INDEX.

	Page
The Opinion of the Court Below	1
Jurisdiction—Rule 12	1
Chronology of Events	2
Constitutional Provisions	3
Proceedings in Court	5
Specifications of Error	5
Argument	6
The Resolution to Ratify the Proposed Amendment Did Not Pass because It Did Not Receive a Majority of the Votes of the Senate. The Lieutenant Governor, who Cast the Deciding Vote, Was Not a Member of the Legislature and Was Not Entitled to Vote	7
When the Kansas Legislature of 1925 Adopted an Affirmative Resolution to Reject the Amendment, Filed Notification Thereof with the Secretary of State and Adjourned Sine Die, It Had Completed Its Action and Kansas Had Exhausted Its Power with Reference to the Proposed Amendment	12
Whenever More than One-fourth of the States Vote affirmatively to Reject a Proposed Amendment the Proposal is Defeated.. At the End of 1925 the Proposed Amendment was Definitely and finally Rejected	29
The Proposed Amendment Has Lost Its Potency by Reason of Old Age	32
Conclusion	37

TABLE OF CASES.

Page

Congressional Record, 41st Congress, 2d Session, page 1479 .... 26, 27, 28

Dillon v. Glass, 41 S. C. 510, 256 U. S. 368.... 15, 34, 36, 37

Hawke v. Smith, 253 U. S. 221, 40 S. C. 495.... 7, 9, 17, 25

Leser v. Garnett, 256 U. S. 130, 42 S. C. 217....... 10, 19

Rhode Island v. Palmer, 253 U. S. 350, 40 S. C. 486.. 19, 28

United States v. Chambers, 291 U. S. 417 54 S. C. 434 33

STATUTES.

Acts of Congress, April 20, 1818 (U. S. Rev. Stats. § 205, 5 U. S. C. A. § 160).......... 4

Constitution of State of Kansas:
- Art. I, § 1 and 12 3
- Art. I, § 15 4
- Art. II, § 1, 2, 3, 13 and 29 4

Constitution of the United States:
- Art. V 3

TEXTS.

Grinnell, Frank W.—American Bar Association Journal, July, 1934 30

Harvard Law Review, 25, page 481 15

Jameson, Treatise on Constitutional Conventions, 4 Ed. § 585 and 586 .... 14, 25, 32

Orfield, Prof.—Federal Amending Power, 25 Ill. Law Review 418 25

Documentary History of the Constitution, Vol. 2, pages 636 and 893 .... 20, 21, 22

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 796

ROLLA W. COLEMAN, W. A. BARRON, CLAUDE C. BRADNEY, ET AL.,
PETITIONERS,

vs.

CLARENCE W. MILLER, AS SECRETARY OF THE SENATE OF THE STATE OF KANSAS, ET AL.,
RESPONDENTS.

BRIEF ON BEHALF OF PETITIONERS.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Kansas is reported in 146 Kan. 390, and is printed in full in the record at pages 34 to 49.

JURISDICTION—RULE 12.

The appellants have complied with Rule 12. Order allowing certiorari was filed March 28th, 1938.

The questions involved in this case arise under Art. 5 of the Constitution of the United States relating to the submission to and adoption by the respective legislatures

of the states of proposed amendments to the Constitution. An amendment to the Constitution of the United States, popularly known as the Child Labor Amendment, was proposed on June 2nd, 1924, by the 68th Congress, to become valid when ratified by the legislatures of three-fourths of the several states.

CHRONOLOGY OF EVENTS.

On January 30, 1925, the legislature of the state of Kansas adopted a resolution affirmatively rejecting the proposed amendment. (R. 3)

On February 2, 1925, notice thereof was filed with the Department of State. (R. 5)

March 18, 1927. On this date and prior thereto twenty-six states adopted resolutions affirmatively rejecting said amendment and filed notice thereof with the Department of State. Only five states had at that time ratified said amendment. (R. 11)

December 19, 1917. The Congress submitted the Eighteenth Amendment and placed a limit of seven years within which it should be ratified. (R. 12)

February 20, 1933. Congress proposed the twenty-first Amendment with a limitation of seven years. (R. 12)

January 13, 1937. There was introduced in Kansas Senate concurrent resolution No. 3 to ratify the amendment proposed by Congress on January 2, 1924. (R. 5)

February 15, 1937. This resolution came to a vote in the Kansas Senate. Twenty Senators voted in favor and twenty Senators voted against the adoption of said resolution. Forty Senators is the maximum number under the

Kansas Constitution (infra). Thereupon, W. M. Lindsay, Lieutenant Governor, over the protest of the opponents of said resolution, cast a vote in favor of its adoption. The resolution was messaged to the House, where it was passed, returned to the Senate for further procedure and certification, but this suit was filed. (R. 6, 7, 8)

CONSTITUTIONAL PROVISIONS.

The pertinent provisions of the Constitution of the United States and of the Constitution of the State of Kansas are as follows:

Art. 5. Constitution of the United States:

> "Congress *** shall propose amendments to this constitution *** which *** shall be valid to all intents and purposes as part of this Constitution when ratified by legislatures of three-fourths of the several states. *** "

The Constitution of the State of Kansas:

Art. 1:

> " § 1. The executive department shall consist of a governor, lieutenant-governor, secretary of state *** ; who shall be chosen by the electors of the state at the time and place of voting for members of the legislature, *** and shall hold their offices for the term of two years.
>
> " § 12. The lieutenant governor shall be president of the Senate, and shall vote only when the senate is equally divided. The senate shall choose a president pro tempore, to preside in case of his absence or impeachment, or when he shall hold the office of governor.

" § 15. The officers mentioned in this article shall at stated times receive for their services a compensation to be established by law which shall neither be increased nor diminished during the period for which they shall have been elected.

Art. 2:

" § 1. The legislative power of this state shall be vested in a house of representatives and senate."

" § 2. The number of representatives and senators shall be regulated by law, but shall never exceed one hundred twenty-five representatives and forty senators *** . "

" § 3. The members of the legislature shall receive as compensation for their services the sum of three dollars for each day's actual service at any regular or special session, and fifteen cents for each mile, etc., but such compensation shall not in the agregate exceed the sum of *** one hundred fifty dollars for each session *** nor more than ninety dollars for any special session."

" § 13. A majority of all the members elected to each house, voting in the affirmative, shall be necessary to pass any bill or joint resolution."

" § 29. *** members of the house of representatives shall be elected for two years, and members of the senate shall be elected for four years."

The Act of Congress of April 20, 1818 (U. S. Rev. Stats. § 205, 5 U. S. C. A. § 160), putting upon the Secretary of State certain duties in connection with the announcement of the adoption of an amendment, is as follows:

"Amendments to Constitution. Whenever official notice is received at the Department of State that

> any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published, with his certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."

PROCEEDINGS IN COURT.

This suit was brought as an original proceeding in mandamus to enjoin further proceedings and to compel the Secretary of the Senate to erase the endorsement that the resolution had passed the Senate and to endorse thereon a statement that it did not pass. The Senate by resolution directed the Attorney-General to enter appearance for the State of Kansas. (R. 20)

There was no real issue of facts. The matter was submitted to the Supreme Court of the State, and on September 16, 1937, the writ of mandamus prayed for was denied. On the 16th of October, 1937, the petition for rehearing was denied. (R. 31)

Writ of certiorari was granted by this court, as above stated, on March 28, 1938.

SPECIFICATIONS OF ERROR.

The Supreme Court of the State of Kansas erred:

(1) In holding that the lieutenant-governor had a right to vote upon the resolution to ratify the proposed amendment to the Constitution of the United States;

(2) In holding that the affirmative resolution rejecting the proposed amendment, adopted by the Kansas

Legislature on January 27, 1925, approved January 30, 1925, notification of which was filed with the Department of State on February 2, 1925, was not a final and conclusive action of the legislature of the State of Kansas;

(3) In holding that said proposal to amend having been rejected by the legislatures of more than one-fourth of the states, to wit: by 20 states at the end of 1927, was not definitely and conclusively rejected and thereby withdrawn from further consideration by the states.

(4) In holding that an amendment submitted to the states by Congress in the year 1924 and not yet adopted by the legislatures of three-fourths of the states, was in 1937 still pending and open to consideration by the legislatures of the states.

ARGUMENT.

The opinion of the Supreme Court of Kansas is printed in full in the record. (R. 33) The Kansas Court held that:

> "The right of the parties to maintain the action is beyond question." (R. 36)

The court also states:

> "There is no dispute as to the facts." (R. 35)

THE RESOLUTION TO RATIFY THE PROPOSED AMENDMENT DID NOT PASS BECAUSE IT DID NOT RECEIVE A MAJORITY OF THE VOTES OF THE SENATE. THE LIEUTENANT GOVERNOR, WHO CAST THE DECIDING VOTE, WAS NOT A MEMBER OF THE LEGISLATURE AND WAS NOT ENTITLED TO VOTE.

Article V of the Constitution of the United States provides two methods of ratification of proposed constitutional amendments, (a) by legislatures, and (b) by conventions of the several states. Congress makes the choice. In submitting the child labor amendment, it chose ratification by the legislatures. Under either method of ratification the action is by a deliberative assemblage representative of the people. Whether the ratification by legislature or by a special convention called for that purpose, it is not an act of legislation within the proper sense of the word but is only the expression of the assent or dissent of the people of the respective states to a proposed amendment.

Hawke v. Smith, 253 U. S. 221; 40 S. C. 495.

When the Congress provided that this amendment should be ratified by the legislature it designated and defined the deliberative assembly which should consider the amendment. The function of Congress in proposing an amendment and in defining the method by which it shall be considered is a Federal function derived from the Federal Constitution, and it transcends any limits sought to be imposed by the people of a state. A state, therefore, has no power to change or enlarge the deliberative assemblage to which Congress has referred the mat-

ter. The legislature of the State of Kansas to which this matter was referred is a body created and defined by the constitution of the State of Kansas. It is composed of a House of Representatives consisting of 125 members elected from their respective districts for a term of two years, and a Senate composed of 40 members elected from their respective districts for a term of four years. The lieutenant-governor is not a part of the legislature. His office is created and defined by the Constitution of the State of Kansas. He is a member of the Executive Department chosen by the electors of the whole state for a term of two years. There is no Constitutional provision with reference to his compensation. The compensation of the members of the Senate and the House is fixed at $3.00 per day not to exceed $150.00 for the regular session nor more than $90.00 for any special session, together with mileage. It is true that part of the duty of the lieutenant-governor is to preside over the Senate with the right to vote only in case of a tie and not then upon any joint bill or resolution, but that does not make him a member of the legislature. The governor must sign laws before they become operative and may veto acts of the legislature but that does not make him a member of that body any more than the power of veto on the part of the President makes him a member of Congress. The proposal to amend the Constitution has been held by this court not to be a legislative function. The President, therefore, is not required to sign a resolution proposing an amendment nor has he the power to veto it.

In *Hawke v. Smith,* supra, this court said in referring to the case of Hollingsworth v. Virginia, 3 Dall. 378:

> "In that case it was contended that the amendment had not been proposed in the manner provided in the constitution as an inspection of the roll call showed that it had never been submitted to the president for his approval in accordance with Article 1, Section 7 of the constitution. The attorney general answered that the case of amendments is a substantive act unconnected with the ordinary business of legislation and not within the policy or terms of the constitution investing the president with a qualified negative on the acts and resolutions of congress. In a footnote to this argument of the attorney general, Chase said:
>
> > 'There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the constitution.' "

The court by a unanimous judgment held that the amendment was constitutionally adopted.

In the same case this court held that the power to legislate is derived from the people of the state but the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from a Federal Constitution to which the state and its people have alike assented. This court further said:

> "Such legislation, however, is entirely different from the requirement of the constitution as to the expression of assent or dissent to a proposed amendment to the constitution. In such expression no legislative action is authorized or required."

The same rule is again declared by this court in *Leser v. Garnett,* 256 U. S. 130; 42 S. C. 217.

The State of Kansas in the opinion from which this appeal is taken recognizes and declares the same rule. (R. 36) Therefore, the only assemblage qualified to act upon the proposed amendment is the legislature of the State of Kansas which does not include the lieutenant-governor. We understand the decision of the Supreme Court of Kansas to hold that the lieutenant-governor is not a member of the Senate or of the legislature. In speaking of the contention of the defendants, the court said:

> "On the other hand defendants contend that the lieutenant-governor is entitled to vote as a member of the senate on the final passage of bills and joint resolutions. As he was not elected as a member of the senate this theory writes with invisible ink an amendment to Section 13 of Article II which specifies that the lieutenant-governor is a member of the Executive Department of the state." (R. 38)

And again,

> "The lieutenant-governor was not elected to the Senate." (R. 39)

We concur with the court in holding that the lieutenant-governor is not a member of the Senate, but believe the court to be in error in further holding that because he is made the presiding officer of the Senate and because the Constitution allows him to cast the deciding vote upon some matters other than bills or joint resolutions he can, therefore, vote upon the ratification

of a proposed amendment to the Federal Constitution. That privilege cannot be derived from any parliamentary rule or usage. It is true that by the Constitution he is given by implication the power to vote in case of a tie (Article I, Section 12), but this does not make him a member of the legislature, and if he be not a member of the legislature, then under Article V of the Federal Constitution he has no right to vote upon a resolution of ratification. The legislature in considering a proposed amendment sits like a convention called for the purpose of considering the amendment under the second method provided by Article V. It could hardly be contended that if Congress had provided that the matter should be submitted to a convention in the several states and that in Kansas the convention should consist of a definite number of members elected from their respective districts that the state could add another member who should preside over the body and have the right to vote in case of a tie. Yet that is the result of the decision of the Supreme Court of Kansas. It holds as it must under the provisions of the Constitution of Kansas that the legislature consists of 40 senators and 125 representatives and that the lieutenant-governor is not a member of the Senate although he is the presiding officer. It then allows him to cast the deciding vote with the result that a man who is not a member of the legislature and has never been chosen as a representative of the people to sit in a convention or legislature to ratify a proposed amendment deter-

mines for the whole state that the amendment shall be ratified. To say that the legislature of the state in ratifying a proposed amendment to the Constitution derives its power wholly from Article V of the Constitution; that the act of the legislature in ratifying the amendment is a judicial function and not a legislative function; that the lieutenant-governor is not a member of the legislature *but may vote in case of a tie* is a non sequitur. The lieutenant-governor by virtue of his office as a presiding officer with its attendant and customary duties may be a part of the legislative power, but he is not a part of the legislature any more than the governor who may sign or veto an act.

WHEN THE KANSAS LEGISLATURE OF 1925 ADOPTED AN AFFIRMATIVE RESOLUTION TO REJECT THE AMENDMENT, FILED NOTIFICATION THEREOF WITH THE SECRETARY OF STATE AND ADJOURNED SINE DIE, IT HAD COMPLETED ITS ACTION AND KANSAS HAD EXHAUSTED ITS POWER WITH REFERENCE TO THE PROPOSED AMENDMENT.

When Congress proposes amendments, it may provide that the amendment may be ratified by the legislatures of the several states or by conventions in the several states. The usual method is the one followed in the "child labor amendment". In this case, Congress by two-thirds vote of each house proposed the amendment and provided that it should be ratified by the legislatures of the several states instead of by conventions. The wording of the proposal is as follows:

"JOINT RESOLUTION.

"Proposing an amendment to the constitution of the United States of America in congress assembled (two-thirds of each house concurring therein), that the following article is proposed as an amendment to the constitution of the United States, which, when ratified by the legislatures of three-fourths of the several states, shall be valid to all intents and purposes as a part of the constitution:

"Article —,

"Section 1. That congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

"Sec. 2. That power of the several states is unimpaired by this article, except that the operation of the state laws shall be suspended to the extent necessary to give effect to legislation enacted by the congress."

Congress, therefore, provided that the method of ratification should be by the legislatures of the several states rather than by conventions. If Congress had provided that the proposed amendment should be ratified by conventions in three-fourths of the several states, there would appear to be little doubt that when a convention called pursuant to such proposal had been held in any particular state, the action taken by such convention duly certified to and filed with the secretary of state would upon adjournment sine die of that convention become a binding act of the state and would be conclusive upon any later convention which the state might

assume to call for the purpose of again considering the action already taken.

When ratified by the legislatures of the several states, the legislatures are acting not in a legislative capacity but as though representing the people in conventions assembled for the particular purpose of ratifying or rejecting the proposed amendment. When the legislature of a particular state has taken affirmative action either adopting or rejecting the proposed amendment, it has completed its task as such a convention representative of the people of the state. When that action has been certified to the secretary of state and the legislature has adjourned, its task is completed, its power is exhausted. A subsequent legislature cannot assume to undo what a previous legislature acting as a constitutional convention has already done. The vote of that state has been cast. The matter of the amendment is no longer before that particular state. It would indeed be a strange thing if the act of the legislature of Kansas of January 30, 1925, taken less than a year after the proposal to amend was submitted by Congress, and therefore contemporaneous with it, could be set aside and held for naught by a resolution adopted by the legislature of Kansas in 1937, nearly 13 years after the amendment was proposed by Congress, and, therefore, not contemporaneous with it. In his treatise on Constitutional Conventions, 4 Ed., section 586, Jameson says:

> "If an amendment to the Federal Constitution should be proposed by Congress and submitted to state conventions instead of to the legislatures, the

> powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."

In 25 Harvard Law Review 481, Professor Orfield in considering the Federal amending power said:

> "Conventions like legislatures are mere agents of the people. The ratifying process is equivalent to a roll call of the states. The Constitution of the United States was prepared and submitted as coming from the people and not from the states. It was submitted to conventions of the several states. The action of amending the Constitution is an action of the people and not of the states. This is the reason why the legislature in ratifying an amendment to the Constitution *is acting under power conferred upon it by the Constitution of the United States and not in its capacity as a legislature under the power of the constitution of the state. It is the people acting through the legislature as a constitutional convention and not the state acting through its legislative body."*

In *Dillon v. Gloss,* 41 S. C. 510, 256 U. S. 368, this court speaking by Justice Vandeventer of the two modes of proposals said:

> "When proposed in either mode, amendments to be effective must be ratified by the legislatures or by conventions in three-fourths of the states 'as the one or the other mode of ratification may be proposed by the congress' thus the people of the United States by whom the constitution was ordained and established have made the condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified by three-fourths of them. The plain meaning of this is (a) that all amendments must have the

sanction of the people of the United States, the original fountain of power acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the peoples' will and be binding on all.''

The recent decisions of this court holding that the act of the legislature in ratifying or rejecting a proposed amendment is not a legislative act but is an act more in the nature of a constitutional convention were foreshadowed in an article written by the late Chief Justice Taft before he went upon the Supreme Bench in which he says:

> ''That it was the intention to submit the ratification to the popular representative bodies named, and not to their constituencies, is clearly shown by the alternative for the state legislatures which under the Articles Congress may in its discretion substitute as the ratifying agencies. These are conventions in the state called for the purposes. These are the same kind of representative bodies which adopted the Constitution and exclude necessarily any idea of further submission to the people directly of the proposed amendment.
>
> ''This, too, disposes of the argument adopted by the Washington and Ohio courts, that the word 'Legislatures' means the law-making power of the states, for certainly a convention called for the purpose of ratifying an amendment is not part of the law-making power of the state. ***
>
> ''If proposal or ratification were mere law making, then under section 7, Article I, action of the two Houses of Congress must be submitted to the President for his approval or disapproval. Yet in

> Hollingsworth v. Virginia it was held that a proposal by two-thirds of both Houses was sufficient under the article without submitting it to the President for his approval or disapproval, and this view has been confirmed by the practice since and by express resolutions of the Senate."

In *Hawke v. Smith*, 253 U. S. 221, 40 S. C. 495, Justice Day speaking for the court said:

> "The method of ratification is left to the choice of Congress. Both methods of ratification by legislatures or conventions call for action by deliberative assemblages representative of the people which it was assumed would voice the will of the people. *** What did the framers of the Constitution mean in requiring ratification by 'legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, section 2, prescribes the qualifications of electors of Congressmen as those 'requisite for electors of the most numerous branch of the state Legislature'. Article 1, section 3, provided that Senators shall be chosen in each state by the Legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment, which made provision for the election of Senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state Legislature."

After considering the meaning of the word "legislatures" as found in different sections of the Constitution of the United States and calling attention to the

Constitution of Ohio which now provides for referendum vote to which the officials of the state were seeking to submit a proposed amendment, he said:

> "The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.
>
> "At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. *Hollingsworth et al. v. Virginia*, 3 Dall. 378, 1 L. Ed. 644.
>
> "The court by a unanimous judgment held that the amendment was constitutionally adopted.
>
> "It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented.
>
> "This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might

> lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states."

In *Rhode Island v. Palmer,* 253 U. S. 350, 40 S. C. 486, it was held that the referendum provisions of state constitutions cannot be applied consistently with the Constitution of the United States in the ratification or rejection of amendments to it. In *Leser v. Garnett,* 256 U. S. 130, 42 S. C. 217, the court says:

> "That the function of a state legislature in ratifying a proposed amendment to the Federal Constitution like the function of Congress in proposing the amendment is a federal function derived from a Federal Constitution and it transcends any limitations sought to be imposed by the people of the state."

While there is a diversity of opinion upon the subject, it would seem to follow as a conclusion from the above rulings and from the logic of the case that the action of a legislature once taken and recorded in the office of the Department of State would be a final and conclusive action of the people of the state represented by that legislature the same as though the people had assembled in a state convention for the purpose of considering the amendment. A contrary doctrine arose over the amendments that were submitted following the Civil War when there was great sectional disturbance.

The Thirteenth Amendment proposed in February, 1865, was rejected by 4 of the Southern states in 1866,

and by Virginia in January, 1867, all acting through the legislatures which were part of the state governments set up under President Lincoln's proclamation. Thereupon on March 16, 1867, over the veto of President Johnson, Congress passed a law reciting "no legal state government or adequate protection of life or property now exists in the rebel states of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas", and setting aside the state governments organized under Lincoln's amnesty.

The Fourteenth Amendment was thereupon ratified by the Carpetbag government of Georgia, North Carolina and South Carolina, which added to those of other states amounted to three-fourths, completing the necessary number of states to effect the ratification. The binding and conclusive effect of those states which had voted to reject the amendment was thus effaced by setting aside the governments themselves, thus treating the action rejecting the amendments as a nullity.

There was no serious question about the adoption of the Thirteenth Amendment abolishing slavery, although New Jersey having previously rejected the amendment undertook to ratify the amendment, but this occurred after the adoption of the amendment by three-fourths of the states and Secretary Seward in his proclamation did not mention New Jersey as one of the ratifying states. Documentary History of the Constitution, Vol. 2, page 636.

The Fourteenth Amendment was first proclaimed as adopted on July 20, 1868. There were then 37 states so that 28 states were necessary for adoption. Action was taken ratifying the Constitution by 25 states which did not undertake to reverse their position. Two states, Ohio and New Jersey, had ratified and afterwards rejected the amendment. North Carolina and South Carolina ratified through their *new* governments after having rejected the amendments under their former government. It appears from the Documentary History of the Constitution, Vol. 2, page 893, that Secretary Seward called attention to the fact that New Jersey and Ohio had tried to withdraw their ratifications and that six of the Southern states by newly constituted and newly established bodies avowing themselves to be and acting as the legislatures respectively of those states had ratified the amendment. It was by him "deemed a matter of doubt and uncertainty" whether the later resolutions of Ohio and New Jersey were

> "not irregular and invalid and therefore ineffectual for withdrawing the consent of the said two states",

but notwithstanding this doubt he stated in his praclamation—

> "and WHEREAS, the 23 states first thereinabove named whose legislatures have ratified the said proposed amendment, and the 6 states next thereafter named as having ratified the said proposed amendment by newly constituted and established legislative bodies together constitute three-fourths of the whole number of states.

> NOW THEREFORE BE IT KNOWN I *** do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the foresaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those states which purport to withdraw the consent of said states from such ratification then the aforesaid amendment has been ratified in the manner hereinbefore mentioned and so has become valid to all intents and purposes as a part of the Constitution of the United States."

The day after this proclamation was issued, Congress adopted a resolution reciting that the 29 states mentioned above had ratified the amendment and affirmed "that said Fourteenth article is hereby declared to be a part of the Constitution of the United States and it shall be duly promulgated as such by the Secretary of State." A week later, July 28, 1868, the Secretary of State issued a second proclamation, including also the State of New Jersey, which had withdrawn her former rejection and had later ratified the amendment. Doc. Hist. Con., Vol. II, page 893.

In the above congressional action, it would appear that Congress took the position that after a state had ratified an amendment, it had exhausted its power and could not thereafter reconsider the question and pass a resolution rejecting the amendment. There are no court decisions upon this point, but several of the writers upon constitutional amendments, such as Jameson and Burgess, have undertaken to construe the action of

Congress as a legislative precedent to the effect that an affirmative vote to ratify was binding upon the state and exhausted its power to further action upon that amendment, and then announced, non sequitur, that a negative action refusing to ratify although filed with the Secretary of State is not binding and conclusive, because, as they say, the state at any time might vote to ratify. This seems to us to fail to recognize what has now become the law of the land under the recent decision of this Court, to-wit, that the legislature in ratifying is not acting in a legislative capacity but is in effect acting as a constitutional convention. It appears to us that when the legislature, undertaking to consider the amendment, acts upon it either affirmatively or negatively and announces its decision to the Secretary of State, it has then cast its vote on behalf of the people of that state, and the vote so cast, whether affirmative or negative becomes the act of the people of the state. When that legislature adjourns, the power of the state with reference to that amendment has been fully exercised and exhausted.

When the vote so taken is not only a vote of the state not to ratify but is an affirmative vote to reject the amendment, the suggestion made by Jameson and others loses its force. The state has then définitely and affirmatively declared itself upon the amendment. Having so acted, its recorded vote is conclusive. Its legislature has no right to thereafter assume to act as a convention of the people to again vote upon the amend-

ment which once has been definitely, positively and affirmatively rejected.

Because of the somewhat vacillating congressional action upon the Civil War amendments, some of the constitutional writers, led by Mr. Jameson, have developed a theory that a vote by a state to ratify is definitive and cannot thereafter be recalled while an affirmative vote to *reject* an amendment is not definitive but is subject to change at any time. The argument supporting this is that Article V of the Federal Constitution speaks only of ratification and is silent as to rejection of any proposed amendment. Logically the rule would apply just as well to an action taken by a state under a special convention as it would to an action taken by the state legislature but no one yet has had the temerity to suggest that if a state should call a convention to act upon a proposed amendment and that convention should definitely reject such amendment and then adjourn sine die, the state might thereafter call another convention and undo its action.

When an amendment is proposed by Congress, it is submitted to the people of the several states. The states then vote upon the proposal in the manner prescribed by Congress, either by a convention called for that purpose or by the legislature sitting in effect as a convention called for that purpose. It is a roll call of the state. The action of the convention or of the legislature determines the vote to be cast by that state. When that vote is cast, and the convention or legislature act-

ing as such a convention has adjourned, the action of the state would seem to be definitive. It is as unchangeable if it be an affirmative vote to reject as if it be an affirmative vote to ratify. In either case it is the vote of the state cast upon the proposal.

Prof. Orfield, in an article on Federal Amending Power, 25 Ill. Law Review 418, says:

> "Conventions like legislatures are mere agents of the people. The ratifying process is equivalent to a roll call of the states."

Jameson, in his Treatise on Constitutional Conventions, 4th ed., §586:

> "If an amendment to the federal constitution should be proposed by congress and submitted to the state conventions instead of to the legislatures, the powers and disabilities of the two classes of bodies in respect to the amendment would, it is conceived, be precisely the same."

In *Hawke v. Smith,* 253 U. S. 221, 40 S. Ct. 495, the Supreme Court says:

> "Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people."

In the same opinion the court says:

> "Ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the states to a proposed amendment."

The exact question was under discussion in Congress in 1870, and what we believe to be the correct doctrine was stated by Senator Garrett Davis, of Kentucky, in such clear and convincing language that we quote at length from his speech of February 22, 1870, which is reported in the Congressional Record, 41st Congress, 2d session, page 1479, et seq.:

> "But I will hasten on, Mr. President. Now, this is the main proposition to which I was coming. The same thing exactly is submitted to a State Legislature or to a convention of the State. The two tribunals of the State, whether it be a legislature or a convention, have precisely the same power. The convention would have as much as a Legislature; a Legislature as much power over the subject as a convention; and neither would have any more power over the subject of a proposed amendment than the other would have—not one iota. I challenge any Senator on this floor to point out to me a different and a larger power which a State acting by its Legislature would have over a proposed amendment than it would have if it was acting upon the same amendment by its convention. The subjects would be the same, identically; the powers the same; the convention would have no more power than the Legislature; the Legislature no more than the convention, and neither less than the other.
>
> "And here I take now my further position; that before each body the power would not only be of the same extent, but it would be exactly of the *same continuance and duration.* That, Mr. President, is an important proposition. It involves an important principle; it is the hinge upon which this question, in my judgment, turns. And what is the duration of the power? The Legislature acts until it has ratified; if it does not ratify the power con-

tinues until it acts to reject. *The power to reject is in all respects parallel to the power to ratify.* It is one of equal size, of equal force, of equal duration. It is the correlative, by necessary implication, of the power to ratify; and when the act of rejection has taken place the power, the whole power, is then exhausted—as much exhausted as it would have been by a ratification by the same Legislature.

"Let us apply this argument to a convention of a State called to consider a ratification *** Now, suppose that in each State you had a convention organized and that convention had met to consider, say, the fifteenth amendment; conventions in all the states had been summoned in obedience to the legislation or resolutions of Congress to pass upon the fifteenth amendment, whether it should be ratified or rejected; those conventions got together, charged, as they might have been, especially with this isolate, particular, and constitutional power of acting upon the proposed amendment, and passed upon it and rejected it, and the conventions then adjourned (sine die) and went home, could anything be more unsound, anything more monstrously absurd, than that such a convention might be reconvened for the purpose of withdrawing its action of rejection of the proposed amendment, and ratifying it? Sir, for any convention to have acted upon the subject in that form would have required special and particular language in the Constitution to authorize it.

"I agree with the honorable Senator from New York that this power is special; it is extraordinary; it does not appertain to the legislative powers of the States. So, too, the power to propose constitutional amendments does not appertain to the legislative powers of Congress. They are particular, extraordinary powers, made for a special and isolated case. They are to be construed strictly; and when

they are executed they are powers that are gone forever, because their function has been exercised.

"* * * * *

"The honorable Senator's argument upon the first branch of his proposition I thought powerful and conclusive; but when he contended that this power of a State to act upon a proposed amendment to the Federal Constitution was a power to ratify, and imported no power to reject, I think he was widely from the true principle and widely from logic. How shall it be before a Legislature that has rejected it? How long shall it be an open question? Twenty years? Fifty years? How long? Where is there any principle or provision of the Constitution that would so protract the question before a State convention or State Legislature acting upon the subject of a proposed amendment? There is none. There is not a syllable of language from which such a power can be inferred. It does not exist. When the subject is submitted to a State for its action, it is but for one action. The action of acceptance is no more extensive than the action of rejection; it has no more validity or effect. The effect of either mode of action is to exhaust the power of the State over that proposed amendment, and it can never come before that State again in any form whatever unless it comes before it in the form of a new proposition to amend the Constitution."

The position taken by Senator Davis accords with the views of this Court as stated by Justice VanDeventer in *Rhode Island v. Palmer,* 253 U. S. 350, 40 S. Ct. 486, where the power to reject seems to be recognized as correlative with the power to ratify. The Court says:

"The referendum provision of state constitutions and statutes cannot be applied consistently with the

constitution of the United States in the ratification *or rejection* of amendments to it."

Under all parliamentary rules, when a question is submitted to the vote of an assembly or to the vote of the states, the right to vote against its adoption is inherent and is just as substantial as the right to vote in favor of its adoption. If the vote to adopt be irrevocable, then certainly the vote not to adopt is equally irrevocable. The provision in the Fifth Article of the Constitution of the United States must by implication give the same right to vote against the proposed amendment as to vote in favor thereof.

When the Kansas legislature of 1925 cast its affirmative vote to reject the amendment, it exhausted the power of the State unless the amendment is resubmitted by Congress.

WHENEVER MORE THAN ONE-FOURTH OF THE STATES VOTE AFFIRMATIVELY TO REJECT A PROPOSED AMENDMENT THE PROPOSAL IS DEFEATED. AT THE END OF 1925 THE PROPOSED AMENDMENT WAS DEFINITELY AND FINALLY REJECTED.

At the end of 1925, the vote of the states stood four for ratification and twenty-one for rejection. Six of the votes for rejection were merely negative votes defeating the proposal to ratify, but fifteen of the votes were affirmative votes *adopting resolutions to reject.* Even upon that basis, therefore, the vote stood four affirmative for ratification and fifteen affirmative for rejection. (R. 13-18)

If the argument in our preceding subtitle be correct, then since more than one-fourth of the states had positively and definitely rejected the amendment, it was definitely defeated in 1925. By the end of 1926, the vote against ratification was even stronger. Twenty-six states at that time had definitely either rejected the amendment by adopting a resolution to that effect or had defeated a resolution to ratify. At that time, therefore, more than a majority of the states had rejected the amendment. Unless thereafter the states had the right to renege, the amendment was as dead as a door nail at the end of 1925, and the corpse was ready for burial at the end of 1926. This was a contemporaneous expression of disapproval by the people of a clear majority of the states of a proposal by Congress of 1924.

This question was discussed by Frank W. Grinnell, of the Boston bar, in an article published in the American Bar Association Journal, in July, 1934. A portion of his article is as follows:

> "In the very recent unanimous opinion by Chief Justice Hughes in *U. S. v. Chambers and Gibson,* decided February 5, 1934, the court took 'judicial notice of the fact that the ratification of the twenty-first amendment which repealed the eighteenth amendment was consummated on December 5, 1935', and they cited the case of *Dillon v. Gloss,* 225 U. S. 368. December 5th was the date on which the thirty-sixth state voted to ratify.
>
> "Since the constitution requires a vote of three-fourths of the several states to ratify an amendment, it requires only one state more than one-fourth to defeat ratification and it seems to follow as a

matter of common sense and orderly procedure from the decision just referred to that the rule must work both ways and that when thirteen states (one more than one-fourth of the forty-eight states) have voted not to ratify an amendment it is no longer pending, but is defeated *until Congress sees fit to resubmit it.* Otherwise, a state could change its mind in one direction after a final vote of the necessary number of states, but not in the other direction.

"In the case of the Child Control Amendment, not only thirteen but twenty-six states voted not to ratify. I submit that it was clearly defeated. If this is not so, states might be subjected to constant agitations over defeated amendments after the citizens considered them defeated and were off their guard.

"When an amendment is submitted by Congress, the process of ratification is really a debate among the several states. If it is true, as I believe it to be, that at this time the Child Control Amendment is no longer before the states, the action of those states which have attempted to ratify it during 1933 has no legal affect.

" * * * * *

"If we are to have deliberative government in this country on such important matters as amendments to the Constitution of the United States, is it not essential that we should maintain the rules of orderly procedure similar to those in our legislatures under which, after a matter has been definitely defeated by the requisite majority, it cannot be considered again unless it is *resubmitted in the usual way—in this case by Congress.*"

We respectfully submit that the proposed amendment, having been previously definitely rejected by more than

one-fourth of the states, to-wit: twenty-six, could not properly be brought before the 1937 session of the legislature of Kansas for action.

THE PROPOSED AMENDMENT HAS LOST ITS POTENCY BY REASON OF OLD AGE.

There is nothing in Article V of the Constitution of the United States placing a limit upon the time within which the states shall ratify an amendment, but constitutional writers have recognized the necessity for some such rule. From the very nature of things, it would seem to be quite improper that an amendment proposed by Congress should hang in thin air for generations, awaiting ratification by the several states, or that no matter how inactive the states might be that that proposal should still be pending. One or two such proposals are now more than a hundred years old and have never been either ratified or affirmatively rejected. It would seem very strange if by some campaign new life could be put into these age old proposals and they be brought now to the states for their ratification. Judge Jameson, in his work on the Constitution, 4th Ed. §585, says:

> "The better opinion would seem to be that an alteration of the Constitution proposed today *has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.*
>
> " * * * * *

> "We discuss this question here merely to emphasize the dangers involved in the Constitution as it stands, and to show the necessity of legislation to make those points upon which doubts may arise in the employment of the constitutional process for amending the fundamental law of the nation. *A constitutional statute of limitation, prescribing the time within which proposed amendments shall be adopted or be treated as waived, ought by all means to be passed."* (All italics ours.)

The validity of a time limit is approved by this Court in *United States v. Chambers,* 291 U. S. 417, 54 S. C. 434.

We have then a congressional expression repeated three times to the effect that seven years is a reasonable time within which a proposed amendment should be ratified or rejected by the state. This limitation has been approved by the Supreme Court with the further statement that Article V does not contain any suggestion that an amendment once proposed is to be open to ratification for all time but that

> "We do not find anything in the Article which suggests that an amendment, once proposed, is to be open to ratification for all time, or that ratification in some of the states may be separate from that in others by many years and yet be effective. We do find that which strongly suggests the contrary. First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are

to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period which, of course, ratification scattered through a long series of years would not do."
Dillon v. Gloss, 41 S. C. 510, 512.

And the court definitely approved the period fixed by Congress as reasonable time as follows:

"It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

With respect to the last suggestion the records show that the period within which constitutional amendments have been adopted, omitting the first ten, to be as follows:

Eleventh:	2 yrs. 4 mo.
Twelfth:	9 mos.
Thirteenth:	10 mos.
Fourteenth:	2 yrs., 1 mo.
Fifteenth:	1 yr., 1 mo.
Sixteenth:	3 yrs., 6 mos.
Seventeenth:	1 yr., 2 wks.
Eighteenth:	1 yr., 1 mo.
Nineteenth:	1 yr., 2 mos.
Twentieth:	11 mos.
Twenty-first:	9 mos. 2 wks.
AVERAGE TIME:	1 year, 6 months.

The proposed amendment under consideration shows a very definite adverse sentiment of the people of the country *at the time the amendment was proposed.* As we have above stated, by the fall of 1925, scarcely a year after the proposed amendment, it had been rejected by twenty-one states and ratified by only four. By 1926 there were twenty-six rejections. In 1927 one ratification and one rejection. It then fell into a long period of innocuous desuetude and was not ratified by any other state until a very aggressive campaign for its revival was started in 1933. With this hiatus of eight years, it can scarcely be said that the activity of 1933 is contemporaneous with the date of submission of 1924 and its definite rejection in 1925. The contemporaneous expression was definitely and definitively against ratification. The proposal lost its potency by old age, (if we apply the seven-year period prescribed by Congress in the three later amendments), long before the renewed attempted rejuvenation in 1933, and the action by Kansas in 1937.

We very respectfully submit that the amendment must be again proposed by Congress in order to now properly come before any of the states. For this reason, the amendment was not properly brought before the legislature of Kansas in 1937.

Jameson evidently believed that any such limitation would require a constitutional amendment. However, Congress acting under the same sentiment when it proposed the Eighteenth Amendment respecting alcoholic

beverages, inserted the limitation that it should be inoperative unless ratified "within seven years from the date of the submission hereof." A similar provision respecting the proposal and the time of ratification is contained in the submission for the Twentieth and the Twenty-first Amendments.

The power of Congress to fix such a limitation in a proposal to amend was challenged in *Dillon v. Gloss,* 256 U. S. 368, 41 S. C. 510. To this the court replied:

> "These considerations and the general purport and spirit of the Article lead to the conclusion expressed by Judge Jameson 'that an alternation of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress'. That this is the better conclusion becomes even more manifest when what is comprehended in the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the states many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more states to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable. We conclude that the fair inference or implication from Article 5 is that the ratification must be within some reasonable time after the proposal."
>
> "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the rati-

> fication we entertain no doubt. As a rule the Constitution speaks in general terms, leaving the Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification. It is not questioned that seven years, the period fixed in this instance, was reasonable, if power existed to fix a definite time; nor could it well be questioned considering the periods within which prior amendments were ratified."

CONCLUSION.

We have shown the following:

First: The resolution, considered by the Kansas Senate in 1937, to ratify the proposed United States Constitution Amendment, did not pass because it did not receive a majority of the votes in that body: twenty senators voted in favor and twenty senators voted against the adoption of said resolution.

The Lieutenant Governor of Kansas, who cast the deciding vote, not having been elected to the senate and, therefore, not a member of the legislature, was not entitled to vote on the resolution even to decide a tie.

Second: When the Kansas legislature in 1925 adopted an affirmative resolution to reject the Child Labor proposed amendment, when proper notification of this action was filed with the Secretary of State and then adjourned

sine die, it had completed its action and Kansas had exhausted its power to again even consider the amendment.

The 1925 legislature completed its task as a convention representative of the people of Kansas. A subsequent legislature cannot assume to undo what a previous legislature, acting as a constitutional convention, has already done. After the action in 1925, the matter of the amendment was no longer before Kansas.

Third: Whenever more than one-fourth of the states vote affirmatively to reject a proposed amendment to the Constitution of the United States, the proposal is defeated. At the end of 1925 the proposed amendment was definitely and finally rejected. By the end of 1926, the vote against ratification was even stronger: twenty-six states had either rejected the amendment or defeated a resolution to ratify. This was a contemporaneous expression of disapproval by the people of the states of the proposal of the Congress in 1924.

Fourth: It would seem quite improper that an amendment proposed by the Congress should hang in thin air for generations. The Supreme Court has approved the thrice-repeated congressional expression to the effect that seven years is a reasonable time within which a proposed amendment should be ratified or rejected by the states.

An eight-year hiatus between the submission of the amendment in 1924, its definite rejection in 1925, and the activity for its ratification in 1933 can not be said to be a reasonable time. The proposal lost its potency by old age long before the attempted rejuvenation in 1933 and the action by Kansas in 1937.

The opinion of the Supreme Court of Kansas, should be reversed.

Respectfully Submitted,

ROBERT STONE,
JAMES A. McCLURE,
ROBERT L. WEBB,
BERYL R. JOHNSON,
RALPH W. OMAN,
All of Topeka, Kansas,

ROLLA W. COLEMAN,
Olathe, Kansas,

Attorneys for Petitioners.

A copy of the foregoing brief received this..................

day of................................., 1938.

....

Attorney General of State of Kansas.

....

Attorney for Miller, Secretary of Senate.

....

Attorney for Ryan, Secretary of State of State of Kansas.

....

....

....

Attorneys for Buzick, Speaker of the House, and Bishop, Chief Clerk.

....

Attorney for Lindsay,
Lieutenant Governor of the State of Kansas.

....

Solicitor General of the United States.