

## Arkansas—April 22nd, 1911

On August 2nd, 1909, Governor George W. Donaghey of Arkansas sent a letter to Philander Knox, Secretary of State of the United States, acknowledging receipt of the certified copy of Senate Joint Resolution No. 40.

In the next session of the Arkansas Legislature, in 1911, a ratification resolution was introduced in the House, but that resolution was rejected in the Senate. On March 28th, the Governor transmitted official notice of the rejection to Knox—

Said proposed amendment was passed by the House of Representatives, but failed to pass in the Senate of said Thirty Eighth General Assembly of the State of Arkansas.

On April 5th, another resolution to ratify the proposed Sixteenth Amendment was introduced in the Arkansas Legislature, this one in the Senate—

Senate Joint Resolution No. 7, by Senator Rodgers of Benton, approving a proposed amendment to the Constitution of the United States, being special order was read third time, Senator Covington made the point of order that the resolution was out of order and that it be postponed until April 12th. (SJ at 306)

There having been no previous reading of S. J. R. No. 7 in the Senate, Senator Covington was quite right in having S. J. R. No. 7 postponed a week, so that the Senate might have a chance to correct a situation in violation of Article V, Section 22 of the Arkansas State Constitution which provided that—

Every bill shall be read at length on three different days in each house, unless the rules be suspended by two-thirds of the house, when the same may be read a second or third time on the same day; and no bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the persons voting for and against the same be entered on the journal, and a majority of each house be recorded thereon as voting in its favor.

The Senate, not having read S. J. R. No. 7 the first two times during the preceding week, the resolution was again taken up as a special order in the following manner, on the 12th as scheduled—

Senate Joint Resolution No. 7, by Mr. Rodgers of Benton, ratifying and approving the proposed amendment to the Constitution of the United States, relating to income tax, being special order, was read third time.

Senator Martin moved that the resolution be postponed until April 13th at 2 p. m.

Roll call was ordered on the motion.

The Secretary called the roll and the motion failed.

On motion of Senator White, the Senate at 11:40 a. m. took a recess till 2 p. m.  
(SJ at 331)

So, the Senate had apparently decided not to postpone the vote on S. J. R. No. 7 another day. Following the recess, consideration of S. J. R. No. 7 was postponed another five days, until the following Monday. (SJ at 332)

On Monday, the 17th, S. J. R. No. 7 was taken up for the third reading the third time without any previous readings (first or second) having taken place to that point—

Senate Joint Resolution No. 7, by Mr. Rodgers of Benton, being special order, was taken up.

Senator Covington moved to indefinitely postpone the resolution.

Roll call was ordered on the motion.

The Secretary called the roll and the following Senators voted in the affirmative:

. . . Total, 6.

In the negative: . . . Total, 20. Absent and not voting, 9.

So the motion lost. (SJ at 342)

Again, a motion was lost to postpone consideration of S. J. R. No. 7. Consideration of S. J. R. No. 7 was taken up later that day with the following result—

Senator Carl Lee (sic) moved the previous question and the call was sustained, the question being, shall the resolution pass (sic)

The Secretary called the roll and the following Senators voted in the affirmative:

. . . Total, 24.

In the negative: . . . Total, 6.

So the resolution passed. (SJ at 346)

S. J. R. No. 7 was introduced in the House on the next day, the 18th, as follows—

I am instructed by the Senate to inform your honorable body of the passage of Senate Joint Resolution No. 7, by Senator Rodgers of Howard (sic), the same being an amendment to the Federal Constitution for an income tax, and I herewith transmit the same for your favorable consideration. (NJ at 837)

On the 21st of April, S. J. R. No. 7 was taken up—

Senate Joint Resolution No. 7 by Senator Rodgers of Benton, as follows, to-wit:

Joint Resolution of the Legislature of the State of Arkansas ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax.

Whereas, the Sixty-first Congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March, 1909, proposed an amendment to the Constitution of the United States, in words and figures as follows:

Article XVI. Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several states, and without regard to any census or enumeration.

Now, therefore, be it resolved by the legislature of the State of Arkansas, that the foregoing resolution, being the sixteenth amendment to the Constitution of the United States, be, and the same is hereby, approved and ratified.

Adopted by the House of Representatives, the \_\_\_ of \_\_\_\_ . . .

\* \* \*

Was read the first time, rules suspended and read the second time and made a special order for tomorrow morning immediately after the reading of the journal. (HJ at 856)

The next day, S. J. R. No. 7 was taken up for a vote, after the third reading, in the following manner—

Senate Joint Resolution No. 7, by Senator Rodgers, of Benton, the same being a joint resolution of the Legislature of the State of Arkansas, ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax.

Whereas; the Sixty-first Congress of the United States of America, at the first session begun and held in the City of Washington, on Monday the 15th day of March, 1909, proposed an amendment to the Constitution of the United States, in words and figures as follows:

Article VXI (sic). Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several states, and without regard to any census or enumeration;

Now, Therefore, be it resolved by the Legislature of the State of Arkansas: That the foregoing resolution being the sixteenth (sic) amendment to the onstitution (sic) of the United States, be, and the same is hereby approved and ratified.

Adopted by the House of Representatives, the — of — . . .

The same being a special order for this hour, was read the third time and placed on final passage.

The question being, "shall the bill pass?" the Clerk called the roll when the following voted in the affirmative:

. . . Total, 54.

The following voted in the negative:

. . . Total, 2.

The following were absent and did not vote:

. . . Total, 44.

So Senate Joint Resolution No. 7, was adopted.

Mr. Parker, of Ouachita, moved that the vote by which Senate Joint Resolution No. 7, was passed be reconsidered and that motion be laid upon the table, which motion prevailed and the motion to reconsider was laid on the table. (HJ at 864)

Over a month passed before the following letter, accompanied by a copy of S. J. R. No. 7, was sent by a Deputy Secretary of State to Knox, on June 8th, 1911, which stated—

In pursuant (sic) to the Constitution of the United States of America I herewith transmit to you a certified copy of Senate Joint Resolution No. 7, ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax, passed by the respective bodies of the Arkansas Legislature during the session of 1911 of the thirty eighth General Assembly.

A memorandum, dated June 12th, was transmitted to a Mr. Clark, apparently of the State Department, by someone named Tonner, of the Bureau of Rolls and Library, also of the Department of State, asking Mr. Clark what should be done about the transmittal of Arkansas—

The Secretary of State of the State of Arkansas has forwarded a certified copy of a Joint Resolution of the Legislature of that State ratifying the proposed Income Tax Amendment to the Constitution, which shows that it was vetoed by the

Governor.

An opinion is therefore desired as to whether the Department should include Arkansas in the list of States which have ratified the Amendment.

In the margin of the memorandum, Mr. Clark's answer was handwritten—

Yes—at least for present time.

A more definitive answer would be forthcoming from the Solicitor of the Department of State. In his memorandum of February 15th, 1913, the Solicitor made some remarks about the Arkansas situation. First, he commented on the date of ratification, claiming that April 22nd, 1911 was the—

Date passed by legislature. Governor vetoed June 1, 1912. March 28, 1911, Governor informed Secretary of State legislature had failed to pass resolution. So first rejected and subsequently ratified. (at 4)

Feeling a need to explain himself, the Solicitor expounded upon Arkansas on the next page of that memorandum—

*Ratification by Arkansas. Power of the governor to veto.*

It will be observed from the above record that the Governor of the State of Arkansas vetoed the resolution passed by the legislature of that State. It is submitted, however, that this does not in any way invalidate the action of the legislature or nullify the effect of the resolution, as it is believed that the approval of the Governor is not necessary and that he has not the power of veto in such cases. (emphasis added)

The Solicitor, in categorizing the intentional changes which the various State Legislatures had made to the Congressional Joint Resolution as "errors," said that it seemed "a necessary presumption, in the absence of an express stipulation to the contrary, that a legislature did not intend to do something that it had not the power to do . . ." Apparently, the Solicitor applied the same sort of logic to the veto of the Governor of Arkansas, i.e., since the Governor had not the power to veto S. J. R. No. 7, he didn't intend to do it, he did it in error, by mistake. Of course, the Governor did have the power to do it and he did do it and not by mistake. According to the provisions of Article VI, Section 16 of the Arkansas State Constitution—

Every order or resolution in which the concurrence of both houses of the General Assembly may be necessary, except on questions of adjournment, shall be presented to the Governor, and before it shall take effect, be approved by him; or being disapproved, shall be repassed by both houses, according to the rules and limitations prescribed in the case of a bill.

In that the Governor of Arkansas vetoed S. J. R. No. 7 and the Arkansas Legislature failed to repass that resolution, it was not valid.

But, S. J. R. No. 7 could not have been under the purview of Article VI, Section 16. Article XVI, Section 11 of the Arkansas State Constitution provided that—

No tax shall be levied except in pursuance of law, . . .

and Article V, Section 21 provided that—

No law shall be passed except by bill . . .

Therefore, S. J. R. No. 7 was required to have been legislated as a bill. Article XVI, Section 11 goes on to require that—

... every law imposing a tax shall state distinctly the object of the same; . . .

S. J. R. No. 7 did not distinctly state the object to which the tax to be imposed under that resolution would be applied and, therefore, violated this provision of the State Constitution.

Dated June 1st, 1911, the certificate accompanying the transmittal letter of the Deputy Secretary of State of Arkansas indicated that "Senate Joint Resolution No. 7, by Senator Rogers of Denton County" had, indeed, been "(v)etoed by the Governor June 1st, 1911." This certificate further indicated that the vote in the House, on April 22nd, was "Total ayes 64, total naves (sic) 7, absent and not voting 29." That tally is not what the journals had reported, the tally in that document having been 54 ayes, 2 nays, and 44 absent and not voting. The number of ayes in the tally in the Senate was blotted out on the certificate; however, the rest of the vote in that house was reported as ". . . total nays, 6, absent and not voting, 5." That tally was, also, not what the journals had reported. Either the journals were false in these tallies, or the certificate of the Secretary of State of Arkansas was fraudulent, or both. (See Appendix)

The copy of S. J. R. No. 7 sent to Washington was unsigned and the text read as follows—

Senate Joint Resolution No. 7.

(By Senator Rogers (sic) of Benton County.)

JOINT RESOLUTION of the Legislature (sic) of the State of Arkansas ratifying and approving the proposed amendment to the Constitution of the United States relative to income tax.

WHEREAS, The Sixty-first Congress of the United States of America, at the first session begun and held in the city of Washington, on Monday the 15th day of March, 1909, proposed an amendment to the Constitution of the United States, in words and figures as follows:

Article XVI. Congress shall have the power to lay and collect taxes on incomes from whatever source derived without apportionment among the several states, and without regard to any census or enumeration:

NOW, THEREFORE, be it resolved by the legislature of the State of Arkansas, That the foregoing resolution, being the sixteenth amendment to the Constitution of the United States, be, and the same is hereby, approved and ratified.

Adopted by the House of Representatives the 22nd day of April, 1911.

In a comparison of the text in the document transmitted to Washington, D. C. with that which was printed in the House journal, the following discrepancies are evident—

1. the word "the" was inserted in front of the word "power" in the proposed amendment;

2. the period was replaced by a colon in the proposed amendment;

3. the word "that" was capitalized in the State resolve.

The text of S. J. R. No. 7 which apparently passed the Arkansas Legislature (although it cannot be determined for certain from the journals) contained the following changes to the official Congressional Joint Resolution—

1. the preamble was discarded;

2. the word "The" was deleted;

3. the comma following the word "incomes" was deleted;
4. the comma following the word "derived" was deleted;
5. the word "States" was changed to a common noun.

These changes were in violation of the duty which the Arkansas Legislature had to concur only in the exact wording as proposed in United States Senate Joint Resolution No. 40. According to the Solicitor of the Department of State in his letter of February 15th, 1913, responding to a request for a determination of whether or not the notices of ratification of the proposed Sixteenth Amendment from the several States were proper—

. . . under the provisions of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment. (emphasis added)

This is the only proper mode of ratification. This standard of compliance to which the States are held is also illustrated in DOCUMENT NO. 97-120, of the 97TH CONGRESS, 1st Session, entitled *How Our Laws Are Made* written by Edward F. Willett, Jr. Esq., Law Revision Counsel of the United States House of Representatives, in which the comparable exactitude in which bills must be concurred under federal legislative rules is detailed—

. . . Each amendment must be inserted in precisely the proper place in the bill, with the spelling and punctuation exactly the same as it was adopted by the House. Obviously, it is extremely important that the Senate receive a copy of the bill in the precise form in which it passed the House. The preparation of such a copy is the function of the enrolling clerk. (at 34) (emphasis added)

When the bill has been agreed to in *identical form* by both bodies—either without amendment by the Senate, or by House concurrence in the Senate amendments, or by agreement in both bodies to the conference report—a copy of the bill is enrolled for presentation to the President.

The preparation of the enrolled bill is a painstaking and important task since it must reflect *precisely* the effect of all amendments, either by way of deletion, substitution, or addition, agreed to by both bodies. The enrolling clerk . . . must prepare meticulously the final form of the bill, as it was agreed to by both Houses, for presentation to the President. . . each (amendment) must be set out in the enrollment exactly as agreed to, and *all punctuation must be in accord with the action taken*. (at 45) (emphasis added)

In like manner, as stated by the Solicitor, the States must exactly and precisely concur with Congress in a proposed Constitutional amendment.

The purported ratification of the proposed Sixteenth Amendment by the Legislature of the State of Arkansas was, thus, defective for the following reasons—

1. Failure to concur in United States Senate Joint Resolution No. 40 as passed by Congress in that the following changes were made to the official Congressional Joint Resolution:

- a. the preamble was discarded;
- b. the word "The" was deleted;
- c. the comma following the word "incomes" was deleted;
- d. the comma following the word "derived" was deleted;
- e. the word "States" was changed to a common noun;

**2. Failure to follow the guidelines for the return of a certified copy of the ratification action as contained in Congressional Concurrent Resolution No. 6 and as required by Section 205 of the Revised Statutes of 1878 in that the certificate returned with the copy of S. J. R. No. 7 is in substantial disagreement with the journals of the State;**

**3. Violation of Article V, Section 22 of the Arkansas State Constitution in the failure of the Senate to read S. J. R. No. 7 on three separate days prior to passage;**

**4. Violation of Article XVI, Section 11 of the Arkansas State Constitution in that S. J. R. No. 7 fails to state distinctly the object to which the tax to be imposed under that resolution will be applied;**

**5. The Governor vetoed S. J. R. No. 7 and the Legislature failed to properly repass the resolution under the State Constitution.**