THE ATTORNEY GENERAL'S ERROR.

By FRANK BERGEN.

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The 9th article of the constitution of this State provides that:

"Any specific amendment or amendments to the constitution may be proposed in the senate or general assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months previous to making such choice, in at least one newspaper of each county, if any be published therein; and if in the legislature next chosen as aforesaid, such proposed amendment or amendments, or any of them, shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments, or such of them as may have been agreed to as aforesaid by the two legislatures, to the people, in such manner and at such time, at least four months after the adjournment of the legislature, as the legislature shall prescribe; and if the people, at a special election to be held for that purpose only, shall approve and ratify such amendment or amendments, or any of them, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments so approved and ratified shall become part of the constitution; *provided*, that if more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly; but no amendment or amendments shall be submitted to the people by the legislature oftener than once in five years."

A majority of the members of each house of the legislature of 1896 proposed and agreed to certain amendments to the constitution relating to the following subjects: (1) The judiciary; (2) biennial sessions; (3) woman suffrage at school meetings; (4) gambling, and (5) appointment to office in certain cases.

There is nothing in the constitution or elsewhere prescribing the method by which amendments must be proposed. It may be done by joint or concurrent resolution, or by separate resolutions identical in substance, and passed by each house. Each amendment proposed must be agreed to by a majority of the members of each house in some manner, and the yeas and nays entered on the journals of the first legislature that agrees to them. The legislature of 1896, in proposing and agreeing to amendments, did so by means of concurrent resolutions, five resolutions in all being passed, one for each subject.

The amendments so proposed and agreed to were referred to the legislature of 1897, being the legislature then "next to be chosen," and were published for three months previous to the last election for members of the legislature in at least one newspaper in each county. In March last, the Senate, by means of concurrent resolutions, agreed to all of the amendments proposed in 1896 except those providing for biennial sessions of the legislature. On the 30th of March the Assembly passed three of the Senate concurrent resolutions and refused to pass the other—the one relating to the judiciary. On the following day the legislature adjourned *sine die*.

In May the legislature was called to meet in special session to correct a typographical error that the Governor had discovered in the bill providing for submitting the proposed amendments to a vote of the people at a special election. The call for the special session, however, did not and could not restrict the legislature to any particular business. The members of the legislature met at the time fixed in the call, and shortly after organizing, Mr. Demarest of Hudson offered in the House a resolution beginning as follows:

"Resolved, That the following amendments to the constitution of this state, which were agreed to by a majority of the members of each house, in the year eighteen hundred and ninety-six, and published for three months previous to the

third day of November last, in at least one newspaper in each county, and which have been agreed to by a majority of the members of the Senate in the present year, shall be and the same are hereby agreed to." (Then follows the text of the proposed amendments relating to the judiciary).

A short discussion followed, then a recess was taken and a conference held. At the conference a majority (28) expressed a desire to adopt the judiciary amendments. After the conference adjourned several other members of the Assembly expressed their intention to vote for the judiciary amendments, so that their adoption seemed certain. The House met at three o'clock, and Mr. Demarest at once moved that the rules be suspended and that his resolution be agreed to. Mr. Lloyd of Camden moved that the Attorney General be requested to give his opinion whether the House had power to pass the resolution; that is, to agree to the judiciary amendments. The motion of Mr. Lloyd was agreed to, and an adjournment taken for an hour to await the opinion.

The Attorney General's opinion, when it came, declared that the members of the Assembly had lost the power to agree to the judiciary amendments, because in March preceding a majority were not willing to agree to them. He gave no other reason for his opinion and cited no authority whatever to sustain his view.

It was well understood that the opinion of the Attorney General would determine the momentous question whether the people should be permitted to vote on a proposition to reform our judicial system and get rid of the present establishment that long since became inadequate and unsatisfactory. That fact alone should have caused him to hesitate, even if he could have found plausible reasons and respectable authority to support his conclusion; but for some unpublished reason the Attorney General proceeded to suppress a movement for a great reform by writing an opinion that cannot bear examination.

Whatever its purpose was, its only effect could be to confuse for a time a number of gentlemen who had been persuaded to appeal to him in confidence for instruction.

It should be noticed that the Attorney General does not put his opinion on the ground that the legislature was sitting in special session, and for that reason the members were without power to act as the majority desired. A glance at the 9th article of the constitution will make it clear that proposed amendments require the consent of a majority of the members of each house of the legislature, and it makes no difference at all whether the members are sitting in regular or special session. Their power at either session is the same. It should also be noticed that the opinion is not put on the ground of any irregularity in the form of the resolution or of the method of proceeding in the House The Attorney General no doubt knew that a majority of the members of the Assembly are the absolute masters of their methods of procedure, subject only to explicit directions in the constitution, in statutes, possibly, and in rules which they may have adopted, while such rules are in force. How the members should decide to express the agreement of a majority to the proposed amendments, and when, was a matter over which no one but themselves had any control.

The opinion rests entirely on the bare assumption that the members of the House of Assembly had exhausted their power over the proposed amendments by the vote in March. It is a mere *dictum*, entirely unfounded, and so hollow that an attack upon it is like striking the air.

To exhibit the fallacy of the Attorney General it is only necessary to refer to the most familiar elements of constitutional and parliamentary law. Congress has only the legislative power conferred by the Federal constitution. State legislatures possess all legislative power not withheld from them

by constitutions (11 Vroom, 389). In order, therefore, to find a limitation of the power of the legislature, it is necessary to look to the constitution. To find a limitation of the power of either house to take action on a particular subject the statutes and parliamentary rules in force should also be examined. If no limitation can be found there it can be found nowhere.

The entire provision of our constitution relating to amendments is quoted above, and anyone who can read can see that there is nothing in it which gives the slightest color of support to the opinion that the members of either house of the legislature cannot agree to proposed amendments to the constitution, for the reason that at a previous sitting, or on a former day, they entertained a different opinion. There is not a word of statute law in this State on the subject, nor is there any parliamentary rule which would have been violated by the proposed resolution. As the rules of the house may be suspended by a bare majority of members—the number necessary to adopt the resolution—and as the motion of Mr. Demarest contained a provision to suspend the rules (although the Speaker said it was not necessary to do so) it is impossible to find any provision, line or word in constitutional, statute or parliamentary law to sustain the astonishing position of the Attorney General. His opinion, therefore, was an arbitrary ruling without even a plausible excuse.

There is an easy method of testing the accuracy of this criticism. Suppose the Assembly had passed the resolution by the votes of a majority of all its members, notwithstanding the opinion of the Attorney General, and the proposed amendments relating to the judiciary should be submitted to a popular vote and adopted. How could the most subtle ingenuity find a substantial defect in the proceedings or a rational method to defeat the popular will? If the Attorney General should appear before the present courts, or before the courts established

in pursuance of the proposed amendments, and apply for a writ of certiorari, quo warranto or injunction, or take some other proceeding to draw in question the validity of the action of the Assembly, what could he say against it that would not seem absurd? He would be constrained to admit that the amendments relating to the judiciary had been proposed in the Senate of 1896, and agreed to by a majority of the members of each house of the legislature, and entered on their journals with the yeas and nays taken thereon, and referred to the legislature of 1897, and published for three months previous to the last election for members of the legislature in at least one newspaper in each county, and agreed to by a majority of all the members of each house of the legislature of 1897, and submitted to a vote of the people at a special election held for that purpose, and approved and ratified by a majority of the electors who voted. It would appear from these facts that the amendments had become part of the constitution of this State, because every direction in the constitution would have been complied with strictly.

If the Attorney General should persist in his effort to destroy an important article of the constitution by a lawsuit, based on his opinion, he would probably be told that a great movement to amend the fundamental law of a state for the public benefit need not be directed, and should not be retarded, by the flighty notions and petty fears of ignorance.

It would be prudent for the Attorney General to remain silent in regard to this matter, but if for any reason he should be persuaded to speak, let him not fail to point, if he can, to at least *one* precedent or authority, anywhere in legal or parliamentary literature, to sustain his opinion that if the Assembly had passed Mr. Demarest's resolution on the 25th of May it would have been ineffectual. No such precedent or authority exists, but if one could be found among the records

of the Dark Ages it would fall under the condemnation of Dr. Johnson's aphorism that "No precedent can justify absurdity."

The precedents and authorities on the subject are all one way, and all against the opinion of the Attorney General. So far from it being true that the Assembly by its vote in March deprived itself of the power to agree to the judiciary amendments in May, the fact is that it was impossible for the Assembly to do so by any method or proceeding, even by unanimous consent. The authority to agree to the amendments was conferred by the constitution, to be exercised by the members of the legislature at any time while they were in office and sitting in session, and no act of the legislature or of either house could take away that duty and power. Speaker Reed, in the 52d paragraph of his manual of parliamentary law, declares: "The assembly cannot deprive itself of power to direct its methods of doing business. It would be like a man promising himself that he will not change his own mind."

But if any one could have discovered an irregularity in the action proposed by the resolution offered on May 25th it would have made no difference.

In the *Senate case* the Chief Justice said: "If the question here presented had been whether this senatorial body had been organized in the accustomed mode, or in open violation of its own practices and rules, a totally different subject of inquiry would have been *sub judice*, and it may well be that the decision of such senatorial body itself would have been received as conclusive and entirely beyond the power of this tribunal to review. This court does not claim the slightest legal faculty to supervise or interfere with such transactions." (27 Vroom, 616.)

In the great case of *Bradlaugh vs. Gossett*, L. R., Q. B. Div., vol. 12, 271, it was held that "the House of Commons [which is the prototype of our assembly] is not subject to the

control of Her Majesty's courts in its administration of that part of the statute law which has relation to its internal procedure only. What is done within its own walls cannot be inquired into in a court of law."

In the case of *Pangborn vs. Young*, 3 Vr., 29 (a case with which the Attorney General must be familiar, because he cited it himself in a recent litigation), it was decided that when the presiding officer of either house had certified to the passage of a bill by that house, the court could not go behind the certificate, even for the purpose of ascertaining whether the forms, prescribed by the constitution, had been observed in its passage. This was manifestly a proceeding within its own walls relating to a subject matter over which it had exclusive jurisdiction, and the courts would not, for that reason, interfere with or question it.

In *Kilgore vs. Magee*, 85 Pa. St., 412, the court said: "In regard to the passage of the law in question, and the alleged disregard of the forms of legislation required by the constitution, we think the subject is not within the pale of judicial inquiry."

In two cases reported in 80 Wis., 407, 414, it was held that "when it appeared that an act was passed in accordance with the constitution, no inquiry will be permitted to ascertain whether the two houses have or have not complied strictly with their own rules in their procedure upon the bill intermediate to its introduction and final passage. The presumption is conclusive that they have done so. We think no court has ever declared an act of the legislature void for non-compliance with the rules of procedure made by itself or the respective branches thereof, and which it or they may suspend at will." It would be easy to fill a volume with similar quotations.

This being so in regard to statutes passed in an irregular manner or in violation of the customary forms of legislative

procedure, it is idle to argue that a court could invade a legislative chamber and declare void a mere resolution expressing consent that certain proposed amendments to the constitution be submitted to the people for approval or rejection, for no reason at all except that some gentlemen preferred another resolution on the same subject or desired that nothing be done to facilitate the administration of justice. It would be as sensible to say that the legislature can pass a bill to reverse a judgment of the Supreme Court.

Aside from the palpable error in his conclusion, there is internal evidence that the opinion of the Attorney General was written so that it was better adapted to confuse than to instruct.* As a reason for thinking the action of the Assembly in refusing to agree to the judiciary amendments in March was final, he says: "The provision of the constitution as to the entry upon the journals with the vote taken indicates that the action in question is final."

If the Attorney General, as he wrote, had not forgotten the language of the 9th article of the constitution, which he had quoted shortly before, he would have known that the second legislature is not required by the constitution to enter the amendments on its journals with the yeas and nays thereon, and neither the first nor the second legislature is required to do so *unless the proposed amendments are agreed to* by a majority of the members of each house. Therefore it was not necessary that the judiciary amendments be entered on the journal of the Assembly in March with the vote thereon, although it makes no difference whether they were so entered or not. The Attorney General forgets what the constitution requires; imagines that it contains a provision not in it, and then offers his fiction as a reason for his opinion; and that is the nearest

*In urging the motion for an opinion Mr. Lloyd said the Attorney General had studied the question with great care.

he gets to any reason at all. After that he goes on to wonder and inquire what the consequence might be if something else should be done in a proceeding to amend the Federal constitution.

The observation of the Attorney General on the proper way to amend the constitution of the United States affords another illustration of his ill-success when he tries to impart information on a point of constitutional law. If his statement is correct he has discovered a startling fact, namely, that the 14th amendment to the constitution of the United States is not in force.

The method of amending the Federal constitution is prescribed in its 5th article. It provides that two-thirds of both houses of Congress may propose amendments, or call a convention for proposing amendments, on the application of two-thirds of the states, which in either case shall become part of the constitution " to all intents and purposes " when ratified by the legislatures of three-fourths of the states or by conventions in three-fourths. The 14th amendment was submitted by Congress to the states on the 16th of June, 1866. At that time there were 37 states in the Union. Between June 16th, 1866, when the amendment was submitted, and July 28th, 1868, when it was declared to be a part of the constitution, it was ratified by the legislatures of 30 states. But among those 30 states were New Jersey and Ohio. New Jersey ratified the amendment in September, 1866 (at a special session), and withdrew her consent in April, 1868. Ohio ratified in January 1867, and withdrew her consent in January, 1868. Among the 30 states were also North Carolina, South Carolina and Georgia. Those three states ratified the amendment in July, 1868. The legislatures of every one of those states, however, had previously (in November and December, 1866) passed resolutions refusing to ratify the amendment, and had thereby " exhausted their

power" to do so, according to the notion of our Attorney General that a legislative body, while considering a constitutional amendment, has no power to change its mind or to differ with a previous legislature.

William H. Seward, Secretary of State, had been directed by an act of Congress to issue a proclamation declaring the proposed amendment to be a part of the constitution upon receiving official notice that it had been adopted by at least three-fourths of the states. He declined to count New Jersey and Ohio as part of the necessary three-fourths, because they had withdrawn their consent before three-fourths had ratified. But he did count North Carolina, South Carolina and Georgia, although they had ratified the amendment after having refused to consent to it. In his proclamation, dated July 28th, 1868, Seward declared that the amendment had been ratified by "more than three-fourths of the states and had become valid to all intents and purposes as a part of the constitution of the United States," and it has been so regarded ever since by everyone but our learned Attorney General.

A little study of these figures will show that the 14th amendment was not ratified by three-fourths of the states prior to the time it was proclaimed to be a part of the constitution, if the ratification of states that had previously rejected it could not be counted. This would still be so even if New Jersey and Ohio should have been counted.†

It should be added that more than a year later (October, 1869) Virginia ratified the amendment, and Texas did the same in February, 1870; but that could not help the matter according to Mr. Grey's opinion, because both of those states

†In Seward's proclamation of July 28th, 1868, he recited the fact that New Jersey and Ohio had ratified the amendment and subsequently passed resolutions to withdraw their consent, but he refused to issue the proclamation until three-fourths of the states had ratified, not counting New Jersey and Ohio.

had, prior to that time, refused to ratify it—Texas in November, 1866, and Virginia in January, 1867—and had thereby "exhausted their power" to consent.

There is another fact supporting the common opinion that a legislative body or state may change its mind while considering a constitutional amendment. In April, 1870, the legislature of New Jersey rejected the 15th amendment to the Federal constitution, and ratified it in February, 1871. New Jersey reversed her action on the 14th and 15th amendments. The 14th amendment was at first ratified and then rejected, and the 15th was at first rejected and afterwards ratified. All the statesmen, jurists and politicians of both parties in the State at that time seemed to agree that it could be done; but they had not read the Attorney General's opinion.

Of course everyone understands that a state cannot withdraw its consent to an amendment proposed by Congress after it has been ratified by three-fourths of the states, because a proposed amendment, when so ratified, becomes *ipso facto* a part of the constitution, and binding on all the states.

If the Attorney General is right neither house of the legislature can recall a bill from the governor nor from the other house. No legislature can repeal a law which itself had passed. The constitution, in paragraph 6 of section 4 of article 4, prescribes how bills must be passed, declaring that they shall be read three times in each house and "the yeas and nays of the members voting on such final passage shall be entered on the journal." This is quite as mandatory as the provision of the 9th article relating to amendments, and no one discovered before the 25th of May that entering the names of members of the house on its journal rendered their action "final" and "exhausted" the power of the house over any subject. The truth is, that viewed from any standpoint, or

tried by any test, the opinion of the Attorney General will appear to be utterly unreliable.

To get a legal opinion for the purpose of confusing the populace or their representatives, and thus frustrate or delay a movement toward better conditions, does not possess even the merit of novelty. It is a dodge that crafty politicians learned from kings. Charles I got an opinion that ship money was a lawful tax. George III was advised that the stamp act was legal. The slave power in this country got a *dictum* from Taney that the Missouri compromise was void. An attorney general gave an opinion to Buchanan that the National government had no power to preserve the Union or "to coerce a state," as he chose to express it. And every school boy knows that all of these opinions were given just before the collapse of those who instigated the movements to obtain them. Their purpose was short-sighted ; the effect in every instance was to accumulate indignation.

There is another instance with which the Attorney General is probably more familiar. A few years ago an impressive popular demand was made in this State for better government. The voters at the general election of 1893 changed the political personnel of both houses of the legislature. In the Senate, however, the reformers succeeded only in obtaining a majority of one. To postpone the *dies irae* the minority persuaded the governor to get an opinion from the then attorney general that the Senate was "a continuous body." And now that the controversy is over and the passion it engendered has passed away, it must be conceded that whether the Senate of this state was a continuous body or not was a fairly debatable question. It is true the opinion of the attorney general was overthrown by the Supreme Court after a doubtful struggle, in which plausible and forcible arguments were urged in its support ; but the sinister purpose of a few dexterous politicians to

use the opinion, while it lasted, to baffle the public purpose, aroused much feeling.

In that memorable struggle Mr. Grey was on the right side, and the popular side. In his speech before the Supreme Court his indignation refused to be confined even by the grave and decorous surroundings. Those who turned out to be on the wrong side of the debatable question, and had gotten a legal opinion to deceive the people, seemed to Mr. Grey to be public enemies, not entitled to the benefit of clergy. The peroration of his speech was much admired by some of those who heard it, and, fortunately, the reporter has preserved it all. (27 Vroom, 557.) Indeed, if the opinion he criticised three years ago had been as baseless as the opinion he gave to the confiding Assembly in May, one could hardly wish to add a word to his rich vocabulary of denunciation. I do not refer to it as a chaste passage of forensic eloquence, although one might find inferior sentiments in the speeches of Erskine; nor to expose the concealed extract from Junius that forms its climax; nor even to applaud the devout supplication at its close; but, taking one consideration with another, it must be regarded as a wholesome homily, with power still to teach and warn. Change a few words here and there, erase some of the expletives, subdivide the remaining verbiage, and it may serve as a timely reflection on the present discontents. If the Attorney General had written his opinion on the 25th of May in the same exalted spirit his conclusion must have been different.

FRANK BERGEN.

Elizabeth, June, 1897.

THE ATTORNEY GENERAL'S OPINION.

TRENTON, N. J., May 25th, 1897.

HONORABLE GEORGE MACPHERSON,

Speaker of the House of Assembly.

SIR—In response to a communication received from the Clerk of the House I beg to submit the following :

[Then follows a recital of the 9th article of the constitution and a statement of the action taken by the legislature of 1896 and the legislature of 1897 upon the proposed amendments to the constitution, and the opinion continues :—]

Under these circumstances, I have received, by instruction of the House, the following resolution : " Resolved, That the resolution now pending, providing for an amendment to the Constitution touching the judiciary, be referred to the Attorney General for his opinion respecting the power of the House to pass it."

The power of the House to act in the matter at all is derived from the ninth article of the constitution, above quoted. Under the provisions of this article the power of the legislature when once exercised is exhausted. I do not think that the legislature, having once acted upon a proposed amendment, can again take action upon the same amendment. It has the power under the constitution to propose an amendment, or to agree upon an amendment proposed by a preceding legislature, or to disagree to such amendment, but having proposed it cannot propose again, having agreed it cannot afterwards disagree, and having disagreed to the adoption of the amendment it cannot afterward agree.

I think the language of the constitution clearly indicates that legislative action in reference to an amendment proposed is absolutely final. The provision of the constitution as to the entry upon the journals, with the vote taken, indicates that the action in question is final. Besides, the fact that it is legislative action upon the amendment to the fundamental law which the constitution authorizes is of itself a conclusive indication that careful, deliberate action in the first instance is assumed to have been taken, and having been once taken, the power to act is exhausted.

Under the Federal constitution, whenever two-thirds of both houses deem it necessary they may propose amendments

to the Constitution of the United States, or on the application of the legislatures of two-thirds of the states a convention may be called for proposing amendments; and the amendments thus proposed, when ratified by the legislatures of three-fourths of the states, or by the conventions in three-fourths, become part of the constitution.

It could scarcely be claimed that under this provision of the Federal constitution, when two-thirds of both houses of Congress had proposed an amendment, that subsequent action could withdraw the amendment thus proposed before action had been had upon it by the legislatures of three-fourths of the states; nor could the amendment, if acted upon by the legislatures of three-fourths of the states, be defeated by a reconsideration of the vote approving it by the legislature of any one of the states necessary to constitute the three-fourths.

It seems to me manifest that legislative power over the amendments to the fundamental law is necessarily exhausted when once exercised. If legislative action be favorable to the amendment to the constitution, that is final; if it be unfavorable to the proposed amendment, that is equally final. I am clearly of the opinion that in the case in hand the legislature, having acted upon these proposed amendments, having passed a law for the submission of these amendments to the people for their approval, having, in consequence of a clerical error in the law providing for that submission, been reassembled for the correction of that error, is entirely without power to reopen the whole subject either by the adoption of the amendments heretofore rejected or by the rejection of the amendments heretofore adopted. Any other conclusion would result in a degree of indefiniteness as to legislative action which would make the amendment of the constitution practically impossible.

Very respectfully,

Your obedient servant,

S. H. GREY,

Attorney General.