does not require the Auditor to make an annual statement and account of the receipts and expenditures of the public money. The Constitution itself requires this without any statute, section 230; and if it did not so require, the proper place for such a provision is in the chapter of the general laws with reference to the Auditor and his duties.

The Governor calls attention to the fact that during the last four years there has been paid to the Auditor's agent in Jefferson county the sum of $48,280, yet he does not have one word to say about the sum that has been brought to the State Treasury by this means from that county, which sum amounts to $242,800. Since the act passed authorizing the appointment of these agents, to-wit: in 1881, there has been collected into the treasury, through

this means, the sum of $649,904, for which there has been paid such agents $120,441.

But the bill vetoed by the Governor provided that hereafter these agents should be paid their commissions by the delinquents instead of getting it from the State Treasury, so that had the Governor signed this bill this obnoxious feature of the law would have been avoided, whereas, by his veto, he perpetuates it until another law repealing it can be passed.

For these reasons, and because, while the the bill in question treated fairly and conservatively all interests affected thereby, it would, at the same time, have added largely to the revenues of the Commonwealth, the counties, the cities and towns especially, as the Constitution intended, by subjecting to taxation a large amount of corporate property that has heretofore remained untaxed, we submit that there was no justification for vetoing this, the only general revenue bill that has ever been vetoed since the establishment of the Commonwealth.

J. M. FRAZEE,
J. P. O'MEARA,
FENTON SIMS,
M. S. CLARK,
JOHN BOTTS,
SAMUEL H. SHOUSE,
JOHN D. WOODS,
E. KENTON,
R. K. HART,
JOHN M. GALLOWAY,
WM. GOEBEL,
D. H. SMITH,
J. H. MULLIGAN,
J. W. McCAIN,
GARRETT S. WALL,
W. H. ANDERSON,
J. S. WORTHAM,
HENRY GEORGE,
W. M. MOORE.

OPINION

—OF—

J. Proctor Knott.

FRANKFORT, KY., Aug. 20, 1892.

Hon. J. Proctor Knott:

DEAR SIR—Having great confidence in your ability, experience and integrity as a lawyer, st- tesman and citizen, we desire your opinion as to the validity of certain reasons assigned by the Governor in his messages vetoing the Revenue and Corportion bills, and ask you to answer the following questions hereto attached.

Very respectfully,

GARRETT S. WALL,
JOHN M. GALLOWAY,
D. H. SMITH,
WM. GOEBEL,
J. H. MULLIGAN,
J. P. O'MEARA,
J. M. FRAZEE,
FENTON SIMS,
JOHN D. WOODS.

LAW OFFICE OF KNOTT & EDELEN, HUME BUILDING,

FRANKFORT, KY., August 23d, 1892.

Messrs. Garrett S. Wall, Jno. M. Galloway and others:

GENTLEMEN—Referring to your communication of this date now before me, I find the first question you submit for my opinion as follows:

"A bill containing an emergency clause, but making no appropriation of money, nor providing for the creation of a debt, is introduced into the House, where it is read on two separate days; referred to the proper committee after its second reading; printed for the use of members; regularly reported back by the committee; amended in various particulars; is read a third time at length on a separate day, and passed (with the reasons for the emergency clause set out on the journal at length) by a vote of 67 ayes to nays none; taken upon a regular call of the yeas and nays; and the vote entered at large upon the journal; it is duly reported to the Senate, as it passed the House; is read at length in the Senate on two separate days; referred to the proper committee after the second reading; printed for the use of the Senators; is regularly reported back by the committee; is amended in various particulars by the Senate, after which it is read at length a third time, and on a separate day, and passed by the Senate—the reasons for the emergency being entered at large upon the journal—on a vote by yeas and nays of 20 ayes to 6 nays; the Senate amendments are regularly reported to the House, and the House requested to concur therein; the House refuses to concur; the Senate adheres, and a conference committee is regularly appointed on the disagreeing votes of the two houses, which makes a report to each house; the House agrees to the conference report by an aye and nay vote of 41 ayes to 31 nays, which are entered at large upon its journal, and the Senate likewise agrees to it by a yea and nay vote of 16 in the affirmative to 10 in the negative, which vote is also entered at large upon its journals. Now, upon such a state of facts, is the bill then passed a nullity from

non-compliance with the provisions of sections 46 and 55 of the Constitution, or is it a valid law ?"

With all proper respect for the opinions of those who may entertain a different view, I do not hesitate to say that in my judgment the enactment of a statute in the manner detailed by you would be in strict accordance with the requirements of the sections of the Constitution referred to, and that if no other objection could be found to its constitutionality, it would not only be a perfectly valid law, but would take effect from its approval by the Governor. Even if the question admitted a doubt, that doubt should be resolved in favor of the validity of the statute; as it has been so frequently and uniformly held by the courts that the principle has become too trite for either argument or authority, that the power of the judicial department to declare legislative acts void for repugnance to the organic law is to be exercised with the extremest circumspection and care. But I do not regard the question as susceptible of even a doubt when it is considered in the light of the long settled canons of legal construction, taken in connection with the familiar and well-settled usages in parliamentary proceeding which have prevailed for centuries in all legislative bodies among English speaking people.

The statement of your question, which supposes a literal compliance with the Constitution in every other particular, narrows itself down to this: Does the Constitution require that the report of a committee of conference upon the disagreeing vote of the two houses upon an amendment to a bill with an emergency clause, shall be agreed to "by the concurrence of a majority of the members elected to each House of the General Assembly on a yea and nay vote entered upon their journals?"

Those who would answer this question in the affirmative should be able to point to the provision which makes the requirement in express terms, or to some implication as imperative as the written text upon which it is supposed to arise; for surely the framers of the Constitution were not merely setting

a trap for the unwary, and if they had intended that the same formalities should be observed, and the same majority should be required in agreeing to an amendment between the two houses, as in passing the bill originally, it would have been perfectly easy for them to have expressed their intentions in plain, unambiguous language about which there could be no dispute between rational minds. It would be monstrous, indeed, to suppose that they deliberately hid away in some provision of the instrument they were drafting an unheard of principle, totally foreign to any code of parliamentary procedure known to our race, to be dragged from its lurking place by a mere inference in order to invalidate the entire work of an expensive session of the Legislature. To do so would be to ascribe to them a deeper infamy than is alleged against the tyrant Caligula, who is charged with having written his law in small characters, and hung them on high pillars where they could not be read, the better to ensnare the people.

But we look in vain for any such provision, or any thing in the entire instrument from which any such implication can be drawn. Section 46 provides that "No bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members. Every bill shall be read at length on three different days in each House, but the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending. * * * No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays and entered on the journal: Provided, any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House."

As I have already said, the very statement of your question assumes a strict compliance with every provision in this section, consequently it is only necessary to note here that it does not

contain a solitary syllable with regard to amendments by either House, or between the houses.

The only other section from which any light upon the point under consideration could be expected is the 55th, which is as follows:

"No act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by the concurrence of a majority of the members elected to each House of the General Assembly, by a "aye" and "nay" vote entered upon their journals, an act may become a law when approved by the Governor, but the reasons for the emergency that justifies this action must be set out at length in the journal of each House."

Still we find no provision, either directory or mandatory, with regard to amendments of any kind, or at any stage of the proceedings. But your statement assumes that on the original passage of the bill by each house it receives a majority of all the members elected thereto, respectively, upon an "aye" and "nay" vote regularly entered upon the journals as this section requires, and that the reason for the emergency were "set forth at length in the journal of each house," and, moreover, that the amendments recommended by the conference report were concurred in by a majority of those voting, which was more than two-fifths of the members elected to each house, ascertained by an "aye" and "nay" vote, entered on the journals of the houses respectively. If, therefore, it is contended that it necessitate, the bill must be repassed, or the amendments agreed to by a majority of all the members elected to each house and by an "aye" and "nay" vote entered upon their journals respectively, because the emergency clause is required to have that majority, the question must naturally present itself; whence such a necessity arises; as the emergency clause—which relates alone to the time when the act shall take effect—has already received the requisite majority, with a careful compliance with all the prescribed formalities in both houses.

It seems to me, however, that there can be no difficulty in solving the question if it shall be borne in mind that in adopting the two sections under consideration, the framers of the Constitution must, necessarily, have had in view certain familiar principles which may be said to be axiomatic, especially when taken in connection with section 29, which vests the legislative power in the House of Representatives and Senate, and section 39 authorizing each house to determine the rules of its proceedings:

First. That without the limitations expressly prescribed in these two sections the two Houses of the General Assembly would have had absolute authority to adopt any other rules of procedure in those particulars that their own discretion might dictate, and

Second. That in prescribing those limitations specifically they left the legislative discretion entirely free with regard to every other step that might be deemed necessary in the enactment of a law, not prohibited by some other provision in the Constitution. For instance, they might have provided by rule that the mere majority of a quorum should be competent to pass any bill whatever; that one reading of a bill should be sufficient, or that all bills should be read at length on four separate days; that the yeas and nays should not be necessary on the passage of any bill whatever, unless demanded by two members as the Constitution prescribes; or that any bill might take effect from and after its passage, or at any other prescribed time. Having, however, expressly prescribed rules for the conduct of the houses in the particulars enumerated in these sections, it must be conclusively presumed that they did not intend that any limitation not thus prescribed in the Constitution should be placed upon the mode of legislative proceedings. *Expressio unius, exclusio alteirus.* It follows, therefore, as trhee is no such requirement with regard to agreeing to amendments between the two houses, upon a bill which has had its third reading and been passed in both, as there are with respect to the passage of a bill, that such amendments may be agreed to

by a mere majority of a quorum, and without observing the formalities prescribed in these two sections or either of them.

This will appear still plainer to you when you reflect that the two sections under consideration must be construed in the light of the fact, which was evidently recognized by the framers of the Constitution themselves, from the very language of the sections as adopted, that the proceedings of our Legislatures had always been and would, in all human probability, continue to be conducted according to the well-known usages of parliamentary procedure which have been in practice in England and in this country for centuries. In fact the provisions of the two sections in question are neither more nor less than alterations of, or limitations upon, that well-settled and long-accepted code in the particulars therein specified.

Now, if you will recur to the mode of procedure uniformly observed, with slight modifications under special rules, by the British Parliament, the Congress of the United States, the Legislatures of the various States, and—what is more to the point—by the Legislature of Kentucky, from the time it became a State to the present moment, you will find that where a bill has gone through the various preliminary steps, and been read a third time in either house, the question then put has invariably been: "Shall the bill pass?" If it has received the requisite majority the uniform practice has been for the Speaker to announce distinctly that "the bill has passed." It has in like manner been the invariable custom for the originating house to send the bill thus disposed of to the other house, with a message that it has "passed." You will find also that it has been the uniform custom everywhere, for the house to which a bill has thus been sent, if it shall have passed the bill with amendments, to send a notice of that fact to the originating house with the request—not that the house shall again pass the bill; but—that it "will concur in the amendments," whereupon the question always has been, "Will the house concur in the amendments?" And I venture the assertion that an instance can not be found in the annals of Anglo-Saxon

legislation, where it ever occured to a Speaker of average intelligence, under such circumstances, to put the question again, "Shall the bill pass:" and for the simple reason that the bill had already passed, and concurrence in the amendments proposed by the other house had the same effect, no more and no less, than if the amendments had been agreed to before the third reading of the bill; and the same reason applies, and the same practice has invariably prevailed whether the question has arisen directly on amendments adopted by the house to which the bill was sent, or upon those proposed by the report of a Conference Committee.

It will not do to say that an amendment by one house to a bill originating in the other may, in effect, make it a new bill, and that, therefore, a concurrence in the amendment must require the same vote necessary to pass the bill in the first instance. The convention must be presumed to have been familiar with the parliamentary practice pursued by the Legislature in such cases, and, as I have already observed, if it had been their intention to establish a rule at variance with that practice they would have done so in express terms, but they did not do so, and if it is to be held by a mere inference that amendments made in one house to a bill which has passed in the other must be concurred in by the same majority required to pass the bill originally, on the grounds that the amendments may make it, in effect, a new bill, then, by parity of reason, the new bill thus created, on being returned to the originating house, should undergo all of the formalities prescribed in sec tion 46, precisely as if it had been there introduced for the first time. It should be read at length on three separate days, referred to a committee, printed for the use of the members, be open to amendments on its second reading, not only as to the amendments passed by the other house, but to any portion of the original text, and again passed *in solido* on its third reading and reported to the other house, where it would have to go through the same formalities, be passed again on its third reading, and sent back to the house in which it first originated, perhaps

with amendments to amendments already concurred in by that house; and so on *ad infinitum*.

It may be argued, however, that it might happen that one house might pass a bill appropriating a comparatively small amount of money for a specific purpose, and that the other house, without regard to public policy or the necessities of the case, might amend it so as to appropriate at least ten times the sum originally proposed, and that, therefore, the amendment should receive, on its concurrence in the originating house, a majority of all the members elected thereto, notwithstanding the Constitution does not so expressly provide, or that a great wrong against public economy might be perpetrated by the vote of a mere majority of a quorum. But the bare possibility of such an outrage affords no ground for saying that its commission is prevented, simply because the framers of the Constitution could have, and perhaps ought to have, provided against it, but failed to do so in express terms. It will not do to say that such a provision ought to exist, and, therefore, it does exist. In the case, however, neither the people nor the house in which the bill originated would be totally without remedy. If a majority of all the members of the amending house should unfortunately prove to be so corrupt, so incompetent, or so recklessly extravagant as to vote, by way of amendment to a bill, ten times as much of the public treasure as might be necessary for a given purpose, and a majority of all the members in the originating house should be so remiss in their duty as to permit the amendment to be concurred in by a bare majority of a quorum, a faithful and vigilant Executive would surely return the bill without his signature, on the ground that he could not approve such an outrage upon the people; and in that event the appropriation would be defeated unless passed in each house on any aye and no vote by a majority of all the members elected thereto over the Governor's veto.

But suppose, on the other hand, that the appropriation as passed by the constitutional majority in the originating house

should be ten times as much as was necessary, and the other house, by an amendment, should reduce it by nine-tenths, could it be said that the interests of public economy require that the amendment should be concurred in by a majority of all the members elected to the house in which the bill originated, or that the people would be outraged if a majority of a quorum of that house should be permitted to concur in such an amendment? But the question still recurs, if one of the requirements specified in section 46 shall apply to the concurrence in an amendment between the two houses, on the plea of either necessity or policy, why should not the others?

Fortunately we are not entirely without judicial light on this question. The Constitution of Illinois, adopted in 1870, provides that "every bill shall be read at large on three different days in each house, and the bill and amendments thereto shall be printed before the vote shall be taken on its final passage," and, in the case of the People, &c. v. Wallace, 70 Ill., 680, it was contended that inasmuch as the printing of amendments, as well as of a bill, was required by the provisions above quoted, that the requirement that a bill should be read at length on three different days in each house, should apply to amendments also; but the court summarily disposed of the contention by saying "we are clearly of the opinion that the requirement does not apply to an amendment, and the objection can not prevail."

But the case of the State, &c. v. Liedtke, 9 Neb., 490, is still more instructive. The eleventh section of article 3, of the Constitution of Nebraska, provides that "every bill and concurrent resolution shall be read at large on three different days in each house, and bills and all amendments thereto shall be printed before the vote is taken upon its final passage." Yet, in the case above referred to, the court held that the provision just quoted "does not apply to amendments attached to a bill upon the report of a committee on conference after a disagreeing vote of the two houses."

Mr. Justice Cobb, in delivering the opinion of the court,

having found that the clause in controversy had been reported as an amendment by a committee of conference and had not been printed, said: "But I also come to the conclusion that the letter of the Constitution does not require it to be printed. And while such a requirement is probably within the spirit of the constitutional provision referred to, I have met with no authority which has gone so far as to reject a provision of a statute because of its conflict with the spirit only of a constitutional provision."

Having detailed the various steps taken by each house before the appointment of the committee of conference, including the proceedings upon the final passage of the bill in each, the learned judge continued: "It will thus be seen that the constitutional provision requiring the bill and all amendments thereto to be printed before the vote is taken upon its final passage" had spent its entire force before the clause limiting or qualifying the appropriation to the relator had been proposed.

"The words 'final passage' as applied to matters on legislation were well known to the framers of the Constitution, and presumably so to the people who adopted it. And it is a part of the legislative and political history of the country that a large per cent. of the most important legislation of the States, as well as of the National Government, consists of measures proposed as amendments to bills by committees of conference, after such bills have gone through all the stages of legislation in the two houses, and only lack concurrence, often on trivial and unimportant points." * * *

"All this was well known to the framers of the Constitution, and hence the section under consideration does not require the printing of amendments after the bill has been put upon its final passage. Any other line of construction, if followed in its necessary sequence, would lead to a condition of repeated printing, and readings on different days, which would tend to becloud rather than to enlighten the Legislature, and would render it impossible to perform the necessary legislation within the forty days to which another section of the Constitution

limits each session of the Legislature." Additional authorities to the same effect might be adduced, but it is deemed unnecessary.

I can not concede that the convention which framed the Constitution of Kentucky was composed of gentlemen of less intelligence than the people of Nebraska. They too, clearly understand the meaning of the words "final passage" as applied to matters of legislation. They understood them in the sense taught by Hatsell, and Grey, and Blackstone, and Jefferson, and Story, and in which they have been accepted by intelligent parliamentarians for hundreds of years. They understood that the "final passage" of a bill, either by the House or Senate, meant the formal agreement to it as an entirety after its third reading and upon the question stated by the Speaker; "Shall the bill pass," and that the entire force of the constitutional provision, that no bill shall pass unless it shall receive the vote of two-fifths or a majority of all the members elected, as the case may be, is expended in each house when the vote is taken on that question.

They knew, moreover, that such had been the construction placed upon those words by the uniform and unquestioned practice of our State Legislatures for nearly forty years. The very Constitution they were convened to revise (the Constitution of 1849–50, section 40, article 2), provided that "the General Assembly shall have no power to pass any act or resolution for the appropriation of any money, or the creation of any debt exceeding the sum of one hundred dollars, or the creation of any debt exceeding the sum of one hundred dollars at any one time, unless the same, *on its final passage*, shall be voted for by a majority of all the members elected to each branch of the General Assembly, and the yeas and nays thereon entered on the journal."

At the first session of the General Assembly after that Constitution went into effect the House, by a majority of all the members elected thereto, on an yea and nay vote entered upon its journal, passed a bill, entitled "An act for the education of the blind," making a large appropriation of money (see House journal, December 23, 1851, page 343). The same bill passed the Senate with amendments by a yea and nay vote (January 1, 1852) as shown by the Senate journal, and

the House journal for January 5 (page 434) shows the following: "The amendments proposed by the Senate to the bill from the House of Representatives, entitled 'An act for the education of the blind,' were taken up and concurred in." In the next General Assembly (1853–4) the general appropriation bill was enacted in precisely the same manner. It first passed the House by a yea and nay vote, was amended by the Senate and passed by a yea and nay vote, and the House concurred in the amendments without a call or record of the yeas and nays. The act appropriating $46,000 for the benefit of the Central Lunatic Asylum, in the session of 1883–4, was also passed in the same manner. The bill was first introduced in the Senate and passed by a yea and nay vote of 24 ayes to 2 noes (see Senate journal, 1884, page 1211), amended by the House and passed on yea and nay vote of 51 ayes to 22 noes (see House journal, page 1695), the Senate concured in the House amendment without call or record of yeas and nays (see Senate journal, 1884, page 1405) Again, the act appropriating $200,000 for the completion of the branch penitentiary at Eddyville, originated in the Senate, and passed by a yea and nay vote March 30, 1888, appropriating the sum of $200,000 (see Senate journal, page 1136). Passed the House with sundry amendments by a yea and nay vote April 24, entered on the journal (see House journal, session of 1887-8, page 1737). Senate concurred in House amendments without call or record of yeas and nays (see Senate journal, page 1573).

I have only referred to the earliest and some of the more recent legislative precedents construing the provisions above quoted from the Constitution of 1849. Perhaps others to the same effect might be found in the journals of the intermediate Legislatures; but these cited are abundantly sufficient to show the light in which the provision has been viewed by the law-making department, not only at the earliest possible period after its adoption but in instances so recent that they must have been fresh in the memory of the members of the convention

by which our present Constitution was framed. Comment, it strikes me, would be superfluous. If the construction, thus placed upon the provision as it stood in the Constitution of 1849, was erroneous and needed correction, the convention could and no doubt would have corrected it in expressed and unmistakable terms, but they did not do so. On the contrary, having adopted provisions involving precisely the same principles, it must be conclusively presumed that they approved the construction which these provisions had uniformly perceived and intended that they should continue to be so construed. Authority upon this point is so abundant and uniform th t it need not be cited. Nevertheless you may refer to numerous decisions by the Supreme Court of the United States recognizing the well-settled rule that contemporary interpretation of a con stitutional provision, practiced and acquiesced in for years, conclusively fixes its construction. Stuart v. Laird, 1 Cr., 299; Martin v. Hunter, 1 Wh., 304; Cohens v. Virginia, 6 Id., 264, Cooley v. Phil. Port Wardens, 12 How., 299; Burrows-Giles Lith. Co. v. Sarony, 111 U. S., 53; Pollock v. Bridgeport St. Co., 114 U. S., 411.

With regard to your second question, I have only to say that the provision of the Constitution relating to it is too plain in my judgment to admit of controversy. If a bill should be returned by the Executive, with the objection that it had not received the constitutional majority on its "final passage," or that the amendments between the two houses require for their concurrence, but have not received the majority requisite to the final passage of the bill in either house, the passage of the bill on reconsideration by the requisite majority on a yea and nay vote, spread upon the journals of each house, would cure the defect even if the objection should be conceded to be well taken. The very language used in section 88 answers your question. "If, after such consideration, a majority of all the members elected to that house shall agree to pass the bill, it shall be sent, with the objections to the other house, by which it shall likewise be reconsidered, and if approved by a majority

of the members elected to that house *it shall be a law*, but in such cases the vote of both houses shall be determined by year and nays and the names of the members voting for and against the bill shall be entered upon the journals of each house, respectively."

I have the honor to be,

Very respectfully,

J. PROCTOR KNOTT.