

LEGISLATURE: Bill must be passed by majority of members elected even though there is a subsequent vacancy in the membership.

April 10, 1946



Honorable C. J. Tindel
Missouri House of Representatives
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

"Will you please render an opinion on the constitutional requirement of passing a bill by 'a majority of members elected.' You may be familiar with the question which arose only a few days ago in regard to the number now necessary to pass a bill, since there was one vacancy which had been declared by the House, and the Governor notified, leaving 149 members in the House. Under these circumstances, what would be a majority of members elected?"

Section 27, Article III of the Constitution of Missouri, 1945, provides in part, as follows:

"* * * nor shall a bill be finally passed, unless a vote by yeas and nays be taken and a majority of the members elected to each house be recorded as voting favorably."

(Underscoring ours.)

The question presented by your request is, in view of the fact that there were one hundred and fifty members elected to the House of Representatives of the 62nd General Assembly, and since such election,

one vacancy has been declared by the House, does the above constitutional provision require a vote of a majority of the one hundred and fifty original members, or will a majority of the one hundred and forty nine present members suffice.

The above Section of the Constitution has been held to be mandatory. State ex rel. vs. Mead, 71 Mo. 266. There are no cases in Missouri directly passing upon this question in so far as they relate to this Section.

In State ex rel. McCaffery et al. vs. Mason 155 Mo. 486, the Court had before it a bill which was passed by a vote of seventy-five members, with fifty-three votes in opposition thereto, three members absent, four members absent with leave, and four members reported sick. The Court held, l.c. 503:

"*** We will take judicial notice that the House of Representatives is composed of 140 members; this being the case, it is obvious that House bill No. 760, the name by which the bill was known and identified, received the requisite constitutional majority."

It will be noted in the above case that there were only one hundred and thirty-nine members accounted for in the computation of the vote upon the bill in question, while the Court took judicial notice that there were one hundred and forty members of the Legislature. However, since there is no showing as to whether the other member had resigned, or that there was a vacancy in the membership of the House because of some other contingency, this case is very little authority in deciding the instant question.

In O'Dwyer vs. Monett, 123 Mo. App. 184, 100 S.W. 670, the St. Louis Court of Appeals had before it the legality of an ordinance which had been passed by a three to one vote, there being eight members elected to the city council. There was a statute which provided that: "'No ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elected to the council shall vote therefor.'" The Court held that the ordinance

did not receive the votes of the majority elected, and had failed to pass.

It may be well to note the case of State vs. McBride, 4 Mo. 303. The facts and question involved in that case as given by the case are as follows, l.c. 308:

"The first objection of the defendant's counsel is, that this amendment did not pass the senate by a majority of two thirds of that house. The senate then consisted of twenty-four members, and it appears that seven voted against, and fifteen for it. The question to be solved is, what is the meaning of the word house, as used in the constitution; does it mean all the members elected, or does it mean any number sufficient to constitute a quorum?"

The Court held that: "The most common meaning of the word then, being a number of members sufficient to constitute a quorum to do business, it is our opinion that fifteen members of the senate having voted for this amendment, and seven only against it, two being absent, it was passed by the required number of votes.

The above case holds that when the word "house" is used that only a quorum of the members is necessary, but recognizes the fact that if the words "elected to the house" had been used a different holding would have resulted.

The Courts of foreign jurisdictions which have passed upon this question are uniform in their decisions. They followed the rule laid down in 37 Am. Jur. 674, which states: "Where a statute provides that the vote of a certain number of members elected to the common council shall be necessary to take action of a certain character, the fact that there are vacancies in office, however occurring, does not diminish the number of votes necessary to take such action."

The Supreme Court of Minnesota in State ex rel. Peterson, vs. Hoppe, 194 Minn. 186, 260 N.W. 215, l.c. 217, said:

April 10, 1946

"* * * it seems to be clear that where the requirement is that a majority or other proportion of 'the members elected' is required there must be such affirmative vote as will satisfy the requirement of all who were elected to that particular body. This rule is illustrated in San Francisco v. Hazen, 5 Cal. 169 (175). It was there held that because the requirement was an affirmative vote of 'all the members elected,' there being one vacancy, the vacant office must also be considered in determining the total number of members as and when elected. * * * "

The identical question was presented to the Court in Wood vs. Gordon, 58 W. Va. 321, 52 S.E. 261, and that Court ruled as follows: (l.c. 262)

"The rule is well established that in the construction of statutes effect must be given as far as possible to every part thereof. Evidently the Legislature had some object in providing that a vacancy should be filled 'by a majority vote of all the members elected.' The number of members elected to said council was 12, of which 7 are required for a majority. If a majority of a quorum, or of the number then constituting the council after one or more had died or resigned, had been intended, the Legislature would have so provided by saying that a majority of the council as then constituted, or a majority of a quorum, as might be intended, should fill the vacancy. Pollasky v. Schmid, 128 Mich. 699, 87 N.W. 1030, 55 L.R.A. 614, 92 Am. St. Rep. 560, is a case exactly in point, where the Supreme

Court of Michigan holds that 'the number of votes necessary to pass an ordinance over a veto, under a statute providing that it shall be two-thirds of all the members elected to the council, must be based on the total number elected, although at the time of the vote one member has died and one resigned.' And in *Pimental v. San Francisco*, 21 Cal. 351, the act provided that no ordinance should be passed, 'unless by a majority of all the members elected to each board.' The board of assistant aldermen was composed of eight members, and one of the eight had resigned, and four of the seven remaining had voted for the ordinance, and the court held that 'the ordinance in question, therefore, not having received the vote of a majority of all the members elected, was never passed. It was in fact rejected, as much so as if every member had cast his vote against its passage. It was, therefore, for all purposes an absolute nullity.' See, also, *McCracken v. San Francisco*, 16 Cal. 591; *San Francisco v. Hazen*, 5 Cal. 169."

In view of the above authorities, it will be seen that, where a constitutional provision provides that a bill must be passed by a majority vote of the members elected, that it means a majority vote of all members that have been elected to the body, and a subsequent vacancy does not, in any way, affect the number that is required for the passage of such a bill.

CONCLUSION.

It is, therefore, the opinion of this Department that, under Section 27, Article III of the Constitution of Missouri, 1945, that a bill to be finally passed by the Legislature must be voted upon favorably by a majority of the members elected to each house. A subsequent vacancy

Honorable C. J. Tindel

-6-

April 10, 1946

in either house does not change the number of votes necessary to constitute the majority. There were one hundred and fifty members elected to the House of Representatives of the 62nd General Assembly, and, therefore, it would require a favorable vote of seventy-six members in order for a bill to be passed by such house. The fact there has been a vacancy declared in the house does not, in any way, affect such requirement.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:ir