IR

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CONSTITUTIONAL HISTORY

OF THE

STATE OF NEW YORK

BY

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PREFACE TO SECOND EDITION

The apathy which seemed to prevail when the question of calling a constitutional convention was submitted to the people of this State in the fall of 1913 has been succeeded by widespread interest in its proceedings and by great activity among civic bodies interested in various reform projects. Associations of the bar seem keenly awake to the desirability of urging changes in the judiciary article. Advocates of local home rule will seek a constitutional amendment granting municipalities adequate powers of local self-government. The recent Workmen's Compensation Amendment will come under scrutiny. Woman suffrage will have its champions. The short ballot will strongly be urged. Biennial legislative sessions will probably be advocated, as also four-year terms for senators and the governor. The convention may be asked to limit legislative power over franchises. Labor will doubtless have claims to present. Changes will probably be sought in the canal provisions of the constitution, better conservation of the water power of the State, and of its forests, demanded. The proceedings of the convention will be followed with interest all over the country. Its work, if ratified, may have profound effect upon the destinies of the State, and influence the fortunes of other States to an extent that can hardly be measured.

Whether the action of the convention be conservative or radical, the State cannot divorce itself from its past. The past should be understood by those who would interpret and build for the future. Sociological phenomena are as related as other physical phenomena. Nature's aberra-

tions, its cataclysms, could be foretold if the past were completely known. Human society is subject to like inexorable laws. The most revolutionary constitutions, as in France after the first Revolution, were built upon accepted foundations. Constitutional history is an evolution. Hence the necessity to understand the past. Ideas supposedly new, seem to have been repeatedly and well discussed in former conventions. Of the subjects now in the popular mind it will, I think, be found that few have not been considered by previous conventions. The short ballot is now ardently advocated. The expression is modern, the idea old—as is revealed in the discussions in the convention of 1867 and the commission of 1872. The need for some reform which shall prevent constitutional changes at the behest of slender minorities, now strongly felt, has long been patent. Judicial recall is an old fallacy masquerading under a new name. Although since the publication of the first edition of this book, the doctrine of judicial recall and of the recall of judicial decisions has been the subject of profound analysis and exhaustive discussion, the author has preferred to leave untouched what he originally wrote upon this theme.

Unless a constitution is to be radically altered it is the author's opinion that as between a convention and such a commission as was appointed in 1872, the latter furnishes a more satisfactory method of revision. The coming convention will consist of one hundred and sixty-eight delegates; the commission of 1872 had thirty-two members, all specially equipped to deal with constitutional problems. From a small commission work of a higher quality usually emanates. Not only matter but also phraseology receives more careful consideration. Moreover, the work of a convention is at once submitted to voters; whereas a commission reports to the legislature, and two altogether distinct legislatures decide whether they approve the proposed amendments before these can be submitted. In 1869, it is true that besides the question of approving or rejecting the

constitution framed by the convention of 1867, three separate questions were submitted. In 1894 two questions were submitted in addition to the question whether the new constitution should be ratified. It is, however, impracticable for voters to pass upon a new constitution section by section—it has to be considered as a whole. The presence of one unpopular change may endanger the whole work. Or some unwise provision may be carried by a powerful demand for the rest. With the report of a commission nothing of this kind is likely to happen, for its report is considered section by section in the legislature, and each separate amendment, if approved by two legislatures, is separately submitted to the people.

Had no convention been favored at the special election last April, resort could have been had to the method of amendment first provided in 1822. This has become the vehicle for numerous amendments, some of profound importance. For example, eleven distinct amendments were submitted November 3, 1874. This is the largest number submitted in any one year. In 1905, seven amendments were voted upon; in 1909, four. The relative smallness of the vote upon such amendments—in fact, of the vote upon the work of a constitutional convention—is the subject of comment in subsequent pages. Some remedy should be sought by the coming convention.

Although the people have voted that a convention shall be held "to revise the constitution and amend the same," it does not follow that the convention should report in favor of any change. It may make none. Such a conclusion, however, is extremely unlikely. Nor does to "revise" and "amend" forbid complete remodeling—building from an altogether different basis. The powers of the convention are imperial, save only that no form of government not republican may be devised. It is extremely improbable that the convention will attempt to raze the present structure and build anew from the foundation.

Every convention has contained a large number of lawyers. The coming one will not be an exception. In some quarters there may be a disposition to look askance at the lawyer, yet he is a necessary factor in every constitutional convention. If the reproach that the bar is a mercenary body with no larger horizon than fees or the narrow special interests of its clients were ever merited, it is not so today. The work of the profession all over the State is of the most altruistic sort. The interest of the lawyer in constitutional government is of the philosophic kind. He lives in the atmosphere of basic principles and is ready to expound them in the public interest. As President Wilson has said, the State "never needed lawyers who are statesmen more than it needs them now . . . lawyers who can think in the terms of society itself," and are not "mere cogs in a machine which has men for its parts." Every one familiar with the activities of lawyers in behalf of sound government must admit that at present they are responding to the highest claims of society upon them.

Whether or not the constitution be revised in its principles and ideas, it might well be improved in phrase and greatly abridged. Why should not the convention challenge every word to explain its function, expunge every unnecessary expression? The constitution could be shortened without sacrifice of one idea. Some provisions have none of the attributes of a constitution; they are altogether statutory. Furthermore, every qualifying phrase is a restriction of power. Every limitation upon the two methods of amending the constitution is an obstacle in the path of freedom of amendment. Such qualifications have led astute lawyers to insist that some constitutional powers have not been constitutionally exercised. They would construe a hairbreadth departure from a specifically defined plan as an unconstitutional procedure, whereas a broader theory should prevail. The reserve power of alteration and amendment should not be hedged about by meticulous

restrictions that hinder rather than aid freedom of change. The purpose behind the power of amendment should ever be kept in mind—to enable the voters of the State to decide whether they wish to alter their constitution basically or otherwise, and to elect responsible representatives or delegates to do for them that which, because of their great numbers, they cannot do for themselves.

New York, February 12, 1915.

Constitutional History of the State of New York

CHAPTER I

INTEREST IN CONSTITUTIONAL HISTORY SHOULD BE GENERAL —AIM OF PRESENT WORK—SOURCES OF THE HISTORY—CONTRAST BETWEEN FEDERAL CONSTITUTION AND STATE CONSTITUTION—DESIRABILITY OF AROUSING INTEREST IN CONSTITUTIONAL QUESTIONS.

The history of constitutional development in New York should interest the lawyer, the statesman, the student and the man of affairs. Much has been admirably written to show the extent of the debt which the State owes to its Netherland beginnings and the influence of a long English colonial experience in shaping the main outlines of the first State government and in moulding institutions which still persist and will form enduring features of State polity. After the elaborate, painstaking, and admirable work of Mr. Charles Z. Lincoln upon the constitutional history of New York, and numerous essays and studies concerning the relations of the State government to the colonial governments by Mr. Robert Ludlow Fowler and others, it might be thought that no need exists for a volume seemingly covering part of the same ground. No attempt is made in these pages to rival the contributions of these authors to the constitutional history of the State, or to write its political history—which Mr. De Alva Stanwood Alexander has recently so well done. The aim, far less ambitious, is, by presenting in a

single volume a series of pictures of constitutional evolution, to arouse an interest which longer and more technical works, hardly popular in character, have perhaps failed to create.

The annals of colonial times have been explored by historians with more industry and fullness than have later records. The effort of the present writer has been briefly to sketch the colonial epoch as a background for the story since the Revolution, and to describe in short chapters the events which have led to the successive constitutions of the State, and the constitutions themselves. This involves study of the work of the convention of 1777, which framed the State's first written constitution, and of the convention of 1801, whose chief task was judicial, that is, the interpretation of the meaning of Article XXIII of the first constitution, concerning the power of appointment to office. The remarkable part played by both the council of appointment and the council of revision has to be understood in order that the demand for the call of the convention of 1821 may be comprehended.

Paradoxical as it may seem, since it was liable to change of membership every year, the council of appointment was the longest-lived and most powerful political agency ever created in this State. The paternity of the Albany regency is easily ascribable to it. The council of revision without even writing a veto,—by a mere intimation from some of its members that it was averse,—could block the passage of any bill through one or both of the houses, and as judges always formed a majority of the council, they were given a power over legislation that often prevented the enactment of measures which they did not approve. With the exception of New York City, the older parts of the State were aristocratic communities, largely dominated by a few landed families; the newer sections were settled by New Englanders, to whose coming into the State it was in great measure due that the convention of 1821 was called. The story

therefore requires consideration of the two councils and of the movement of population from New England into New York; of the work of the constitutional convention of 1821, and of the new or second constitution which was the outcome of its proceedings.

Canals have had potent influence in the history of the State. The nature of this influence and the connection of the canals with constitutional changes must be perceived if the history is to be understood. Since the State has recently embarked upon a policy of canal improvement involving colossal expenditure, the earlier canal history may profitably be studied. In 1842 it was resolved to curtail the power of the legislature to incur debt. This decision and the reaction against the tendency to involve the government in private business led to the convention of 1846. The work of that convention and the constitution reported by it, the third constitution of the State, have been discussed in this book. Whatever may be the common impression, the most important part of the labor of that convention dealt with the subject of public debts.

The next succeeding constitutional convention was that of 1867, all of whose work except the judiciary article was rejected at the polls. Then followed the constitutional commission of 1872, which took up a large part of the unaccepted effort of the convention of 1867, revised it, and presented it to the State legislature in such form that much of it was eventually incorporated in the constitution. To the able and thoughtful men in the convention of 1867 it must have seemed lamentable that their labors were not appreciated. The valuable ideas which the convention formulated first passed through the crucible of public discussion and afterwards were debated in the commission of 1872. The good work of the convention was not lost; on the contrary, it was improved, and, fortunately for the people, some notions much in vogue at the time were never submitted by the legislature for popular vote, and were happily kept out

of the organic law. The lesson which that period should teach is that proposed constitutional changes need thorough consideration before their submission to the people.

In 1890 a constitutional commission was summoned into being to revise the judiciary article. The article framed by it was not approved by the legislature, and was therefore never submitted to the people. A new convention accordingly became necessary, particularly as the constitution of 1846 had provided for a possible convention every twenty years. The revision of the judiciary article by the commission of 1890 was utilized by the convention of 1894, and is the basis of the judiciary article reported by that convention.

The work of the convention assembled in 1894 has also been considered. The two methods of obtaining amendments to the State organic law have been discussed, as have also their origin and the extent of their use. The city problem is so important and so related to constitutional matters that two chapters have been given to city government; and the subject of taxation has been deemed of sufficient moment to be made the theme of one chapter.

There is a great wealth of material bearing upon the constitutional history of the State, material so overwhelming in volume as to be almost beyond mastery. Jabez D. Hammond's Political History of New York is a veritable treasure house. But Hammond's history, including his "Life of Silas Wright," brings the study down only to 1846, and no treatise of equal merit—in fact, no single work—covers the interval between that time and the present. It would be useless to compile a bibliography of the numerous authorities which have been examined in the writing of this book. Recourse has repeatedly been had to the statutes, the messages of the governors, which have been put by Mr. Lincoln into easily available form, and the records of the debates of the several conventions, commencing with those of the convention of 1821. The more the

volumes of convention debates are examined, the more they will be found to yield, especially the volume dealing with the convention of 1821. The actual speakers in the convention were relatively few in number, but the extent to which in the exposition of their ideas they drew upon the experience of the nation and of other States is surprising.

Perhaps indications of a secret fondness for the work of that convention may occasionally be detected in this book; it is the author's conviction that there never assembled in this State a convention containing talent greater or better fitted to deal with its particular task. By way of contrast the work of the convention of 1846, apart from its treatment of financial questions, is correspondingly disappointing. Too many of its members were inclined to loquacity. It spent parts of twenty-three days in discussing the question whether to be eligible for the governorship a person should have been a resident in the State for a specific length of time.

That constitutional changes have not always been wisely made would seem clear from the fact that things which have been done have, again and again, been undone. Continuity of policy seems at times to be lacking, yet no valid reason can be found why such continuity should not have existed. Our history conveys the impression that constitution framers have often been feeling their way to results without clear conviction how these were to be attained. Study of the constitutional history of the State awakens question whether we have not reached a stage where the fundamental law is too readily changed, the disadvantage of which is that popular whim may find its way into the constitution. Although the constitution should always be quickly responsive to sound popular opinion, it should nevertheless not yield to temporary caprice.

Chief Justice Spencer was not far amiss when in 1821 he declared that prohibitions upon lotteries did not belong in the organic law. Laws aimed at frailties in human na-

ture have no place in constitutions; prohibitions upon gambling, horse racing, &c., do not belong there, and Mr. Choate was correct in opposing the introduction into the constitution of 1894 of a declaration that the right of action to recover damages for injuries resulting in death should never be abrogated. The modern tendency is to over-load the constitution with both matter and phrase.

Two contrasts are to be observed between the federal constitution and the constitution of this State. The first is that the federal organic law has become almost unchangeable by the methods of amendment for which it makes provision. This may still be asserted, despite the recent adoption of two amendments. The mere increase in the number of States makes for immobility. All amendments down to and including the twelfth amendment were made before the close of the year 1804. Three amendments were the result of the Civil War. It is by interpretation and judicial exposition that the federal constitution has undergone silent change and, as the years pass, is found to be adequate to new social and national requirements. In fact, the process of judicial interpretation tends to render amendment unnecessary. Secondly, the federal constitution is a model of brevity and of style. The constitution of this State, on the contrary, besides being almost too easily capable of amendment, has become extremely prolix. The framework of government should be brief; it should be the crystallization of large and well-accepted principles. The constitution of the State has instead become a most unwieldy document.

It would be easy to trace alternations of popular feeling regarding the three separate branches of government in the various successive constitutions of the State. In the reaction from English tyranny, which led to the Declaration of Independence, every State began its career with a fear, if not a sort of hatred, of executive power. Today, notwithstanding the march of democracy, the reaction is in favor of enlarged executive authority. Government by executive

commission is rampant, and a corresponding distrust of legislatures is manifested in numerous checks and limitations. Those who are convinced that executive government is wise, and who are inclined to give free rein to the executive, should study the history of the counter movements given in the following pages.

The judiciary has undergone wonderful transformations, yet more consistently than any other branch of the government has maintained its prestige and authority; but it is at present too closely affiliated with the people through the elective system.

The extent of our indebtedness to the distant past is a subject which has received abundant consideration from historians. But it is time that history should be written with an eye to the future, and with more attention to the intermediate development of the State. If conventions have made their mistakes, these should be pointed out, lest they be repeated. Too much confidence should not be reposed in the opinion of the moment, however strong and convincing it seems to be. Even with the utmost freedom of speech and of the press, majority sentiment has an invincible habit of preventing minority thought from obtaining full expression or receiving proper consideration. One thing which should stimulate the interest of its citizens in the constitutional history of New York is the reflection that the State has often been a leader and pioneer in constitutional development. It has blazed the path in which other States have followed. Appreciation of this is pleasurable, but the high record of the State in this respect should be maintained in the future, and this can best be done if its constitutional evolution is widely studied and understood.

CHAPTER II

INDEBTEDNESS OF THE STATE TO ROMAN LAW AND TO DUTCH BEGINNINGS—THE CHARTER GRANTED BY THE STATES GENERAL TO THE DUTCH WEST INDIA COMPANY—COMMISSIONS ISSUED TO THE GOVERNORS OF THE COLONY—THE CHARTER OF FREEDOMS AND EXEMPTIONS—TRIBULATIONS OF THE COLONISTS UNDER DUTCH RULE—EXTENT OF THE DUTCH CLAIMS IN NORTH AMERICA—SURRENDER OF NEW AMSTERDAM TO THE ENGLISH—THE DUKE'S LAWS; GOVERNMENT UNDER ANDROS AND DONGAN—THE CHARTER OF LIBERTIES AND PRIVILEGES—THE COLONY UNDER SLOUGHTER, THE GOVERNOR APPOINTED BY WILLIAM III—THE CHARTER OF 1691—TYPE OF GOVERNMENT UNTIL THE OUTBREAK OF THE REVOLUTION—THE BRITISH PARLIAMENT HAD NO AUTHORITY OVER THE COLONIES—THE CONSTITUTION OF THE COLONY OF NEW YORK AT THE DATE OF THE REVOLUTION AN OUTGROWTH OF DUTCH AND ENGLISH CUSTOMS AND LAWS—LIMITED CHARACTER OF SUFFRAGE.

Originally a colony of Holland, New York traces no inconsiderable measure of her character and polity to her Dutch origin, and, through Holland, to Roman ideas. The influence of her Dutch beginnings pervades the life of to-day. The indebtedness of all the States to Roman law and Roman civilization is now generally recognized. If the pressure of population upon the means of subsistence had not driven Rome to comprehensive colonization, her jurisprudence might never have been established in Western Europe. As West European nations made settlements in America, Roman public law, with its doctrine of title by

discovery, came to control the destinies of English, French, Spanish and Dutch colonies. Thus the theory developed by Grotius and other Dutch publicists led to the conflicting claims of Holland and England to the province of New Netherland, and eventually to the surrender of the Dutch colony to the stronger power of England. In many aspects our laws and customs, commonly supposed to be of British descent, may be ascribed to Latin sources, and to the Roman law which, says Sir Henry Maine in his work on the "Early History of Institutions," "next to the Christian religion, is the most plentiful source of the rules governing actual conduct throughout Western Europe." [1]

The corollaries from the principle of title by discovery have governed the course of all titles to real estate in New York, and generally throughout the United States. The State alone, as successor to the discovering nationality, could extinguish the Indian claim, or convey ownership of land; no direct bargain of any individual or company with the aboriginal tribes, even if made in the highest faith and for consideration, could give the purchaser a shadow of title as against a subsequent patentee from the commonwealth. This principle was early announced by the Supreme Court of the United States as underlying all titles to land from the Indians, which could be had only under grant from the general government.[2]

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[1] "Acquisition of territory has always been the great spur of national ambition, and the rules which govern this acquisition, together with the rules which moderate the wars in which it too frequently results, are merely transcribed from the part of the Roman law which treats of the modes of acquiring property *jure gentium*. * * * Those parts of the international system which refer to dominion, its nature, its limitations, the modes of acquiring and securing it, are pure Roman Property Law." Maine's "Ancient Law," pp. 74, 75.

"The Roman principle of Occupancy, and the rules into which the *jurisconsults* expanded it, are the source of all modern International Law on the subject of Capture in War and of the acquisition of sovereign rights in newly discovered countries." Id., p. 180.

[2] Johnson v. M'Intosh, 8 Wheaton, 543.

Although the Dutch discovery occurred in 1609, there seems to have been no real government in New Netherland until a charter was granted by the States General to the Dutch West India Company on June 3, 1621. This charter, in imitation of the charter of the Dutch East India Company, conferred remarkably broad administrative and judicial powers. In order to curb Portugal and Spain, and to advance her own commercial and colonial interests in the distant East, the Holland government had clothed the East India Company with almost irresponsible authority. In the new western world England also was her competitor, and in the general rivalry, especially that between these two nations, it had seemed wise to invest the West India Company with similar latitude of jurisdiction. The primary purpose of the charter was commercial: the corporation was to found colonies and carry on trade, navigation, and commerce upon the coasts of Africa, North America, and the West Indies. For the accomplishment of its purposes it was invested with power to employ soldiers and fleets, build forts, make treaties, appoint and remove governors, officers of justice, and other public officials; to maintain order and police, and to administer justice. The government of a corporation armed with such extraordinary powers was under the ultimate supervision of the States General. There were five separate chambers in the company, and to one, the chamber of Amsterdam, was committed the management of the affairs of New Netherland. The central power was vested in an assembly of nineteen delegates representing both the separate chambers and the States General, and commonly known as the Assembly of XIX. All officers were required to take a double oath of allegiance —to the Company, and to the States General. The colony of New Netherland was established by the Company at New Amsterdam in 1623.

The broad commissions issued by the States General at the request of the Dutch West India Company to the gov-

ernors of the colony might seem unpropitious beginnings for popular government. The director, as the governor was styled, seemed in practice as absolute and uncontrolled in his jurisdiction as was Warren Hastings in the succeeding century in India; the one had for his subjects colonists from Holland, the other ruled numerous tribes of an alien race. The Dutch director extinguished Indian titles or sanctioned their purchase. His ratification was essential to the validity of every contract. He created the courts, appointed nearly all public officials, enacted laws and ordinances as a Roman emperor issued edicts, incorporated towns, imposed taxes, levied fines, and inflicted penalties. He possessed a power almost as extensive over the currency of the colony as did Philip the Fair over that of France. He determined the value of the wampum, the chief money of the time. No jury aided him in the decision of criminal or civil causes; he determined these himself. While his commission usually required him to recognize the cognate jurisdiction of what was termed the Council, he habitually ignored this body as a restraint upon his plenary authority. Yet, in spite of these uncongenial beginnings, a degree of popular government was evolved. The Dutch colonists, like the sturdy individualists who founded New England, carried in their spirits the best traditions of their native country, its devotion to liberty, secular and religious; to freedom of speech, and to education. Men nurtured in the independent air of Holland could not be expected long to endure tyrannical government. Their situation in a new country, surrounded by wild tribes of the forest, amidst novel experiences and sudden dangers which compelled the director frequently to consult with the chiefs of the people, was especially conducive to the development of independence. It is not surprising that the history of the colony during the Dutch era shows the steadfast resistance of its people against the tyranny of governors, repeated protests to the home authorities against the pretensions of arbitrary power, and unswerving insist-

ence upon the rights of free men—among these, the right, long previously familiar to Dutchmen as well as to Englishmen, of representative government.

On June 7, 1629, there was granted the Charter of Freedoms and Exemptions, which introduced the feudal system into part of the colony, and conferred special privileges and powers on all patroons, masters, or private persons who, as the language ran, would "plant colonies in New Netherlands." The patroons were authorized to erect courts of justice, and courts known as the patroons' courts were accordingly established, exercising unlimited civil and criminal jurisdiction within the patroons' territory. In these tribunals the patroon presided in person, or by deputy. He appears to have been clothed with the extraordinary power of life and death, and could decide all civil suits arising within his jurisdiction, subject—where he rendered judgment for a sum exceeding fifty guilders—to an appeal to the Director General and The Council of New Amsterdam. This right of appeal was reserved in the original charter under which the patroons held, but it was practically defeated by the exaction from tenants, before they came upon the manor, of a condition that they would in no case appeal from the judgment of the manorial court. The patroon was the overlord of his tenants, to whom he leased land upon rigorous terms, each tenant submitting himself as a faithful subject bound by an oath of fealty and allegiance to a master clothed with almost boundless civil, military and judicial authority within his demesnes. It was under this charter that Kiliaen van Rensselaer, a merchant prince of Amsterdam and a director in the West India Company, obtained title to extensive tracts of land embraced in what are now the counties of Albany, Rensselaer, and Columbia. The story of the influence of the patroon system forms a chapter of profound interest in the history of the State.[3]

[3] The origin, development and consequences of the patroon system are treated by Mr. Charles Z. Lincoln, in his "Constitutional History of New York," vol. II, pp. 10-27.

Broad as was the authority conferred by the Company upon the director, it was in theory not altogether unbridled; a Council was to form part of the colonial administration, and the Governor was expected to confer with it before acting. He was necessarily left free to determine when he should seek its advice, and the natural result was an indisposition to request any. In this Council, and the Council established under English rule, may be found the genesis of the State Senate.

When Minuit was appointed Director (1626), there was associated with him a Council of Five, and the Director and Council were by his commission to possess all executive, legislative and judicial power subject to certain appellate jurisdiction of the Assembly of XIX, and subsequently of the Amsterdam Chamber. The commission to Van Twiller, his successor in 1633, also provided for a Council, as did the commission to Kieft, appointed in lieu of Van Twiller in 1638. But in reorganizing the administration of affairs, Kieft preserved merely the shadow of a Council by appointing only one person besides himself a member, giving his appointee one vote and reserving two votes to himself. "For nine years he misgoverned the colony." He was ever embroiled in trouble with the natives or the colonists, and was constantly inflicting fines, confiscations and banishments; "and though an appeal lay from his judicial decisions to the Chamber at Amsterdam, he effectually cut it off, by subjecting to fine or imprisonment any one who attempted to resort to it." Yet it was under this Director that the first semblance of a representative assembly was formed, for it became necessary for him to consult with heads of families regarding the treatment of the Indians, and the conferences to which he summoned the leading spirits of the colony resulted in their electing a separate council of twelve men. Its manifestations of independence impelled Kieft to put an interdict upon the meeting of its members without his authority, but further

difficulties with the Indians and troubles with neighboring colonies forced him once more to seek its advice, and this led to the formation of a new representative body of eight men. Kieft's petty tyrannies led to his recall, and the appointment of Stuyvesant, the last of the directors, who was to prove no less intractable than his predecessors. Stuyvesant, upon his arrival as Governor, issued a proclamation requesting the people to choose eighteen persons from among the most honorable and respectable of their number, who in turn were to select a Council of nine to participate with him in the government. The commission to Stuyvesant shows that he was expected to summon a Council to share his extraordinary powers. It is evident, therefore, that the body known as the Nine Men, whom Stuyvesant himself called the "Tribunes of the People," represented a new element in the colonial government, although an element well known in the Fatherland. Like Kieft's Council of Twelve, it was a species of representative assembly. If the share of the Council in the administration was limited, the share of this nascent assembly was far more so. Stuyvesant ill brooked the aid of the Council, and was less willing to concede any power to the assembly.

The affairs of the colony rendered despotic government impossible. As conferences of delegates had repeatedly to be called, there was repeated remonstrance against the Director's tyrannical exercise of power. A convention held on December 10, 1653, formulated an earnest protest to the Director and Council and to the States General. It objected to "arbitrary government," and declared that the consent of the people or their representatives was necessarily required in the enactment of laws and orders affecting their lives and property. The Director replied to the remonstrance, and controversies between him and the colonists continued until the termination of Dutch control. Resistance to one-man power, insistence upon the right of the people to take part in legislation, and upon the necessity

of a representative body to approve the action of the Director and Council, were steadfastly maintained up to the date of the Dutch capitulation to the English.

The contest between the Dutch and the English for control of the colony grew out of their conflicting claims, the English challenging the right of the Dutch on the ground of their own earlier discovery. The Dutch claims included the present States of New Jersey and Delaware, where they were maintained, and Pennsylvania, where they were only asserted. They extended into Connecticut as far east as the Connecticut River, and embraced Long Island also, although the English had made actual settlements there as early as 1640.[4] The grant made by Charles II. to his brother James, Duke of York, upon which the Duke based his title to New Netherland, included a large part of Maine and all the territory between the Delaware and Connecticut rivers; but, before Nicolls' arrival at New Amsterdam, the Duke had transferred his right to New Jersey to other proprietors. Hence, when the Dutch colony passed under English control, its boundaries were uncertain and shadowy. The boundary line between New York and Connecticut was not fixed until 1728. The disputed boundary between New York and Massachusetts led to a suit between the two States before the Congress of the Confederation, and the controversy was finally settled—New York conceding to Massachusetts certain rights of preemption in lands in the western part of this State. The boundary between New

[4] Emigrants from Massachusetts and Connecticut moved to Long Island in such numbers that in 1660 eleven distinct villages had been settled, scattered from one end of the island to the other along the coast, or on smaller bits of land like Shelter Island. The English towns on Long Island were at first independent, all questions being determined by majority vote in town meeting. By 1662 all the Long Island towns had united with either New Haven or Connecticut. ("The Expansion of New England," by Lois Kimball Mathews, 1910, p. 34.) The Long Island towns east of the Connecticut boundary line sent their delegates to the Connecticut legislature and considered themselves part of that state.

York and New Jersey remained undetermined until a treaty was made between the two States in 1833, which was ratified by their respective legislatures and Congress in 1834.

Unless the Duke of York meant to renounce his title, it was necessary that he should enforce his claim with arms. An English squadron under Nicolls was sent into the bay of New York in 1664. This led to the surrender of the colony by the Dutch, August 27, 1664, O. S., under articles of capitulation entered into by the leading citizens of New Amsterdam with the English commander. By these articles [5] all subjects of Holland then residents in the colony were to remain free denizens in the full enjoyment of their private property, and their customs respecting inheritances; and liberty of religious worship was also accorded them. New York was retaken by the Dutch on August 9, 1673, but by the treaty of Westminster in the following year it was retroceded to the English. The crown lawyers argued that, by the treaty, title had passed to the King, so, to meet their doubts, Charles II. gave to his brother James a second patent, substantially a repetition of the earlier grant, and the colony passed from the proprietorship of the Dutch corporation to the proprietorship of an English duke.

The charters granted by Charles conferred upon his brother plenary powers of government, including the power to make laws, but with the salutary check that these should not be contrary to the law of England. The "Duke's Laws," which are said to have been compiled by Lord Clarendon, the Duke's father-in-law, from laws and ordinances in other English colonies, but containing few provisions relative to popular rights, were promulgated in the colony March 1, 1665, after their adoption by a convention of delegates assembled at Hempstead, February 28, 1665, from towns in Long Island and Westchester, which were largely English

[5] These articles are reprinted in Appendix No. 1, in vol. II, of the "Laws of the State of New York," as revised by Van Ness and Woodworth, in 1813.

settlements enjoying the benefit of their own laws and customs. The "Duke's Laws," or "Nicolls' Code," substituted the leading features of the English law of real and personal property for the Dutch law, at least in Long Island and Westchester, for no delegates had been elected to represent the Dutch of New Amsterdam, and it could hardly have been designed to bring these people, who were unfamiliar with English, under a system of government so different from that to which they were accustomed. Upon the re-establishment of English authority after the retrocession by the Dutch, the Duke issued a commission to Major Edmund Andros recommending him to continue the existing courts of justice, authorizing him to commission officers and magistrates, and requiring the appointment of a Council of not more than ten members, inhabitants of the colony, with whom he was to consult on all extraordinary occasions. The Governor and Council formed a sort of colonial legislature until an assembly was created in 1683.

The administration of Andros has been the subject alternately of praise and censure. According to some historians, he was able and enlightened; by others he has been pronounced arbitrary, cruel and despotic, without sympathy with the popular wish for a representative assembly. His faults were those of his master, whose desire for revenue from the colony far outstripped his interest in its welfare, and to whom assemblies of the people were abhorrent, "nothing being more known than the aptness of such bodies to assume to themselves many privileges which prove destructive to the peace of government"; neither could he "see any use for them." The people complained of the Andros administration in a petition to the Duke, declaring that inexpressible burdens were put upon them by a tyrannical government; that unjust revenues were collected and undue taxes imposed upon trade, and that they were esteemed as nothing, and had become a reproach to their neighbors in his Majesty's other colonies. Accordingly, Andros was re-

called, although in 1686 he was made Governor of New England. His place in New York was taken by Colonel Thomas Dongan.

The commission to Dongan (September 30, 1682) instructed him, with the advice of the Council, to issue writs in the Duke's name for the election of a general assembly of freeholders. Ample legislative power was to be conferred upon the assembly, subject to an absolute veto by the Governor and the Duke. This concession to the desire of the colony James made upon Penn's advice, and because of requests from men of every rank in the province. The assembly which was accordingly chosen was a notable one. It passed a law subdividing the province and its dependencies into shires and counties, and also passed an act settling courts of justice and creating a court of chancery, but its chief title to lasting recollection comes from its promulgation, on October 30, 1683, of the famous instrument known as the Charter of Liberties and Privileges.[6] The charter[7] declared that the supreme legislative authority, "under his Majesty and Royall Highness should forever be and reside in a governor, counsell and the people mett in General Assembly," and it provided for government by and according to the laws of England, liberty of choice for all freeholders in elections, and toleration in religion. In plainest terms it announced that no taxes of any kind should be levied with-

[6] "The great principles enunciated in the Charter of Liberties are," says Lincoln, in his "Constitutional History of New York," "drawn from the immortal Magna Charta, which had for nearly five centuries been the source and strength of English free institutions; yet these Dutchmen, no less zealous for liberty than their English neighbors, were willing to accept, adopt, and assert as their own, the rights of citizens as defined by the Great Charter. * * * This charter, closely resembling our modern constitutions in form and substance, and containing many provisions which have been continued in those instruments, might properly be called the original Constitution of New York."

[7] This instrument is printed in the Appendix to Van Ness and Woodworth's Revision of the Laws of the State.

in the province without the assent of the people's representatives.

The charter was not exactly the "pioneer among charters or constitutions conferring upon the people the right of representative government," as it was preceded not only by the "Union of Utrecht," in Holland, but also by the Connecticut charter of 1639. This Connecticut charter was the first practical assertion in America of the right of the people to choose their officers and define their powers. It was the work of that great Connecticut divine, the Reverend Thomas Hooker, who probably had imbibed Dutch ideas of free government [8] while living at Delft, where for three years he had held a pastorate. The Charter of Liberties, however, was, perhaps, the earliest charter distinctly to formulate the principle of representation as a condition of taxation. Although it seems to have met the duke's approval, yet upon his accession to the throne of England as the successor of Charles II. in 1685, he decided to withhold his royal assent to it. It was accordingly vetoed March 3, 1685. The colony ceased to be a proprietary, and became a royal province when the duke became king. A new commission was issued by James II. to Governor Dongan, May 29, 1686. It rejected the Charter of Liberties, but confirmed all laws of the Assembly previously allowed; it reserved the entire legislative power to the Governor and Council, subject to the royal veto. All laws, statutes and ordinances were to conform as nearly as was practicable to the laws and statutes of England; no provision was made for any representative assembly. In civil causes where the amount in controversy exceeded one hundred pounds sterling, appeal might be taken to the Governor. Further appeal lay to the king in council where the amount involved exceeded three hundred pounds. James as king treated the

[8] "The Puritan in Holland, England and America," Douglas Campbell, I, 416.

"Connecticut," by Alexander Johnston, pp. 71, 73.

colony less liberally than he had proposed to do as duke. The probability is that his consent to the call of a general assembly had been reluctantly given, as he was never a friend of popular rule. But parliamentary government, although it never had royal sanction, had already been launched under his previous commission to Dongan, and a movement, impossible to check, had been started. The aspirations of the colonists were soon to be realized under a freer government.

Upon the accession of William III. to the throne of England as the successor of James, a commission was issued to Henry Sloughter appointing him captain-general and governor-in-chief of the province of New York. It authorized him with the advice and consent of the council to summon a general assembly to be chosen and constituted substantially like earlier assemblies. The governor ordered the election of a new assembly which met on April 9, 1691. From that date until the Revolution the assembly was a regular department of the colonial government. Until 1716 members of assembly were elected biennially; thereafter until the Revolution they were elected at greater intervals. The assembly of 1691 drafted a new charter modeled upon the Charter of Liberties and Privileges of October, 1683. In language similar to that employed by its famous predecessor it declared that the "supreme legislative power and authority" should be and reside in a governor and council appointed by the crown, and in "the people by their representatives, mett and convened in general assembly." In accordance with the views of the time "the people" were freeholders owning property producing forty shillings per annum. This charter never received William's approval; nevertheless it was in force in the colony for upwards of six years.

The commission to Governor Sloughter to summon an assembly had been, however, a recognition by the crown of the right of the colony to representative government. This

assembly, under the erroneous impression, says Judge Daly, that none of the acts of the general assembly of 1683 and 1684 had been affirmed by James, and that all were therefore void, reorganized the judicial system of the colony with a court of chancery, a supreme court, a court of common pleas, courts of sessions, and justices' courts.[9]

The charters of 1683 and 1691 made a shadowy differentiation between executive, legislative and judicial authority. They followed in the main the English theory of colonial government. The council and the assembly constituted a bicameral legislature. The governor and after him the king had an absolute veto on all its acts. Landed proprietors alone were recognized as entitled to share in the business of government. The members of the council received their commissions from the crown, but the governor had a qualified right to fill vacancies. Besides sitting as an upper legislative chamber, the council sat as a privy council to advise and assist in political cases. The governor was empowered to adjourn, prorogue and dissolve the assembly in his discretion.

Substantially this type of government was continued until the Revolution, but under an unwritten constitution, no actual charter having been in force after 1697. As has

[9] Immediately upon the passage of the act, the Supreme Court was organized and Joseph Dudley appointed Chief Justice, Thomas Johnson, Second Judge, and William Smith, Stephen Van Cortland and William Pinthorne, Associate Justices. Thomas Newton was appointed Attorney General, but after brief service he was succeeded by James Graham, Recorder of New York, who had previously filled the office. See Judge Daly's "History of the Court of Common Pleas for the City and County of New York, with an account of the Judicial Organization of the State and of its Tribunals, from the time of its settlement by the Dutch in 1623 until the adoption of the State Constitution of 1846." Judge Daly's essay is a most admirable exposition of the political and judicial history of the colony, and evidently a work involving great research and composed in most excellent style. It cannot be too highly commended to the student of the earlier institutions of New York. It appears as an introduction in volume I E. D. Smith's Reports.

been well said by Mr. Lincoln in his treatise upon our constitutional history, the student who would understand the essentials of the institutions which by degrees had been evolving in the colony, will find them formulated in the commission issued in February, 1771, three years before the commencement of the Revolution, by George III. to Governor William Tryon, and in the instructions that accompanied and explained the commission.

In an explanation of the nature of the colonial constitution, transmitted by Governor Tryon to the home government in 1774, its salient features are briefly yet thoroughly described. The constitution, since it became a royal province, "nearly resembled that of Great Britain and the other royal governments in America." The governor was the king's appointee and held office during the royal pleasure; he had a council in imitation of his majesty's council; the province "enjoyed a legislative body" consisting of the council and representatives of the people "chosen as in England," which the governor might adjourn, prorogue or dissolve; it could make no laws repugnant to the laws and statutes of Great Britain, and over all its enactments the governor possessed an absolute veto. Within three months after its passage, every law was required to be sent to his majesty for his approval. The governor was not to give his consent to any law that was not to remain in force for two years. No clause foreign to the import of the title of an act might be inserted in that act,[10] and no act might be suspended, altered, continued, revived or repealed by general words, but the title and date of any such act was required to be particularly mentioned in the enacting part. The province had a court of chancery in which the governor sat as chancellor, and courts of common law, the chief being the supreme court, the judges of which held their commissions at the king's pleasure, and there were county courts

[10] This reappears in substance in the State Constitution in 1874 (Art. III, § 17).

of less jurisdiction, and justices of the peace to try minor causes. There were also criminal courts "correspondent to those in England." Besides these tribunals, all administered according to the common law, there was a court of admiralty which proceeded "after the course of the civil law," and a prerogative court, charged with the probate of wills, the administration of estates and the issuing of licenses for marriage. The governor was commander-in-chief and appointed all military officers, who held at his pleasure. He had power to suspend the lieutenant-governor and members of the council, and to grant pardons, except in cases of treason and murder. The colony could erect forts and other means of defense and establish and maintain a militia. Public money was to be paid only on the governor's warrant, approved by the council. The common law of England was considered the fundamental law of the province and, continued the governor, "it is the received doctrine that all statutes not local in their nature and which can be fitly applied to the circumstances of the colony, enacted before the province had a legislature, are binding upon the colony; but that statutes passed since do not affect the colony, unless by being specially named. Such appears to be the intention of the British Legislature."

This clause is the only reference in this document to the jurisdiction of the British Parliament over the colonies, and it is interesting to note that it is practically coincident with the first denial by the colonies of the power of that body to legislate for them. The theory that the British Parliament had no authority whatsoever over the colonies was as much a development as the now generally accepted theory of the relation of the States to the Nation, which was never triumphant until the Civil War. From the English point of view, the American colonies were, as has well been said, corporations holding their charters at the pleasure of the sovereign, and subject to dissolution by *quo warranto* proceedings in his courts, and, above all, subject to legislation

by Parliament, which, according to Blackstone, was "boundless in its operations." Lord Macaulay mistakenly assumes that down to the Revolution the colonies admitted the authority of Parliament, save as to the power of taxing. When Parliament came to enforce the Navigation Act and other measures inimical to colonial commerce and to rights which they conceived to be theirs as free men, the colonists were impelled to examine the foundations of alleged parliamentary authority, and forced logically to the conclusion that the English Parliament was a foreign body which had never had jurisdiction over them. They were subjects of the king, with parliaments of their own. The British Parliament had no jurisdiction beyond the seas, and no power to tax the colonies or even legislate for them. The Continental Congress (1765) had, it is true, memorialized Parliament as well as the king, but the Continental Congress of 1774 omitted all mention of Parliament in its petition. And the climax of this reasoning is reached in the Declaration of Independence, which arraigned the king for his attempt "to subject us to a jurisdiction foreign to our constitutions, and unacknowledged by our laws, giving his assent to these acts of pretended legislation." Language could not more clearly deny the authority of the British Parliament not alone to tax but also to legislate for the North American colonies, and this foreign parliament had suspended "our own legislatures" and declared itself invested with power to legislate for us.[11]

The constitution of the colony of New York, as it existed at the date of independence (although it was not a written instrument), was the outgrowth of Dutch as well as English customs and laws, for from the Dutch had been inherited the idea of free education, the system of recording instruments affecting real estate, and the doctrine that the people are the ultimate source of authority. The city of

[11] Article on "United States" by Alexander Johnston, in "Encyclopædia Britannica," ninth ed.

New York owes to Stuyvesant the earliest rudiments of a city charter. The men who framed the first State constitutions, and who drafted the Constitution of the United States, were as familiar with the "Union of Utrecht" and the government of Holland as they were with the republics of Greece and Rome. The pages of *The Federalist* are filled with allusions to Dutch history and institutions. Equally profound was their knowledge of Montesquieu, and to him were they indebted for a thorough understanding of the necessity for keeping the three great departments of government separate. They knew intimately the character of the colonial constitutions under which they lived. From these sources they were summoned to construct a new government, or, rather, to adapt government to the new conditions by which they were confronted. That they should retain all for which they and their ancestors had struggled, and the jurisprudence they enjoyed, was to have been expected; that they should reject a system which had made judges subservient creatures of the appointing power, and should evince distrust of executive authority, might equally have been anticipated in view of the king's recent encroachments upon their rights. That, while declaring their profound belief in the inalienable rights of the individual, they should organize governments in which substantially all power was reserved to the land owner, while it may seem extraordinary, was only natural. The colonial government was a government of the land owner, for in none of the first constitutions of the original thirteen States did the people receive any consideration in either branch of the legislature. The idea crystallized in John Jay's maxim that those who owned the country ought to govern it, underlay every constitution. The government set up by many a constitution, despite the principle announced in its preamble, was in reality that of a class. Not until after the beginning of Jefferson's administration did the States commence to broaden the suffrage.

CHAPTER III

IMPULSES TOWARDS STATE GOVERNMENT COME FROM CONTINENTAL CONGRESS—CHAOTIC CONDITIONS AT OUTBREAK OF REVOLUTION, AND FORMATION OF PROVINCIAL GOVERNMENTS IN THE COLONIES—THE THIRD PROVINCIAL CONGRESS OF NEW YORK—THE FOURTH PROVINCIAL CONGRESS, OR FIRST CONSTITUTIONAL CONVENTION—THE WORK OF THE CONVENTION, THE COUNCIL OF APPOINTMENT, THE COUNCIL OF REVISION, THE JUDICIARY, SENATE AND ASSEMBLY—OTHER FEATURES OF THE CONSTITUTION—ITS SIMPLICITY—EARLY GOVERNMENT IN THE INFANT STATE—NEW YORK ACCEPTS THE ARTICLES OF CONFEDERATION—THE ACTION OF THE STATE LEGISLATURE, ULTRA VIRES—RATIFICATION OF THE FEDERAL CONSTITUTION—REVISION OF THE LAWS—NEW YORK CEDES HER LANDS IN THE WEST—THE PRACTICE OF LAW—UNSUCCESSFUL ATTEMPT BY BURR TO ABOLISH SLAVERY—BEGINNINGS OF EDUCATION.

That union of some sort among the colonies preceded the independent existence of any State seems the plain teaching of history. "The irrepressible tendency toward union," as Judge Jameson has termed it, is perceptible as far back as 1643. It gathered additional momentum in 1748 and 1754. It received a powerful re-enforcement when the Stamp Act Congress assembled in 1765. It became the sentiment of all the colonies when the First Continental Congress met at Philadelphia in 1774 to memorialize the king, for its petition, as has been observed, studi-

ously ignored parliament as a body having no jurisdiction in America. The sentiment for union gained strength from the Second Continental Congress which convened at Philadelphia, May 10, 1775. Down to this date no colony had undertaken to assert its independence of Great Britain, and probably none would have done so singly. As Charles C. Pinckney well said in the South Carolina legislature in 1788, in speaking of the Declaration of Independence: "The separate independence and individual sovereignty of the several States were never thought of by the enlightened band of patriots who framed the Declaration of Independence." It was the Second Continental Congress which launched the people upon a career ultimating in independence. von Holst maintains that it was a purely revolutionary body, but it seized no power, and undertook only to guide the separate colonies and to recommend to them the establishment of new governments.

The first impulse toward State government was therefore not from within any colony; the suggestion came from the Continental Congress. Nor was the original idea one of permanent separation from Great Britain; conviction of the impossibility of reconciliation with the mother country was a growth. The strength of the revolutionists lay in concert of action, and it was to the wisdom of all as symbolized in the Continental Congress that each turned.

With the outbreak of the Revolution the people had renounced the authority of Great Britain, and to avoid anarchy some kind of temporary government had to be established. There sprang up simultaneously in all the colonies provincial congresses or conventions, committees of safety and committees of correspondence, the provincial congresses exercising all legislative powers and delegating executive functions to the committees of safety.[1]

The Second Continental Congress, in answer to in-

[1] "History of the People of the United States," McMaster, vol. III, 373.

quiries from some of the colonies (New Hampshire, Massachusetts, South Carolina, Virginia) for "advice respecting the taking up and exercising the powers of civil government," passed a resolution recommending that the "respective assemblies and conventions of the United Colonies adopt such government as should best conduce to the happiness and safety of the several colonies in particular and America in general." This important resolution was passed May 10, 1776. The condition of the colony of New York at this time was peculiarly chaotic; the British were in control of its chief city, the colonial assembly had been dissolved and Governor Tryon did not consider it wise to summon another; Tories and Royalists were in possession of the property of revolutionists; and the temporary congresses or committees were fleeing from one refuge to another. The infant government was practically concentrated in the territory lying between the Highlands of the Hudson and Lake George, Albany and Oneida Lake, for the remainder of the State was a wilderness peopled by red men.[2] Only a fraction of the State was actually independent, and the leaders of the revolutionary movement instinctively turned to the Continental Congress for support. The first constitution of New York shows upon its face that the initiative for State government came from the Continental Congress.[3]

After receiving news of the resolution passed by the Continental Congress, the Third Provincial Congress of New York, on May 31, 1776, recommended an election of deputies or delegates to a new Provincial Congress. The deputies chosen in conformity with this resolution consti-

[2] "American Commonwealths," New York, Ellis H. Roberts, 437.

[3] The dates, given by McMaster, of the adoption of constitutions are as follows: 1776, July 2, New Jersey; July 5, Virginia; July 15, Pennsylvania; August 14, Maryland; September 10, Delaware; December 18, North Carolina; 1777, February 5, Georgia; April 20, New York; 1778, March 19, South Carolina; 1780, March 2, Massachusetts; 1783, October 31, New Hampshire.

tuted the Fourth Provincial Congress, which acted as the First Constitutional Convention. It was not simply a convention to frame a constitution; it had broader powers; it was to "institute and establish" a new government. It was both a convention and a legislature, and it acted in both capacities—first, framing an organic law, and afterward appointing a Council of Safety, which it invested with all powers necessary for the preservation of the State until the legislature should meet.

The Fourth Provincial Congress, or First Constitutional Convention, the calling of which so clearly shows that the initiative for State government came from the Continental Congress, assembled at White Plains on July 9, 1776. The Declaration of Independence, absolving the colonies from allegiance to the mother country, had been promulgated only five days earlier, and the reception of a copy of this notable instrument was almost the first official act of the body that was to frame the first constitution of the State. All fourteen counties were represented by delegates, of whom there were in all one hundred and seven.[4] The business of the convention was transacted by about one-third of its number, for the condition of the colony, the presence of British troops in New York City, the royalist sympathy there, and the checkered success of the cause of the revolutionists required various members of the convention from time to time to suspend their work as delegates and leave the body. As is usual in assemblages of such a nature, the duty of drafting fell upon a small minority. It is commonly accepted that John Jay, Gouverneur Morris and Robert R. Livingston produced the draft that was read to the convention by one of its secretaries, and ultimately adopted with comparatively few alterations and revisions. All three were young men—Jay, the eldest, being thirty-one years of age—and all were lawyers, and familiar with the institu-

[4] Their names are given in Lincoln's "Constitutional History of New York," vol. I, 484-486.

tions of the colony. The era was pre-eminently an age of young men, both in America and in Europe. Hamilton was but twenty-three when he wrote to James Duane the celebrated letter outlining the weakness of the Confederation; Fox was not twenty-one when he first sat in the House of Commons; and Pitt at twenty-six was Prime Minister of England. Napoleon early entered upon that career which made him one of the most vital forces in modern Europe, and he retired to St. Helena when only forty-six. Clay and Calhoun, the leading spirits of the second war with England, were in the twenties when the war commenced, Clay having entered upon his congressional life before actually reaching his majority.

The chief authorship of the Constitution of 1777 appears to have belonged to Jay. That his views were not fully accepted, that he believed it faulty and incomplete, and that he had proposed to suggest new clauses, are clear from his own statements. Two things seem conclusive: Jay drew the celebrated clause providing for the Council of Appointment, while Robert R. Livingston was the author of the original provision for a Council of Revision.

Of the debates in this convention there are no records. The sources of information regarding it, apart from its journal and occasional references to it in the biographies of its leading members, are meagre indeed. But great work usually soon rises from a personal to an impersonal plane, and interesting as is the question of authorship, the language and effect of the document far transcend this in importance. The Constitution was finally approved on Sunday, April 20, 1777, after having been discussed from day to day. The vote for it was thirty-two to one, the only delegate voting in the negative being Peter R. Livingston, of Albany. The journal gives no reason for his dissent.

It was the constitution of a minority of the convention, though accepted as the work of all, for it was impracticable to obtain the presence of a majority, since some were under

arms and others serving upon important and sometimes secret missions during the sessions of the convention. As its work was never ratified by the people, the government of the new State was launched by thirty-two men, all of whom were freeholders.

The first Constitutional Convention was what Judge Jameson calls a "revolutionary convention," inasmuch as it exercised governmental powers. There was no prior vote of the people authorizing the convention; there was an election of delegates or "deputies," but the election was not the consequence of a popular vote for a convention. The difference in the method of initiating this convention and the Convention of 1821 will be apparent when that convention comes to be studied. A constitutional convention should originate in some legislative act giving voters opportunity to decide whether it shall be called, and, if their decision be favorable, making provision for the election of delegates.

The First Constitution opens with a brief summary of events preceding the convention. It recites that the usurpations of the king and parliament had reduced the people of the colonies to the necessity of introducing governments by congresses and committees as temporary expedients; that in view of the resolution of the Continental Congress recommending the colonies to organize new governments, the congress of the colony of New York (the Third Provincial Congress) had recommended to electors in the several counties either to authorize their existing deputies or others in their stead to institute and establish such a government as they should deem best calculated to secure the rights, liberties, and happiness of the good people of the colony, and to continue in force until a future peace with Great Britain should render the same unnecessary; that elections had accordingly been held and new deputies been charged with the duty of instituting and establishing the new government; that the delegates of the United States in the Second Continental Congress had on July 4, 1776, published

the Declaration of Independence; that the reasons assigned by the Continental Congress for declaring the United Colonies free and independent States were cogent and conclusive, and were approved by the convention, whose members would at the risk of life and fortune join with the inhabitants of other colonies in supporting it; and the constitution then proceeded in the name and by the authority of the good people of the State to "ordain, determine, and declare that no authority should on any pretence whatever be exercised over the people or members of this State but such as should be derived from and granted by them." This democratic platform is not fully borne out in the constitution itself. It was "the declaration, rather than the realization of complete popular supremacy." [5]

The assembly was to consist of seventy members elected annually in the several counties of the State, in proportions fixed by the constitution. To be eligible to vote for an assemblyman it was necessary that the citizen offering his vote should have resided in the county six months immediately preceding election day, and also that he should be either a freeholder possessing a freehold of the value of twenty pounds within the county of his residence, or the lessee of a tenement therein of the yearly value of forty shillings. Any elector qualified to vote for an assemblyman was eligible to the office. Freemen in the cities of Albany and New York having had the right to vote for assemblymen ever since 1691 were not disfranchised. But no one might enjoy the elective franchise until he had taken an oath or affirmation of allegiance to the State.

The senate was to consist of twenty-four freeholders chosen by freeholders alone; and only such were entitled to vote as were possessed of freeholds of the value of one hundred pounds over all debts charged thereon. Of the first senators elected, six were to be chosen by lot to hold

[5] Robert Ludlow Fowler, "Memorial History of the City of New York," vol. II, p. 614.

office one year, and a like number were similarly chosen for two, three, and four years, so that one-fourth of the senate should retire every year and their successors be annually chosen. For the election of senators, the State was divided into four great districts—the southern, the middle, the western and the eastern—and the constitution assigned to each district its proportion of senators. The assembly were to "choose their own speaker, and enjoy the same privileges and proceed in doing business in like manner as the assemblies of the colony of New York formerly did." A majority of either house was to constitute a quorum, and each house was made the judge of the qualifications of its members. The senate was restricted to a maximum of one hundred senators, and the assembly to a maximum of three hundred members. Provision was made for the taking of a census at the close of the war and at successive intervals of seven years afterwards, for the purpose of apportioning representation in the senate and the assembly according to the changing distribution of population throughout the State.

The supreme executive power and authority of the State was vested in a governor, who was required to be "a wise and discreet freeholder." He was to be chosen every three years (reduced to two years by the constitution of 1821), or as often as the seat of government should become vacant, by freeholders qualified to elect senators, and the election was to be held at the same time as the election of assemblymen. By virtue of his office he was general and commander-in-chief of the militia and admiral of the navy; he might convene the legislature on extraordinary occasions, and prorogue it from time to time for not more than sixty days in any year. In these respects his functions bore a close resemblance to those of governors under the crown. Impelled by the fear of executive despotism so characteristic of that age, the framers of the constitution took the veto power from the governor, and, upon the suggestion of

Robert R. Livingston, adopted an article framed by him, creating a council of revision. The article as modified by the convention reads as follows:

ARTICLE III: And whereas laws inconsistent with the spirit of this constitution or with the public good may be hastily and unadvisedly passed: Be it Ordained, That the Governor, for the time being, the Chancellor and the Judges of the Supreme Court, or any two of them, together with the Governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the Legislature. And for that purpose shall assemble themselves, from time to time, when the Legislature shall be convened; for which nevertheless they shall not receive any salary or consideration under any pretence whatever. And that all bills which have passed the Senate and Assembly, shall, before they become laws, be presented to the said council for their revisal and consideration: and if upon such revision and consideration, it should appear improper to the said council or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the Senate or House of Assembly, in whichsoever the same shall have originated, who shall enter the objections set down by the council, at large, in their minutes, and proceed to reconsider the said bill. But if after such reconsideration, two-thirds of the said Senate or House of Assembly, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the Legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall be a law.

And in order to prevent any unnecessary delays,

Be it further ordained, That if any bill shall not be returned by the council, within ten days after it shall have been presented, the same shall be a law, unless the Legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case, the bill shall be returned on the first day of the meeting of the Legislature after the expiration of the said ten days.

The exercise of the veto power was apparently not restricted to questions of constitutionality. History shows, as Justice Platt stated in the Convention of 1821, that the first bill passed by the senate and assembly under the Constitution of 1777 was rejected by the council of revision on the ground of inexpediency alone.

The council of appointment consisted of the governor and four senators, one senator from each of the senatorial districts, to be openly nominated and appointed by the as-

sembly every year. Senators were not eligible to the council for two years successively. A majority of the body constituted a quorum. The governor had no vote, but in the event of a tie had "a casting voice." The intention of Jay, the originator of the council of appointment, doubtless was that the governor alone should nominate, but his language is obscure. The controversy in which this obscurity involved the State was finally settled by the Constitutional Convention of 1801. The whole power of appointment was with few exceptions lodged by this article in the governor and four senators, a majority of the five enjoying the real appointing power. An almost equally despotic power of removal was placed in the same hands. It is difficult to-day to realize the extent of power vested in the council. Few officers were elective under the first constitution; certain qualified electors voted for assemblymen; a more restricted number voted for senators and governor; and a few ancient local officers were "eligible by the people." Incumbents of all other offices, civil and military, including a large part of the judiciary, sheriffs, clerks, coroners, mayors and recorders were seated or deposed by vote of the council of appointment. Almost all of its appointees save the chancellor and the judges of the supreme court held their positions during its pleasure.

The judiciary system was very different from that which has been familiar for the last sixty years. The constitution retained the colonial supreme court and county courts, and instituted "a court for the trial of impeachments and the correction of errors." This court was to consist of the president of the senate, the senators, the chancellor, the judges of the supreme court, or a majority of them—a strange blending of legislative and judicial officers in the highest judicial tribunal.[6] In the event of an appeal from

[6] Under the United States constitution and the constitutions of most of the States, judges have no part in impeachments except as presiding officers.

the decision of the chancellor, he was required to inform the court "of the reasons of his decree," but had no voice in the final determination. When the decisions of the judges of the supreme court were under review they, in turn, had to "assign the reasons of such their judgment," and were deprived of a vote for affirmance or reversal. The constitution provided that the chancellor, the judges of the supreme court and the first judge of the county court in every county, should hold their offices during good behavior or until the age of sixty years. This early age limit forced Chancellor Kent from the bench at sixty, although, like Sophocles, he wrote his greatest work at a more advanced age. The chancellor and judges were forbidden to hold any other office except that of delegate to the General Congress "upon special occasions."

Provision was made for a lieutenant-governor who was to be president of the senate and to succeed to the governor's office in case of the latter's impeachment, death, resignation, or absence from the State. A State treasurer was to be appointed by act of the legislature originating in the assembly, no member of either house being eligible to the office. Town clerks, supervisors, assessors, constables, collectors and other local officers theretofore "eligible by the people," as the phrase ran, were to continue to be elected by popular vote, but in the manner directed by act of the legislature. The power of impeaching all officers of the State for mal and corrupt conduct in office was vested in the assembly. Trial by jury was preserved, and a State militia provided for. An unsuccessful attempt was made by Morris to secure a clause recommending the early abolition of negro slavery by the legislature.

The constitution declared the common law of England, the statute law of England and Great Britain, and the acts of the legislature of the colony of New York in force on April 20, 1777, to be the law of the State. Grants of land within the commonwealth by the King of Great Britain

after October 14, 1775, were to be void; and no purchase of lands of Indians made after October 14, 1775, was to be valid unless sanctioned by the legislature. The legislature was given authority to naturalize persons who should abjure and renounce foreign allegiance. The constitution assured to every one the free exercise of religion. It contained a peculiar clause, which was continued in the constitution of 1822, but abandoned in 1847, providing that as ministers of the gospel and priests were "dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their function," no minister of the gospel nor priest of any denomination should be eligible to any civil or military office in the State.

The famous Thirty-ninth Article of Magna Charta was embodied in the first organic law in the words: "No member of this State shall be disfranchised or deprived of any rights or privileges secured to subjects of this State by this constitution, unless by the law of the land or the judgment of his peers."

The framers of the constitution undoubtedly benefited by their colonial experience. Many of its provisions trace their lineage to the colonial government. The judicial system and county and town government remained as they had existed under the crown. Complete separation of the legislative, executive and judicial departments was not effected, and this failure was one of the things most criticised, as it was one of the defects remedied, in the Convention of 1821. In many respects the framers of the constitution had to venture into new fields without precedents to guide them. Much was to be learned from sister States and the Federal government in the course of a few years. Both the council of revision and the council of appointment exercised potent and sinister influence in the subsequent history of the State, and the desire to escape from their tyranny was a leading motive for the Convention of 1821. As the senate consisted exclusively of freeholders, as the governor was to be

a "wise and discreet freeholder," as the council of appointment necessarily consisted of land owners, the land owners controlled the judiciary and government was wholly in the control of landed proprietors.

Through the council of revision the judiciary operated as a further check in the land owners' interest. The struggle for a freer government which culminated in the constitution of 1822, found its chief obstacle in the council of revision. Popular rule in the modern sense was in fact unknown in any of the colonies, and was equally unknown in Great Britain. A partial removal of restrictions upon the suffrage was not made in the latter country until 1832.

By an ordinance adopted May 8, 1777, the convention appointed a Council of Safety, investing it with all powers necessary for the preservation of the State until a meeting of the legislature. Inasmuch as the council of appointment could not be appointed until the legislature had convened, and as there was urgent need for the execution of the laws, "the distribution of justice" and the holding of elections, the convention appointed Robert R. Livingston, chancellor; John Jay, chief justice; Robert Yates and John Sloss Hobart, puisne justices of the supreme court of the State, and Egbert Benson, attorney general. It appointed also sheriffs, county clerks and county judges in various counties. Elections were held and the returns canvassed by the Council of Safety, and George Clinton became the first governor of the State.

"The simple brevity, the 'unsuspecting simplicity' of the first constitution is in striking contrast to the prolixity of some modern constitutions, which evince a misapprehension of the real purpose of a written constitution, namely, to state principles of government in general terms, and not with the fluctuating detail necessarily incident to statutes intended to meet shifting conditions of society or administration. Under this constitution, despite its limitations, the State had a remarkable development. It witnessed the

growth and enlargement of our unsurpassed system of jurisprudence, moulded by the genius of Kent, with the aid of his distinguished associates in the judiciary. Under it were established the university and the common school; and colleges, academies and libraries were nourished and encouraged. The care of the poor and other unfortunates was provided for by a system of administration which in its essential features has continued to this day. A system of taxation was established, the statute law was frequently revised; counties, cities, towns and villages were created; internal administration adequate for the needs of the time was provided for the different branches of State and local government; and under this constitution was begun the development of a plan for the construction of the great canals which have since occupied such a large place in public affairs." [7]

The first assembly elected a council of appointment, and this council appointed Livingston to the chancellorship and made Jay chief justice, and Yates and Hobart associate justices, thus validating the appointments made by the convention. The legislature at a subsequent session, instead of meeting as a legislative body, assembled as a convention, and organized a new Council of Safety to act whenever the convention was not in session, with all the powers and authorities of the former Council of Safety,—the excuse being that owing to the state of the times a quorum of the legislature could not be convened. Just as at the outbreak of the Civil War Congress validated acts of the President of doubtful authority, so the proceedings of this Council of Safety were ratified by the legislature of 1778. The colonial legislature having been dissolved early in 1775, no legislature existed until 1777, and no laws were passed at the session of that year. In fact, no legislation took place in the colony for several years. From the outbreak of the

[7] Lincoln's "Constitutional History of New York," vol. I, 594, 595.

Revolution in April, 1775, until February 6, 1778, when the first State statute was passed, the government was vested in provincial congresses and Councils of Safety.

One of the first acts of the new State legislature was its approval of the Articles of Confederation. The significance of this has only within recent years come to be understood. On June 11, 1776, Congress, one month after it had recommended the formation by the various colonies of independent State governments, resolved that a committee should be appointed to prepare and digest a form of a confederation to be entered into among the colonies. The committee was appointed on the following day. It made its report, which was debated until November 15, 1777, when the Articles were agreed to by Congress, which at the same time directed that they should be proposed to the legislatures of the several States "to be considered, and, if approved of by them, they were advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same should become conclusive."

The legislature of New York accordingly, on February 6, 1778, instructed her delegates to sign, and the articles were signed on behalf of the State on August 8, 1778, by James Duane, Francis Lewis, William Duer and Gouverneur Morris, her representatives in the Congress. Similar action was taken by the legislatures of the other States. The action of the State legislatures was extra-legal, as it was never authorized by the people of the several States. In no State had a legislature been elected for the purpose of acceding to the articles, nor had the question of their acceptance been submitted for popular approval. It was a time of revolutionary government, and none of the State constitutions was ratified by the people. Of the failure of the citizens of the State or of the Union to ratify the Articles of Confederation it has been said: "It was the part of the people and not of the State legislatures to establish the

new government; and had the people framed these articles, the act, however unwise, would have been perfectly legal. * * * The whole system must, therefore, be considered in our political history, as a period of interregnum covering the time between the downfall of royal authority under the British constitution in 1773-1780, and the final establishment of the popular will in its place in 1789 under the American Constitution." Like the Amphictyonic Council and the European confederacies, with which the statesmen of the Revolutionary era were so familiar, the new Confederation was a mere league of States, to which the people had never been asked to agree. The Confederation was a rope of sand, but a genuine union entered into by the people of the various States followed in 1787.[8]

Most of the thirteen States promptly ratified the Articles of Confederation. A few held out for several years, Maryland being the most obstinate, for her ratification was not had until March 1, 1781. Her reluctance was grounded mainly upon her unwillingness to sacrifice her claims to western territory. On December 15, 1778, she had notified her delegates not to agree to the Confederation until these claims had been settled upon an equitable basis. Finding later that persistence in her objections was imperilling the cause of union, she notified her representatives to ratify the articles. New York, to her credit, set an example of generosity worthy of emulation by the other States. She was the first to surrender all claim of title to public lands in the west. Had her claims been established, her boundaries would have extended to the peninsula of Michigan

[8] "It is, Sir, the people's Constitution, the people's government, made for the people, made by the people, and answerable to the people. * * * We are all agents of the same supreme power, the people. The general government and the State governments derive their authority from the same source." Webster, The Reply to Hayne. See also Webster, "The Constitution not a Compact Between Sovereign States," in Reply to Calhoun. These are the two foremost of Webster's great constitutional expositions.

and the mouth of the Ohio. Actuated by the desire of effectuating an alliance among the States under the articles, she generously ceded a vast domain, notwithstanding the fact that a committee appointed by the Congress of the Confederation had reported in favor of her title. Virginia in 1784, Massachusetts in 1785, and Connecticut in 1786 followed New York's example; Connecticut, however, retained as the foundation for her school fund a small tract which subsequently became known as the Western Reserve; and out of these ceded lands was formed the Northwest Territory.

New York also suffered a loss of territory on her northeastern border by the so-called New Hampshire Grants, but it was land to which she really never had pretensions deserving to be sustained. These were grants of land by the Provincial Governor of New Hampshire, Bennington Wentworth, who, between 1749 and 1764, asserted that she might legally extend her western boundary to the line claimed by Massachusetts and Connecticut, about twenty miles east of the Hudson River.

By virtue of the grant to the Duke of York in 1663, New York claimed all land from the Connecticut River to the Delaware, but the grant was silent as to how far north her territory extended. Accordingly Governor Colden of New York issued grants covering the lands already occupied by actual settlers under the New Hampshire government, and a sharp dispute arose between the two governments.

New York appealed to the king in council, who, in July, 1764, issued an order declaring the western banks of the Connecticut, as far north as the forty-fifth degree of north latitude, to be the boundary line between the provinces. Under this order Colden continued to grant immense tracts of land, and the former purchasers were required to take out new grants or run the risk of ejectment. At first the owners of the New Hampshire grants defended ejectment suits, but afterward made default and resisted the execu-

tion of the ejectment writs by force. They opposed the opening of the royal courts, and through town meetings and committees of safety maintained a government independent of New York. In January, 1777, they organized an independent State under the name of New Connecticut, which, in June of the same year, was changed to Vermont.

In June, 1777, Vermont petitioned Congress for recognition as an independent State. Through New York's influence Vermont for years was kept out of the Union. She was actually admitted as a State on March 4, 1791, under act of Congress, approved February 18, 1791.[9]

Vermont had forbidden negro slavery by her organic law. Jay had unsuccessfully sought to insert in the New York constitution a prohibition upon negro servitude. Rufus King, in the House of Representatives in 1785, had offered a proposition to exclude slavery from the Northwest Territory. One of the earliest champions of the cause of abolition was Aaron Burr. According to his biographer, Matthew L. Davis, a bill was introduced in the legislature on February 14, 1785, for the gradual abolition of slavery within the State of New York, which provided that all negroes born after its passage should be born free. Burr, it seems, moved to amend, and proposed to insert a provision that slavery should be entirely abolished after a day specified; but his amendment was lost.

As of special interest to lawyers, it may be observed that as early as March 5, 1778, the legislature required an oath of allegiance to the new government to be taken by all office-holders, including all officers of courts. By a law enacted October 9, 1779, all attorneys, solicitors and counselors-at-law were summoned to produce "certificates of

[9] The constitution of Vermont, originally adopted in 1777, but slightly altered in 1785, was far more democratic than that of New York, as it accorded the right of suffrage to every man of twenty-one years of age, of quiet and peaceable behavior, and a resident in the State for one year preceding the election.

their attachment to the Liberties and Independence of America," under penalty of suspension from practice; and on November 20, 1781, near the close of the war, a law was passed providing for the administration of a test oath, and forbidding all members of the profession who refused to take it from pursuing their vocation. These stringent measures, which must undoubtedly have benefited lawyers able to prove their loyalty to the cause of the revolutionists, remained in force until April 4, 1786, when all disabilities upon Tory practitioners were removed. Yet for a number of years the favored members of the profession were able to enjoy its emoluments with little fear of competition.

The Articles of Confederation were ratified by the several States without popular consent; not so the Constitution of the United States. Conventions were called in the different States to pass upon the question of its ratification. In the State of New York delegates were elected by the people and assembled in convention in Poughkeepsie on June 17, 1788. To counteract the opposition to ratification of the anti-federalists under Governor George Clinton's leadership required all Hamilton's genius, skill and energy. The convention was so closely divided that ratification was obtained by the narrow margin of three votes. When the convention reached this decision the new union was an established fact, for ten States had already approved the constitution and ratification by nine only was needed to carry the new government out of the realm of theory. New York therefore had to decide whether to enter an actual union or remain outside of it.

The anti-federalists had at first proposed a conditional ratification, their terms being the incorporation in the new constitution of a series of amendments constituting a Bill of Rights. When it became evident that the new government would be a success even without New York, the delegates decided to vote for ratification and to change their

conditional acceptance into expression of a hope that their suggestions would be adopted. Two of the proposals which emanated from New York were never accepted. The first ten amendments embody suggestions from several of the States, and upon the resolution of the first Congress (September 25, 1789), these were submitted to the members of the union and were ratified by a sufficient number of States on or before December 15, 1791. New York, the eleventh State to enter the union, was the eighth to ratify the amendments.

The Colonial Laws of New York which, according to the constitution of 1777, were made an integral part of the common law of the State, acquired new importance and underwent various revisions. The earliest statutes of the State were revised and collected by direction of the legislature, and were published in 1789 by the revisers, Samuel Jones and Richard Varick. A new revision was undertaken in 1801 by Justice James Kent and Justice Jacob Radcliff. In 1813 a revision was made by William P. Van Ness and John Woodworth, known as the Revision of 1813. This revision, which is in two volumes, contains certain important ordinances of the Governor and Council of the Colony, including the Charter of Liberties and Privileges of October 30, 1683, and also the Articles of Capitulation signed by Nicolls on behalf of the Duke of York upon the surrender of the colony to England. None of these revisions appears to have been complete.

Shortly after peace with Great Britain, the State of New York created a comprehensive plan for the education of its people. In 1784 Governor Clinton invited the attention of the legislature to this subject, and the legislature, in response, established a board of regents for the University of New York, and changed the name of King's College to Columbia, which by this act was also erected into a university. The members of the board of regents were patrons of learning, and they, in turn, persistently advocated the organ-

ization of a common school system. In 1789 the State took the first real step toward the establishment of education upon a substantial foundation. The legislation of that year was followed, in 1795, by an act appropriating annually for five years, out of the public revenues of the State, the sum of fifty thousand dollars, to encourage and maintain common schools in the several cities and towns of the State, and requiring supervisors to raise by tax in each town a sum equal to one-half of its proportion of the moneys appropriated by the State. Commissioners and trustees were directed to be appointed, and were required to make annual reports to the Secretary of State. This legislation expiring in 1800, Governor Morgan Lewis again brought up the subject in his message to the legislature of 1805. A law was thereupon enacted by which the proceeds of 500,000 acres of public land were to be erected into a fund to be accumulated until its annual income should attain the sum of fifty thousand dollars, when the income was to be applied to the support of the schools. This fund was enlarged by various appropriations, until in 1819 it had reached the sum of $1,200,000. In June, 1812, the legislature provided for the election in town meetings by the citizens of each town, of three commissioners of education to manage the concerns of the schools within the town, and six persons, who, together with the commissioners, should be inspectors of schools, the functions of the inspectors being to examine teachers, visit the schools and advise the trustees. The school commissioners were authorized to divide their towns into school districts, and the people of the districts were authorized to elect trustees. This ancient system is still in force throughout the rural portions of the State. By the constitution of 1822 the common school fund was rendered inviolable and directed to be devoted in perpetuity to the advancement of common schools. By degrees the productive capital of the fund was augmented, so that by the year 1842 it amounted to $1,968,000.

Except as modified in 1801, the constitution of 1777 remained in force for upward of forty-four years. The commonwealth grew and prospered in this interval to an unexampled and unexpected extent. The chief defects in the constitution were the creation of the council of appointment and of the council of revision. And its oligarchic form of government was unsuited to a democratic State. The circumstances which led to the Convention of 1821 will form the subject of the next two chapters.

CHAPTER IV

THE COUNCIL OF APPOINTMENT—HAMILTON'S VIEW—GREAT BODY OF OFFICE-HOLDERS, ITS APPOINTEES—STAR-CHAMBER POWER—FEDERALIST PARTY FIRST TO ABUSE THE POWER—CONTROVERSY BETWEEN GOVERNOR CLINTON AND COUNCIL IN 1794—CONTROVERSY BETWEEN GOVERNOR JAY AND COUNCIL IN 1800—CONSTITUTIONAL CONVENTION OF 1801—ITS CONSTRUCTION OF ARTICLE XXIII—EFFECTS—RISE OF DE WITT CLINTON TO POWER—ABUSES OF THE PATRONAGE SYSTEM—HAMMOND AND THE COUNCIL—GENERAL DESIRE IN 1820 FOR ITS ABOLITION.

The organization of the council of appointment was, according to Hammond, one of the two anomalies in the constitution of 1777, the other being the institution of the council of revision.[1] [2] Until the rise of distinct political

[1] In an elaborate monograph entitled "DeWitt Clinton and the Origin of the Spoils System in New York," Columbia University Press, 1907, Mr. Howard Lee McBain, Ph.D., has undertaken a defense of Clinton's policy in the distribution of offices in New York in 1801. Mr. McBain has made a critical and searching examination of the manuscript minutes of the council of appointment up to 1801, and his essay, which is a valuable contribution to the literature bearing upon the council, is based upon a study of these documents.

[2] In an article entitled "The Council of Appointment in New York," 7 P. S. Q., 80, Professor J. M. Gitterman maintains that the contests of the provincial period turned largely upon the question of the appointing power. Since the royal officials were to be paid from the proceeds of the provincial taxes, the New York assembly accordingly strove to gain the right of nominating all those officials whom the province had to support, i. e., all except the royal governor. The people came to regard appointment and taxation as correlative functions of government and aimed at the control of both. They desired

parties after the ratification of the Federal Constitution, the council of appointment seems to have exercised its prerogatives without arousing much public censure, although there are intimations from the pen of Hamilton in *The Federalist* that its action in the earliest days was subject to just criticism. During the deliberations of the Federal Convention of 1787, the plan of a council of appointment was urged upon that body,[3] which wisely decided to give exclusive power of appointment to the President, subject to confirmation by the Senate. Hamilton, in one of his papers in *The Federalist,*[4] in contrasting the superiority of the method of appointments proposed in the Federal Constitution over that of New York, analyzed with keenness the defects of the State system, which had then been in existence for a decade. After adverting to the fact that the blame of a bad nomination would fall upon the President alone, and the censure of rejecting a good one would lie with the senate, and that both the executive, for nominating, and the senate,

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to secure the appointing power, and as a first step they demanded the right of voting and apportioning the taxes and supplies. After the English revolution of 1688, freeholders of the province obtained a representative assembly. The appointing power was left with the governor, who was responsible only to the crown. But the granting of the taxes from which the salaries and other governmental expenses were to be paid was in the power of the assembly; and this body constantly refused to grant supplies till its grievances were redressed. The governor, treated with more or less indifference by the home authorities, had to contend with the hostility of the French and the never-ending alarms aroused by the Indian confederations. By the time that George III. ascended the throne, a conflict of nearly a century had wrested the power of appointment from the executive and had given it to the assembly. Those contests were fresh in the minds of the members of the convention, and had created a strong prejudice against one-man power, as is evidenced by the decision which was reached as regards the treasurer. It was determined that this officer should be elected by the assembly and senate, independently of the governor. The same distrust of the governor underlies all the plans proposed for the bestowal of the State patronage.

[3] Dougherty—"Power of Federal Judiciary over Legislation," 51, 53, 57.

[4] No. lxxvii; see also lxix and lxx.

for approving, a bad nomination, would incur in different degrees opprobrium and disgrace, Hamilton declared that the reverse characterized the manner of appointments in New York. The council was a "small body, shut up in a private apartment, impenetrable to the public eye." The governor "claimed the right of nomination upon the strength of some ambiguous expressions in the constitution," but it could not be publicly known whether his claim was admitted or opposed, for the proceedings were secret. An unbounded field for cabal and intrigue lay open, and all idea of responsibility was lost. Every council, however constituted, was a conclave in which sinister influences would have full swing. These evils would not be remedied by a frequent change in its personnel, for this would involve the mischiefs of a mutable administration in their full extent. Such a council would also be more liable to executive influence than the senate, because smaller in number and less immediately under public inspection.

As few officers were elective, the great body of office-holders were appointees of the council. Almost none, with the exception of the chancellor, the judges of the Supreme Court, and the first judge of each county court, enjoyed immunity from removal during good behavior. The commissions of the county judges ran for only three years, and unless these were renewed, partisanship found its opportunities in the council. With the election of every new assembly, especially after a change of party, every existing council was liable to deposition, and the business of its successor was the distribution of the entire patronage of the State among political friends and retainers. Security of tenure during efficient administration was probably the principle upon which Governor George Clinton and his successor Governor Jay acted, as a rule. The same precept was enunciated by Washington and by Jefferson in respect to Federal appointments and removals. But as party antagonisms increased in intensity and violence, the entire

list of civil and military appointments in the State became the instrument for rewarding political loyalty. By degrees the ambition of political leaders and the cupidity of their followers evolved the notion that no office not immune from change by constitutional fiat could be held longer than a year. The prerogative of nominating was too vast to be conceded to the governor without a struggle; hence the pretensions of the four senators in the council that they had the same right as he to nominate; hence, also, the construction placed upon article XXIII of the constitution by the convention which assembled in 1801.

It was the star chamber power of the council of appointment that has rendered the politics of this State unfathomable to citizens of other commonwealths. The system accounts for the rise to important station of men of mediocre abilities, and the singular absence from political office of men of commanding talents. New York has produced many statesmen of more than average faculty, yet few intellects of the highest political order. Even her most conspicuous political figures have had their vision narrowed by thoughts of patronage. Hamilton, who was not native born, is the only political genius in the whole history of the State.

By the irony of Fate, the Federal party, which installed the truer system of appointments in the national constitution, was the party which first prostituted the State appointive system. It was while Governor Clinton was serving his seventh term that the earliest open breach between the governor and the council occurred, and it arose over an appointment to the Supreme Court. The council of 1777 had appointed three judges; later the appointment of a fourth judge was voted; the place was offered to Aaron Burr, who refused to accept it, and Morgan Lewis was appointed in his stead.[5] In 1793 the question of creating a fifth place upon

[5] "The real work of the council began in 1778. At first, its powers were exercised in a very conservative spirit. During the continuance of the struggle with England it was, of course, necessary to

that bench was publicly discussed. The ardent wish of the New York Federalists was to see Egbert Benson, a lawyer of distinction and a scholar of no inconsiderable attainments, seated in that tribunal. Clinton and the members of the council not being in accord as to the person to be preferred to the office, an opportunity successfully to urge their candidate came to the Federalists in 1794, when their party secured ascendency in the new assembly and returned Federalist senators from the southern, eastern and western districts. Josiah Ogden Hoffman, an assemblyman from New York, delivering a "violent philippic against the existing council" for its failure to appoint a fifth judge, moved that the house proceed to choose a council of appointment. He was warmly supported by Ambrose Spencer, then a member of the Federalist party, but the motion was strenuously resisted on the ground that the existing council had not been in office an entire year, and that a new council could not be elected before the close of its term. It seems, according to the minutes of the council of 1793, that, while the appointment of a fifth judge was under consideration, differences of opinion had developed as to whether an additional judge was needed. Hoffman's motion was promptly carried, and General Philip Schuyler, Hitchcock, Strong and Hopkins were elected members of the incoming council, the first three pronounced Federalists. Schuyler was almost violent in his antipathy to Governor Clinton, whose use of the appointing power he had often censured, and owing, perhaps, to the intimate relations between him and Hamilton, they were in accord in the opinion expressed by Hamilton in *The Federalist,* that scandalous appointments to important offices had

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restrict the offices to the friends of independence; but it was not customary to employ the patronage of the State to strengthen any particular group of patriots or to increase the political following of any particular leader. The proscription of all opponents was not yet the rule. Nor was it yet perceived that the principle of rotation in office might be so applied as greatly to increase the number of rewards available for friends." J. M. Gitterman, id.

been made under Clinton. When the council convened, Benson was nominated for the supreme court by one of the Federalist members of the body, and all the Federalists in it voted for him, despite Clinton's remonstrance that he as governor alone had the power of nomination.

In the following October the governor published a protest against the action of the majority of the council in the *Albany Gazette,* which printed on the same day the reply of the Federalist members of that body. After contending that the exclusive power of appointment was vested in him, the governor argued that the council had not the power, which the majority further claimed, of displacing any officer or of determining upon the number necessary for the proper execution of the laws—that these were matters confided exclusively to the executive. Although the constitution seemed in many cases to refer the continuance of an office to the pleasure of the council, "by this was not intended a capricious arbitrary pleasure, but a sound discretion to be exercised for the promotion of the public good." The contrary practice would be pernicious and its consequence would be "to deprive men of their offices because they have too much independence of spirit to support measures they suppose injurious to the community, and might induce others from undue attachment to office to sacrifice their integrity to improper considerations." The reply of the Federalist members of the council was, in effect, an attempt to establish that the governor's practice had not conformed with the high precepts enunciated in his protest.

Governor Clinton, whose term of office was about to expire, declined to stand for re-election. The Republicans nominated Chief Justice Robert Yates for the governorship; the Federalists, John Jay; and at the April election in 1795, the latter was elected by a large majority of the votes of the freeholders of the State. No quarrel arose between Jay and the members of the council of appointment until 1801, for the councils chosen in 1796, 1797 and 1798 were largely,

if not entirely, composed of Federalists. Despite Jay's re-election in the spring of 1798, the Republican party was increasing in power and influence in the State. It secured large accessions in the assembly, especially from the city of New York, which returned, among others, Aaron Burr and John Swartwout. By one of those curious revolutions not uncommon in politics, the election of 1799 resulted unfavorably to the Republicans. Mainly through Burr's efforts the Republican defeat of 1799 was converted into a Republican triumph in the following year, when the party secured a majority of twenty-five in the assembly and control of the incoming council of appointment. As the legislature then chose presidential electors and the Federalists had a majority of only six in the senate, the Republicans were able to secure electors of their party. Republican success in New York meant the success of the party throughout the nation. The city of New York, which in the preceding year had given a Federalist majority of nine hundred, elected the entire Republican assembly ticket, and the party was successful in three of the four great senatorial districts of the State. Upon the convening of the legislature in November, a resolution was offered in the assembly for the immediate election of a new council of appointment. This resolution was vehemently opposed by the Federalists upon the identical ground upon which Hoffman's resolution to elect a new council had been resisted in 1794—that the old council had not been in existence for a year. The position of the two parties was the reverse of what it had been in 1794. The governor was now a Federalist, the dominant party in the legislature Republican, the existing council Federalist; whereas in 1794 the governor was Republican, the legislature controlled by Federalists, and the council Republican. The only difference lay in the fact that after election the Republicans announced their intention to fill with party friends offices which had relation to party politics, and to distribute the remaining places among members of the two

parties in the proportion which the vote for their candidates justified.

The chief exponent of this policy, DeWitt Clinton, nephew of the former governor, was coming to be recognized as the dominant factor in the politics of the State. The resolution to elect a new council was adopted by the assembly, and a new council immediately chosen, the members of which were DeWitt Clinton, Ambrose Spencer, Robert Roseboom and John Sanders, all, with Sanders' exception, Republicans. The new council met on February 11, 1801. Clinton and Spencer were at this time in accord in their political beliefs and policies, and the alliance between them continued unbroken until 1812. Roseboom was a plastic instrument in their hands, so that they were readily able to control the council and make appointments and removals at will. Their determination to seize the power of nomination occasioned immediate hostility between them and Governor Jay, similar to that which had taken place between Governor Clinton and the council of appointment in 1794.

War between the governor and the council at once broke out. Jay nominated Jesse Thompson for sheriff of Dutchess county; a majority of the council refused to concur. He made seven other nominations for the same office, all of which were rejected by the council. Some few of his nominations for other places received approval. At an adjourned meeting the governor urged Benjamin Jackson for the office of sheriff of Orange county, but without success. Other nominations of his also failed, whereupon DeWitt Clinton, claiming the right of nomination to reside in each member of the council, proposed John Blake, Jr., for sheriff of Orange county. The governor declined to put the question upon this nomination, but nominated John Nicholson instead. A majority of the council refused to vote upon his nomination, and the governor refused to put the question upon Blake's nomination, as he deemed the executive pos-

sessed of exclusive power to nominate. In view of the deadlock he declared that he would have to consider what course of conduct to follow and requested time for the purpose. Whereupon the council was adjourned. Acting upon his constitutional prerogative, the governor never reconvened it. Two days later he sent a special message to both houses of the legislature, in which, setting forth the differences between himself and the Republican majority of the council, and recalling that in his first speech after election he had urged the importance of legislation declaratory of the powers of the governor as president of the council, he again requested the houses to determine upon the true construction of the twenty-third article of the constitution. His message asserted his belief that the constitution vested in the governor exclusive right of nomination, although he acknowledged that the claim of a concurrent right in other members had been made in 1794. The Republican assembly decided (and perhaps the governor anticipated the decision) that the legislature had no constitutional right to interpret any provision of the organic law. The Federalist senate, on the contrary, resolved that the legislature had this power. Failing in his appeal to the legislature, Jay asked the chancellor and judges of the supreme court for an opinion, which they declined to give, as not within the scope of their judicial duties.

Jay next sought legislation which would permit a suit for the determination of the question, but the Republican assembly defeated a bill introduced for that purpose. A new election for the governorship was to take place in April (1801), and as a result of the antagonism between the governor and the other members of the council, and of the conflicting views developed in the two houses, the constitutional issue was injected into the campaign, which was conducted with much asperity of temper on both sides. Spencer was, perhaps, the recipient of the bitterest criticism. In 1794, as a Federalist member of the assembly, he had supported

Hoffman's motion for the election of a new council. In 1797 he was one of the Federalist council of appointment. In the next year, for some inscrutable reason, he left the party and became a Republican—a change that caused him to be attacked as the "political chameleon."

The governor's efforts to secure from the legislature and the judiciary an interpretation of the constitution evoked a challenge of his claim from the Federalist members of the council. In a communication to the assembly they gave their version of the controversy, presenting lengthy arguments to support the concurrent power of nomination. Unless the wheels of government were to be completely blocked, a constitutional convention became inevitable, for no authority but the people, the assumed makers of the constitution, existed to say where the right to nominate was vested. On April 6, 1801, a law was passed recommending the citizens of the State to elect by ballot delegates to meet in convention "for the purpose of considering the parts of the constitution of this State respecting the number of senators and members of assembly in this State, and with power to reduce and limit the number of them as the said convention might deem proper; and also for the purpose of considering and determining the true construction of the twenty-third article of the constitution of this State relative to the right of nomination to office." The bill did not provide for a prior vote by the electorate upon the question whether a convention ought to be called.

The constitution of 1777 contained no provision for its own amendment. Before calling upon voters to elect delegates to a convention, the legislature in strictness should have given them opportunity to decide whether they wished to summon it. This was the course insisted upon by the council of revision in 1820 and ultimately adopted by the legislature in March, 1821. But in 1801 the council of revision seems to have made no objection to the bill for the election of delegates. Nor did the law for the election

of delegates require ratification by voters of the proceedings of the convention. Reapportionment of members of the senate and assembly had become important in view of changes in the population of the State; hence reapportionment and the construction of article XXIII were the only subjects to be considered by delegates.

The convention met at Albany on October 13, and elected as its president, Aaron Burr, then vice-president of the United States. Burr had been chosen a delegate from Orange county, although not a resident of that county. The sessions of the convention lasted fifteen days. Two questions only were submitted to it, and as Burr in a letter to his daughter Theodosia said, its proceedings might have been concluded in about six hours. The reapportionment of legislative members was easily accomplished, and the result of the election of delegates foreshadowed the interpretation that would be put upon article XXIII of the constitution; in fact, the practice of both parties would have made it inconsistent for either to sustain Governor Jay's contention.

By a large majority, 86 to 14, the convention voted that by the true construction of the twenty-third article "the right to nominate all officers other than those who, by the constitution, are directed to be otherwise appointed, is vested concurrently in the person administering the government of this state for the time being, and in each of the members of the Council of Appointment." [6] Hammond declares "the

[6] The constitutional resolution of 1801 is perhaps the only case of the exercise of judicial power by the people of a State in convention assembled. Here the people in their function of the highest court ordained and declared the construction of the constitution. This followed by a few years the ratification of the eleventh amendment to the Federal constitution, adopted to nullify the decision of the Supreme Court of the United States in Chisholm v. Georgia, which upheld the right of an individual citizen of one State to sue another State. The amendment, however, declares that "the judicial power of the United States shall not be *construed* to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." This

unanimity" to have been "somewhat extraordinary." The vote was reached after little debate. John V. Henry, a Federalist and a distinguished lawyer, perhaps in disgust at his own recent removal from the comptrollership, argued in support of the exclusive right of the governor to nominate. William P. Van Ness and Daniel D. Tompkins recorded themselves in favor of the governor's view. Tompkins, who afterward sat in the Convention of 1821, thus referred in that body to his vote in 1801: "The convention of 1801 was assembled to sanction a violent construction of the constitution." To him, he added, it was a proud triumph, that at the age of twenty-six he had stood alone against the then dominant party. The vicious theory, although not yet embodied in the epigrammatic maxim "to the victors belong the spoils," was too deeply rooted in practice to prevent the successful party from using all agencies of government to reward its supporters and punish enemies and deserters. The power could not be employed with scientific precision unless the right to nominate belonged to every member of the council. This construction of the constitution was soon to be used against one of its foremost advocates with telling effect. Burr, then in the zenith of his fame and influence, by giving his sanction to it, simply sealed the power of DeWitt Clinton to humiliate and crush him, as he soon afterward learned. His overthrow was accomplished by Clinton with the aid of Livingston, the ex-chancellor, who had begun his political career as a Federalist, but ceased, after 1797, to associate with the Federal party. The council of appointment which Jay had dissolved in February, 1801, was summoned together by his successor, Governor George Clinton, in August of the same year, and this council not only deposed practically all Fed-

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amendment had been proposed by Congress to the legislatures of the several States on September 5, 1794, and after its ratification by three-fourths of the States, became part of the constitution on January 8, 1798.

eralists, but in parcelling out the offices ignored the Burrite faction altogether. "Not a single appointment of the least importance," says Hammond, "was conferred on the known friends of Colonel Burr." The treatment meted out to Burr aroused the wrath of his brilliant lieutenant, William P. Van Ness, who, under the name "Aristides," denounced the Clintons. "With astonishment," he wrote, "it was observed that no man, however virtuous, however unspotted his life or his fame, could be advanced to the most unimportant appointment, unless he would submit to abandon all intercourse with Mr. Burr, vow opposition to his elevation, and like a feudal vassal, pledge his personal services to traduce his character and circulate slander."

The subsequent history of this despotic appointive body was what might have been expected after the construction put upon article XXIII by the convention of 1801. It became a pitiless political machine. Morgan Lewis, who owed his elevation to the governorship (1804) to a combination made by the Clintonians and the Livingston family, of which he was a member, against Burr, was soon afterward marked for proscription. Clinton, who was a member of the council of 1806, induced it to remove Maturin Livingston, the governor's brother-in-law, from the office of recorder of the City of New York, and to appoint Pierre C. Van Wyck in his stead. Thomas Tillotson was deposed from the office of secretary of state, and his place given to Elisha Jenkins. These removals and appointments were not effected without protests from the governor and another member of the council, Huntington. According to Hammond, the chief authority for this period, the war upon the governor became open and undisguised, and it was conducted with extreme virulence. "In all the minor appointments, such as sheriffs, county clerks, surrogates, county judges, and justices of the peace, those candidates were preferred by the council, who were known to be hostile to the re-election of Governor Lewis." Lewis,

in turn, after his re-election, employed the council to punish the younger Clinton, who had previously resigned his office of senator at Washington to become mayor of New York City.[7] The council of 1807 removed him from the mayoralty, appointed Colonel Marinus Willett mayor, removed Recorder Van Wyck, and reappointed Maturin Livingston; removed Jenkins from the office of secretary of state, and reappointed Dr. Tillotson. All obnoxious Clintonians lost their positions. In 1804 Lewis had made one appointment for which he is entitled to lasting gratitude—that of James Kent to the chief justiceship of the Supreme Court, which he himself had left for the governorship. Daniel D. Tompkins, then a congressman, was given Kent's vacant seat of associate judge. In less than three years he was to replace Lewis, whose success was temporary. The election of Tompkins as governor was a triumph for Clinton; it restored to the Clintonian Republicans control of the council, which promptly proceeded to the performance of its expected work, removing Tillotson, reinstating Jenkins, making Clinton again mayor, reappointing Van Wyck recorder in place of Maturin Livingston, and appointing Sylvanus Miller, Clinton's personal friend, to the surrogateship of New York County, from which the Lewis council had removed him to make way for Ogden Edwards. Among the appointments made by this Clintonian council was that of Martin Van Buren to the office of surrogate of his native county, Columbia. Woodworth, notwithstanding his Republicanism, was removed from the attorney-generalship because he had supported the cause of Governor Lewis. "This council proceeded to send new general commissions

[7] Upon the resignation of Edward Livingston from the mayoralty of New York City in the summer of 1803 Morgan Lewis, then chief justice of the Supreme Court, was a rival candidate for the office against DeWitt Clinton. The importance at that time of the mayoralty could not be better illustrated, for it was sought by a United States senator on the one hand and the chief justice of the Supreme Court on the other.

of the peace into many of the counties, and in the course of a few months brought about almost an entire change of persons holding civil offices in the State." [8]

DeWitt Clinton had become the arbiter of politics in the State. The victorious Clintonians turned their eyes to the national capital with the ambition of making the vice-president, George Clinton, Democratic nominee for president, but in this they were foiled by the Virginia dynasty. In 1809 the Federalist party regained control of the assembly, largely because of public excitement against the embargo. The new council removed Republican officials and substituted Federalists in their place. Its policy was "thorough"; but in the following year, when the Republicans re-elected Tompkins and carried the assembly, the council of that year at once undid the acts of its immediate predecessor by removing Federalists from office and restoring previous Republican incumbents. DeWitt Clinton again became mayor of New York City, and, remarkable as it may seem in these days, soon afterward became lieutenant-governor as well. The council of 1812 [9] was Clintonian, and the Albany *Register* soon began to urge the claims of DeWitt Clinton for the presidency. He was nominated by a legislative caucus in May, 1812, but in the canvass of presidential votes had only eighty-nine electoral votes as against Madison's one hundred and twenty-eight. In the year 1813 the council of appointment had a strongly Federalist complexion. Its removals of Republicans and appointments of Federalists were general in offices of great and also small importance throughout the State. Abraham Van Vechten succeeded Thomas Addis Emmet as attorney-general, and Josiah Ogden Hoffman succeeded Van Wyck as recorder of New York. The council of 1814 also was Federalist. This council is entitled to the credit of placing Kent in the chancellorship (Lansing, the previous incum-

[8] Hammond, "History of Political Parties in New York," I, 263.

[9] Vice-President George Clinton died at Washington, April 20, 1812.

bent of the office, having reached the age limit), and of making Smith Thompson chief justice. It appointed General Platt, the party's recent unsuccessful candidate for governor, justice of the supreme court to fill the vacancy created by Smith Thompson's appointment to Kent's former place. In 1815 the Republican party again came into power in the State; Van Buren, who had been deposed by the council of 1813 from the surrogateship of Columbia county, was made attorney-general, as Van Vechten's successor. The long-continued alliance between DeWitt Clinton and Ambrose Spencer was disrupted; Clinton was removed from the mayoralty of New York, and his political fortunes were soon afterward at their lowest ebb; yet, in a few years, he was raised to the governorship and the appointing power was again used to punish his enemies. But before the close of his administration the people of the State had become disgusted with the council and had decided to abolish it.

The council of 1816 made comparatively few removals, as its friends were in possession of the more valuable offices. The council of 1817, which was friendly to Clinton, who in the spring of that year had been elected governor, removed the Tammany men from office.[10] Its most signal act was the deposition of the secretary of state, Robert Tillotson, son of the Dr. Tillotson who had several times been exalted to the office and several times removed from it, and the appointment of Dr. Charles D. Cooper in the younger Tillotson's place, although no objection could be made to him save that he had opposed Clinton's aspirations.

Hammond, the historian, was himself a member of the council of 1818. The two leading factors in the senate

[10] The members of this council were, with the exception of Bowne, the New York City member, close friends of the governor. At a meeting of the council, held August 27, it was suggested that the governor was in a position to punish office holders who had been inimical to his interests, but to these importunings it has been said he turned a deaf ear.

consisted of the governor's supporters, and the Bucktail party, which was opposed to him. Van Buren, the master spirit of the anti-Clintonians, while feeling a deep interest in the selection of the council, recognized, says Hammond, the danger of having it so constituted as to be avowedly hostile to the governor, for "in that case the public would impute all the errors which might be committed, to the council, and judge of the executive by his speeches." A council favorable to the governor was not to be appointed, but it was "desirable to form a council which the governor could not control but for whose acts the public would hold him responsible. In other words, Mr. Van Buren wished to create a council which should be really hostile to the governor. Partly by management and partly by accident, a council of the character last described was actually chosen."

In accordance with custom, the members of the council were selected by a caucus of Republicans from each of the four senatorial districts. A coalition of Republicans in Rensselaer county demanded the removal of William L. Marcy, then recorder of Troy; he was deposed, and Dr. Cooper was removed from his office of secretary of state. Hammond himself was adverse to Marcy's removal and to the proposed removal of Van Buren from the attorney-generalship, but for party reasons afterward voted for Marcy's deposition. In this year a bill for a constitutional convention was introduced in the assembly by Ogden Edwards of New York, with the idea of procuring the council's abolition. "All men," says Hammond, "had become disgusted with the appointing power * * * and so universal was the opinion that a change ought to be made that I was satisfied that the Council of Appointment could not much longer form a part of our governmental machinery."

By the year 1819 the breach between the Clinton and the Bucktail factions had become impassable. From that

time they were known as distinct political parties, the opposition of the Bucktails to Governor Clinton being ostensibly rested upon dislike of his ideas upon internal improvements. The council of 1819 made appointments almost exclusively from the governor's friends, many of whom were Federalists, the Bucktails being almost universally proscribed. In this year Van Buren lost his post of attorney general, and Thomas J. Oakley, then the Federalist leader in the assembly, was elevated to his place. Peter A. Jay, son of John Jay, was installed as recorder of New York City in Richard Riker's stead.

The council of 1820, elected by a Republican assembly overwhelmingly favorable to the summoning of a constitutional convention, was in the hands of the governor's political enemies. Roger Skinner, one of its most active members, was a Federal judge of the northern district of New York, holding simultaneously three distinct offices—Federal judge, State senator,[11] and member of the great appointing power. So influential was he that the council came to be known as Skinner's Council. Of its remorseless enforcement of the doctrine that "to the victors belong the spoils," Hammond gives the following account:

"The Council met on the 12th of January, and on the first day of their meeting they ordered the issuing of eleven writs of *supersedeas* to as many sheriffs of counties. They removed Archibald McIntyre from the office of comptroller. The comptroller, since Mr. McIntyre had been the incumbent of the office, had been considered rather as a working man than as a politician. Neither the Council of 1807, 1810, 1813, nor 1814, although Mr. McIntyre was decidedly hostile to them, had manifested the least disposition to remove him. They were aware that it required time and experience to become well acquainted with the financial concerns of this great State, and with the best and most proper mode of managing them; and they treated Mr. McIntyre as before stated, rather as a laborer employed by the State than as a political office holder. Besides, all men admitted that he was an accurate and able accountant, and an honest man. His removal produced great excitement and its effect upon the community would have been greater

[11] The constitution of 1822 put a stop to this evil (§ 11, Art. I).

had not the Council made a judicious selection of a successor. That successor was John Savage, the son of the venerated Senator Edward Savage, and late chief justice of this State. * * *

"The Council also, on the same day, removed Thomas J. Oakley from the office of attorney-general. This was anticipated. Samuel A. Talcott,[12] then a young lawyer, who resided in Utica, was appointed in his place. Mr. Talcott had not then acquired much eminence at the bar, but he soon developed talents in his profession of the highest order. This appointment was considered as peculiarly Mr. Van Buren's; and the amiable traits in Mr. Talcott's character and his splendid legal talents fully justified Mr. Van Buren in taking a warm interest in his favor. Mr. Talcott had been a federalist, but with many others of that party had opposed the election of Mr. Clinton; and Mr. Van Buren, no doubt felt, that good policy required that some distinguished mark of attention and respect should be bestowed on some of the individuals who had been ranked among the federalists. * * *

"The Council did not confine their operation, even on the first day of their meeting, to the removal of civil officers, but superseded several gentlemen holding military commissions. Heretofore, this class of office holders, in consequence of the unproductiveness of their offices, had, during all the political revolutions, remained undisturbed. * * * Stephen Allen was appointed mayor of New York, in lieu of Cadwallader D. Colden, and Peter A. Jay was removed from the office of recorder, to which Richard Riker was appointed.

"After making these changes in the great officers of the State, the Council proceeded into every county and removed all, or nearly all the sheriffs, clerks, surrogates, judges of the courts of common pleas, and justices of the peace, who were known or suspected to be politically opposed to them.

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"But there is one act of this Council, which, in my judgment, admits of no reasonable apology. The act to which I refer, was the removal of Gideon Hawley from the office of superintendent of common schools. Mr. Hawley had, by great skill and labor, formed our common school system. All who know him, and he is now, and was then generally known, admit not only his fitness, but his peculiar fitness for that office. On the able and faithful discharge of his duties depended, not the temporary success of this or that party, but in a considerable degree the weal or woe of the rising generation. The Council removed him and appointed in his place Welcome Esleeck, Esq., a mere collecting attorney, who had scarce any of the requisite qualifications of a superintendent of schools. So gross was this outrage, that the political friends of the Council in the legislature would not submit to it. Gen. Root soon after the appointment of Mr. Esleeck for, as

[12] For interesting pictures of Talcott, Marcy and Benjamin F. Butler, see Alexander, "A Political History of the State of New York," I, 289-292.

was well understood, the mere purpose of getting rid of him, introduced a bill, or attached a clause to some bill on its passage in the assembly, enacting that the secretary of state should, ex-officio, be the superintendent of common schools, which soon passed through both houses with acclamation."

The number of offices under the control of the council in 1820 bore a substantial ratio to the voting population. It was about one appointment for every two hundred persons in the State.[13] The life of a council was determined by each new assembly, and after each member of the council became as potential as the governor himself, it discovered how it might create new offices and increase the number of office holders, as well as depose those whose tenures were under the constitution to be at its pleasure. A position in the council was of transcendent consequence after each member could nominate. Log-rolling became inevitable. The struggle between parties was concentrated in maneuvers to control the council. Bitter personal animosities and factional feuds were engendered. Party ties were lightly appreciated, with the temptation to change of allegiance. The inferior judiciary was degraded. The manhood of every holder of a commission from the State government was undermined and his independence weakened. The council was unwisely conceived, it had abused its powers, and was perverted to evil purposes. And in consequence its abolition was voted in the Convention of 1821 without a single dissent.

[13] The total vote for governor in 1820 was 93,434; the total number of offices in the gift of the council was 14,950. The population in 1800 was 484,065; in 1820, 1,372,812. (See McBain, "DeWitt Clinton and The Spoils System," 79.)

CHAPTER V

COUNCIL OF REVISION—PERCENTAGE OF VETOED BILLS—COUNCIL RAN COUNTER TO PUBLIC SENTIMENT IN 1812-1814—ITS VETOES OF WAR MEASURES—ITS VETO OF THE BILL OF NOVEMBER 20, 1820, FOR A CONSTITUTIONAL CONVENTION—HISTORY OF THE MOVEMENT FOR A CONVENTION—ACT OF MARCH 13, 1821—ELECTION OF DELEGATES, AND ANALYSIS OF VOTE.

The conviction was often expressed in the Convention of 1821 that in the council of revision there was an improper union of legislative and judicial powers. It was not the percentage of the bills which it vetoed, for this was small [1] when compared with the liberal use of the veto power by modern governors and presidents, but their character, which made it the subject of public odium. It had seemed to put itself deliberately in the way of public opinion, and public sentiment would not endure its opposition. On several occasions when the legislature favored an enlargement of the judicial force (the most urgent occasion being in 1812, during the controversy over the charter of the Bank of America), and it was apparent that the council of appointment was ready to respond to the legislative and popular wish, the council of revision interposed its veto of bills providing salaries for the additional judges. While

[1] The abstract of vetoed bills presented by Justice Platt to the convention of 1821 showed that 128 out of 6590 bills passed by the two houses had been vetoed by the council, eighty-three as repugnant to the constitution, forty-five as inconsistent with the public good. The council and the legislature seem oftenest to have come in conflict in the year 1785, sixteen bills having been vetoed in the course of the session, ten as unconstitutional, and six as inconsistent with the public good.

the council of appointment could appoint, it required legislation to fix the salary of new appointees; hence, appointment without legislation for salaries would have been nugatory.

In two other instances the council of revision had placed itself squarely in hostility to public sentiment. This had happened during the War of 1812 and in the year 1820. The second war with Great Britain was fought largely upon the sea, and privateers did much to bring it to a triumphant close. The enormous losses caused to British commerce by American ships, especially those sailing under letters of marque, led to a remonstrance by the merchants of England to Parliament against the further continuance of the war, and eventually to the peace of 1814. The legislature of New York proposed in that year to encourage privateering by authorizing any five or more persons desirous of forming a company for the purpose of annoying the enemy and its commerce by means of private armed vessels, to organize themselves as a corporation, issue corporate stock, and enjoy ordinary corporate powers. The bill actually became a law on October 21, 1814—too late in the war to be fruitful of result. When it came before the council of revision, vigorous objections to it were formulated by Chancellor Kent. Privateering, he declared, was merely tolerated; it was not approved either by the maxims of public law or the opinion of enlightened jurists. "The practice was liable to great disorder, and as its professed object was the plundering of private property for private gain, its tendency was to impair the public morals, to weaken the sense of right and wrong, and to nourish a spirit of lawless ferocity." He objected to the measure on the further ground that it was an unnecessary interference with the power of Congress "to grant letters of marque and reprisal and make rules concerning captures on land and water." The whole subject of the bill, he maintained, properly fell under the jurisdiction of that body.

Kent's repugnance to the bill was in accord with advanced sentiment. In 1856 the leading powers of Christendom, with the exception of Russia and the United States, agreed to the proposal of the Paris convention that privateering should be treated as unlawful and be abolished.[2] But Kent was a Federalist, and the Federal party in New York, or at least some of its leaders, were believed secretly to cherish the unpatriotic sentiments supposed to be entertained by the Federalists of New England. The bill had behind it the earnest support of a pronounced majority in the State legislature, and was zealously urged by Governor Tompkins. Samuel Young, under the signature "Juris Consultus," attempted to refute the chancellor's objections in a series of articles published in the *Albany Argus*. The chancellor, in turn, replied to Young, and Van Buren, with his usual ability, came to Young's support in a series of papers under the title "Amicus Juris Consultus." The council had also made objections to efforts of the houses to raise a volunteer force for the assistance of the government. To a legislature and people bent upon sustaining the government at Washington, the objections of the council seemed to savor of disloyalty. It is strong testimony to the high respect in which the chancellor was held as a man and a jurist that these vetoes did not bring him into public disesteem.

In 1814 the legislature passed a bill to aid in the apprehension of deserters from the army and navy of the United States. It authorized any person who thought he had cause to suspect any other person to be a deserter either from the army or navy or the State militia, to apprehend him without warrant and take him before a justice of the peace.

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[2] The United States withheld its approval from the Declaration of Paris because it favored more complete neutralization of the sea. It proposed that both neutral and belligerent ships should be free from capture unless their cargoes included contraband of war (see Mr. Seward's circular letter to American ministers abroad, April 24, 1861).

This bill was vetoed by the council on the ground that the power it conferred was arbitrary, an infraction of personal rights, and liable to great abuse. Erastus Root expressed the more popular view when he declared that the council "should have bent from its strictness, in aid of the country," in "apprehending deserters who were stalking through the State in their laced coats, with impunity." Both Tompkins and Van Buren spoke with feeling when they referred in the Convention of 1821 to these proceedings of the council during the War of 1812.

"The scenes which passed within these walls, during the darkest period of the late war, cannot," said Van Buren, "be forgotten. It is well known that the two branches of the legislature were divided; while in the one house we were exerting ourselves to provide for the defence of the country, the other house was preparing impeachments against the executive for appropriating money without law, for the defence of the State. But the effort was unavailing. An election intervened, and the people, with honorable fidelity to the best interests of their country, returned a legislature ready and willing to apply the public resources for the public defence. They did so. They passed a variety of acts, called for by the exigencies of our country. But from the council of revision were fulminated objections to the passage of those acts—objections which were industriously circulated throughout the State to foment the elements of faction. Beyond all doubt, at that moment was produced the sentiment which has led to the unanimous vote to abolish the council. The legislature had exerted themselves in the public defence, and the object of these objections was to impress the public mind with a belief that their representatives were treading under foot the laws and constitution of their country. The public voice on that occasion was open and decided; and it has ever since continued to set in a current wide and deep against the council." In making these remarks, he disclaimed, he said, all per-

sonal allusion to the author of those objections. "I entertain for him the highest respect. As a judicial officer, he is entitled to great consideration, and I should esteem his loss from the situation which he fills as a public calamity."

Tompkins declared that he had been a member of the council for three years as a judge, and had also served in it during the term of his governorship. He arraigned the council for its veto in 1812 of the bill for the salaries of the proposed additional judges of the supreme court; for its attitude during the controversy over bank charters; its approval of the charters despite the numerous imputations of corruption, and charged the judges with unconsciously mingling political considerations with their proceedings as members of the council. He had, he said, a high respect for the judicial tribunals of the State, and "could with sincerity avow that with a more enlightened, upright and dignified body he had never been associated, than the judges of the supreme court in their appropriate sphere"; but he could with equal sincerity affirm that he had never been connected with a body "more devoted and firm in party and political controversies when they manifested themselves in legislative proceedings." To preserve judicial purity it would be necessary to abstract the judges wholly from legislative and political concerns, and confine them solely to the interpretation and enforcement of the laws enacted by the proper departments. It was not, he added, "the fault of the judges that they had become involved in political concerns and had mingled with the party contests that had agitated the State for the last thirty years. It was their situation as members of the council of revision, which had dragged them into these contests and had made partisans of them."

The thing which perhaps most inflamed the public mind against the council was its veto of the bill passed by the legislature in November, 1820, for the election of delegates to a constitutional convention; but judged in the calm light

of the present, the veto was eminently wise. As Chief Justice Spencer said in the Convention of 1821, the legislature "had no authority to direct a convention for the general purpose of amending" the constitution "without a previous reference to the people of the question whether it was their wish that it should be thus amended." He denied the right of the legislature to direct a convention. "In doing so they had no higher authority than any other respectable body of men, self-moved, and acting without any delegation of power whatever." The council had insisted that, as a preliminary to holding a convention, the sense of the electors should be taken. The Act of 1821 was in accordance with these principles, although the legislature reluctantly adopted them, as it did not wish to appear to acknowledge their truth. No detriment had accrued to the State from the delay. The only result, as Judge Spencer said, was that the convention, instead of meeting in June, met in August, and "it now meets upon an undisputed right; the people have legitimately expressed their opinion in favor of a convention. This delay of two months in the meeting of the convention is the only grievance to be complained of; but in my opinion a great and salutary principle has been preserved."

The subject of holding a convention distracted the politics of the State for several years. The impulse in its favor had long been accumulating momentum, as the need of changing the appointing power, of curbing the council of revision, and of extending the elective franchise, had grown more evident. Tammany or Bucktail dissatisfaction with the use of patronage by Governor Clinton and his councils of appointment lent aid to the movement. The history of the years 1818, 1819, and 1820 shows that Clinton was himself in doubt as to the advisability of a convention, as he distrusted the effect it would have upon his ability thereafter to control the appointing power, which, he feared, might be dominated by Republicans. In the spring of 1820

he recommended the call of a convention with powers of a limited nature. A bill in conformity with his recommendations was introduced in the assembly, but it failed to become law owing to the conflict between the Bucktails and Clintonians as to the extent of the power which should be conferred upon the convention. In his message of November 7, 1820, after his re-election, when it had become apparent that the pro-convention feeling had acquired greater strength, the governor took a position more in sympathy with that of the Republican party. "The constitution," he said, "contains no provision for its amendment. In 1801 the legislature submitted two specific points to a convention of delegates chosen by the people, which met and agreed to certain amendments. Attempts have been made at various times to follow up this precedent, which have been unsuccessful, not only on account of a collision of opinion about the general policy of the measure, but also respecting the objects to be proposed to the convention. These difficulties may be probably surmounted, either by submitting the subject of amendments generally to a convention, and thereby avoiding controversy about the purposes for which it is called, or by submitting the question to the people in the first instance to determine whether one ought to be convened; and in either case, to provide for the ratification by the people, in their primary assemblies, of the proceedings of the convention."

In the fall of 1820, the Bucktails, who had become the predominant element in the Republican party, had a majority in both houses of the legislature, and were able to pass a convention bill which should accord with party wishes; and to enact it into law, unless forbidden by the council of revision. The bill was promptly passed in the assembly and in the senate. From the senate it went to the council of revision, where it was considered on November 20. The governor, who seems to have been inimical to a convention with general powers, yet unwilling to appear openly antag-

onistic, was desirous of not having to vote in the council. Justices Van Ness and Platt, both Federalists, were equally anxious with the governor to keep their hostility to the bill secret. Yates was supposed to favor it, Kent and Spencer were known to disapprove it, and the belief among the Clintonians was that Justice Woodworth also would be ranked among its opponents. From the position of attorney general, Woodworth had been raised to the supreme court in 1819, upon Smith Thompson's appointment to the Federal Supreme Court, and the Clintonians too hastily assumed that he would take the governor's view of the convention bill. Had all the council been present when the bill came before it, the governor's vote would not have been needed for its rejection, but Van Ness and Platt were absent upon circuit. Chancellor Kent read a vigorous disapproval of the measure, in which Chief Justice Spencer concurred. Yates voted in favor of the bill, and to the astonishment of the governor and his friends, Woodworth, who had unwarrantedly been counted as in opposition, sided with Yates, thus producing a tie in the council and forcing the governor to vote. In this dilemma, Clinton voted with Kent and Spencer, and the bill was rejected. The responsibility for its defeat was clearly placed upon the chief magistrate. The rejection of the bill crystallized sentiment against the council of revision, and aroused a hostility to the judges which would be content with nothing less than their removal from office—consequences the opposite of those intended to be accomplished by the veto. Its object, says Hammond, "was to preserve the supreme court, and it accelerated its destruction. The chancellor and judges were charged with exercising an almost arbitrary power * * * to defeat the declared will of the people. It did not require any special gift of prophecy to predict what would be the result of a contest in a free country between four men on the one side and the people on the other."

The chancellor's objections were vigorously stated, and

were irrefutable. "There can be no doubt that all free governments are founded on the authority of the people, and that they have at all times an indefeasible right to alter and reform the same as to their wisdom shall seem meet. The constitution is the will of the people expressed in their original charter, and intended for the permanent protection and happiness of them and their posterity, and it is perfectly consonant to the republican theory, and to the declared sense and practice of this country, that it cannot be altered or changed in any degree without the expression of the same original will. It is worthy, therefore, of great consideration, and may well be doubted whether it belongs to the ordinary legislature, chosen only to make laws in pursuance of the provisions of the existing constitution, to call a convention in the first instance to revise, alter, and perhaps remodel the whole fabric of the government, and before they have received a legitimate and full expression of the will of the people that such changes should be made." The council, continued the chancellor, "think it the most safe and wise course and most accordant with the performance of the great trust committed to the representative powers under the constitution, that the question of a general revision of it should be submitted to the people in the first instance to determine whether a convention ought to be convened."

The bill of 1820 was, he said, fundamentally erroneous in another particular: It required the electorate to reject or accept the new constitution as a whole, without giving opportunity to discriminate between provisions that were salutary and such as were undesirable or unwise. "If," said Kent, "the people are competent to pass upon the entire amendments, of which there can be no doubt, they are equally competent to adopt such of them as they approve and reject such as they disapprove; and this undoubted right of the people is the more important if the convention is to be called in the first instance without a previous consulta-

tion of the pure and original source of all legitimate authority."

The veto of the council was undeniably sound in principle. It was not the province of a legislative body, of its own initiative, to order a constitutional convention without first ascertaining the will of the people upon the subject. Such action, without any previous referendum, was a plain usurpation of authority. But this had twice been done in the history of the State, and precedents from other States were not wanting. The discussion in 1820 was educational; it led to the insertion in the constitution of 1822 of a provision for amendment through the agency of legislation, and to the insertion in the constitution of 1847 of a provision for the call of a convention. To-day State constitutions as a rule require a vote of the people to decide whether a constitutional convention should be called.

The objections of the council were on the day of their reception in the assembly referred to a select committee, of which Michael Ulshoeffer was chairman, for consideration and report. On January 9, 1821, Ulshoeffer submitted an able and elaborate defense of the bill. He challenged the authority of the council to exercise such ample veto power, declared the bill consistent with the constitution, since that instrument was silent as to the method of its amendment, and contended that the measure was not inconsistent with the public good, as "the public voice has called for this law." But the revisory power of the council was plenary; the silence of the constitution as to the method of its own amendment could not make the legislature the arbiter to determine when it needed revision, and, as should often be remembered in these later days, "the public voice" may not properly call for any law that contravenes the constitution.

Although days were spent by the assembly in debate upon the bill and the council's objections, it was found impossible to obtain the requisite two-thirds vote for its passage; it was therefore lost, and a new bill presented. The

debates showed that no bill could be enacted into law that did not conform with the views expressed by the council. To draw a bill of this nature was to the minds of the Republican leaders a concession which they could not make without virtually acknowledging the council's objections to be valid. It was the hope of the Clintonians that the Bucktail chiefs would adhere to their original views, for the Clintonians were anxious to prevent a convention. But the majority leaders finally and wisely decided for concession. A bill was introduced entitled "An Act recommending a convention of the people of the State," which was adopted by the assembly and subsequently by the senate, and to which, on March 13, 1821, the council of revision affixed its sanction. This act, in certain details, was amended by an act passed April 3, 1821. The act recommending a convention provided that at the annual election to be held on the last Tuesday of April in that year the citizens of the State should determine by ballot whether a convention should be held. Vote upon the question was opened to a wider class than the class entitled to vote for assemblymen under the existing constitution, for had the issue of a convention or no convention been submitted to the narrow electorate of the time, it is almost certain that no convention would have been called. All free male citizens of twenty-one years were made eligible who possessed freeholds or were actually rated or paid taxes to the State; or were actually enrolled in the militia, or in a legal volunteer or uniform corps, and had done actual service therein, either as officers or privates; or had been exempted from taxation or militia duty; or who had been assessed to work, and had actually worked on the public roads and highways, or paid a commutation according to law. The inclusion of militiamen and volunteer soldiers not eligible to vote for assemblymen was in obedience to the feeling that men who had been willing to take up arms for the defense of the State and the Nation were entitled to vote upon this important ques-

tion. As will be seen, the new constitution gave the suffrage to all classes of citizens mentioned in this enactment. The election was to be held during three days, and the act provided that if the appropriate canvassers should certify that the vote was favorable, delegates should be elected on the third Tuesday in June to a convention to be held on the last Tuesday of August, the number of delegates to be equal to the number of members of the assembly. All persons entitled to vote upon the initial question were made eligible to vote for delegates. At the annual election in April the vote for the convention was 109,346; against it, 34,901, a majority of 74,445, or more than double the negative vote. The democratic movement had grown too powerful to be resisted. By constitutional means it had been demonstrated that the overwhelming voice of the people was for a change in the organic law in vital particulars.

The people had indeed spoken, for beneath all dislike of the regnant councils a force was at work which, had there been no refractory councils to abolish, would sooner or later have compelled a broadening of the suffrage. The desire for this was, in fact, the underlying motive for the convention, especially in the middle and western, the more democratic, parts of the State. The influence of the newer sections of the commonwealth in bringing about the convention and the difference in antecedents and temperament between these sections and the older portions of the State have not been sufficiently noted by historians. To the newer counties and to New York City, which as a port of entry for immigrants had been steadily growing more democratic, the decision for a convention was due. The Hudson River counties were the home of the conservatives; New York City and newer counties, the stronghold of the progressives. The Northwest Territory, which had been reserved for freedom under the ordinance of 1787 and which comprised the vast area lying between the Ohio River, the Mississippi River, and the Great Lakes, attracted emigrants from New

England, but many, while *en route,* decided to make permanent homes in central, western, and northern New York. As Rufus King wrote in October, 1821: "Our population is nearly divided between the old and the new inhabitants. The latter are out of New England, whose laws, customs, and usages differ from those of New York."

The chief emigrations from New England after 1781 were to Pennsylvania, New York, and Ohio. It was the pioneers from the Eastern States who settled Utica, Rome, Syracuse, Ithaca, Owego, Binghamton, Elmira, Geneva, Rochester, and Buffalo. Colonists from Massachusetts had availed themselves of the rights granted to that State in Western New York. The resemblance of Central and Western New York to New England was, says a recent writer,[3] "so striking as to excite comment," and Timothy Dwight, who traveled through the State in early days, noted the likeness—the Puritan churches, the houses erected in the New England manner, the "sprightliness, thrift and beauty" of the settlements. The New Englanders carried with them their town meeting and their love of home rule. This element of the population could not long have been contented with a government in which it had little voice. The people of New England extraction, who had been nourished from infancy upon the doctrines of civil and religious liberty, urged a broader basis of suffrage than was accorded by the old constitution. So inviting were the natural wealth and resources of the State that a great influx of population had taken place as early as 1812, when the legislature organized twelve new counties. In 1820 the population had increased to such an extent that at that time the number of counties was fifty. Extensive immigration from the British Isles and Western Europe had not yet commenced. The population of the State was homogeneous, being largely native American.

[3] "The Expansion of New England," pp. 160, 164.

The sentiment from the newer counties was decidedly in favor of calling a convention, whereas the older and aristocratic counties were either apathetic or opposed.[4] The vote took place by counties. In the southern district the total vote for the convention was 15,906, against it 8,409. In New York county alone the affirmative vote vastly preponderated over the negative, being 6,513 to 1,810. In Queens, the vote against holding the convention was almost double that for it, being 1,332 against, to 692 for a convention. The vote in the middle district was 20,158 for; 12,764 against, Ulster registering a heavy adverse vote—2,634 against holding a convention; only 1,224 in favor of it. In the eastern district, comprising the newer northern counties, the vote was 25,465 for a convention to 9,278 against it. In the western district, which was dominated by recent settlers, the vote was 47,817 in favor of holding a convention; 4,450 against it. The majority in each county within this district was heavy, and in some counties there was only a trifling negative vote. From the vote it might have been prevised that although the representatives of the Morrises, the Van Cortlandts, the Livingstons, the Coldens, the Van Rensselaers, and the Schuylers should oppose broadening of the franchise, democratic sentiment would achieve a triumph.

[4] These figures are taken from Debates and Proceedings in the Convention of 1821.

CHAPTER VI

CONVENTION OF 1821—PERSONNEL OF THE CONVENTION—FALL OF THE COUNCIL OF APPOINTMENT AND OF THE COUNCIL OF REVISION—LOCATION OF THE VETO POWER—DEBATES OVER NEGRO SUFFRAGE—EXTENSION OF WHITE SUFFRAGE—INCREASE OF GOVERNOR'S POWERS—THE NEW SYSTEM OF APPOINTMENTS—CHANGES IN THE SENATE—BANK CHARTERS—POWER OF AMENDMENT EMBODIED IN THE CONSTITUTION.

The Convention of 1821 was destined to draft an excellent constitution, and the people were fortunate in their choice of delegates. Men of less ability might have accomplished the destruction of the two councils and the broadening of the suffrage, but they could not so well have dealt with many other problems presented to the convention. The persons chosen as delegates were mainly of the Democratic party [1] and included men prominent in the affairs of the commonwealth, or thereafter to figure importantly in its history. At least one county rose above narrow and provincial considerations in the choice of one of its five representatives. To the wisdom of the people of Otsego county is it due that Martin Van Buren was elected a delegate. He was not a resident of that county, but he was chosen by its people under an impression, says Hammond, that "the public good required that he should participate in the pro-

[1] The old Republican party, the name having been gradually changed between 1810 and 1820. Tammany Hall still clings to the compound name, Democratic-Republican, which was used in the time of change.

ceedings of the convention." Van Buren, who had become a United States senator in February, 1821, was one of the most influential members in a convention of conspicuous talents. His absence from it would have been a distinct loss to the State. No one can peruse the debates without perceiving that his speeches were among the ablest made in the convention. "The clearness and comprehensiveness displayed in his discussions of the great principles of government, the soundness, justice and moderation of his views upon the important questions which arose in the convention must impress the reader," says his biographer Holland, "with the most favorable opinion of his integrity and talent." Holland goes so far as to assert that in order to present a complete view of Van Buren's services it would be necessary to transcribe portions of almost every page of the convention's reports. Hammond, who devotes an elaborate chapter of his history to the convention, repeatedly quotes Van Buren's utterances and commends his wisdom, tact and good temper in the discussion of the important topics that came before that body. New York city sent Nathan Sanford, late a Federal senator and afterward destined to be chancellor of the State, Jacob Radcliff, William Paulding, Henry Wheaton, famous both in the State and the national arena, Ogden Edwards and Peter Sharpe. John Duer, who subsequently acted as one of the statutory revisers and later occupied a seat in the superior court of the city of New York, led the delegation from Orange county; Samuel Nelson, who in 1831 became a justice of the supreme court of the State, in 1836 chief justice of that court, and in 1845 a member of the highest judicial tribunal in the nation, came from Cortland county. Daniel D. Tompkins, then vice-president of the United States, and who had sat in the Convention of 1801, represented Richmond county. The veteran statesman, Rufus King, came from Queens; Samuel Young from Saratoga county. Albany sent an illustrious contingent in Chancellor Kent, Chief

Justice Ambrose Spencer, Abraham Van Vechten and Stephen Van Rensselaer. From Columbia county came Judge William W. Van Ness, of the supreme court, and Elisha Williams, the famous advocate and antagonist of Van Buren at the bar. From Oneida came Judge Platt, while Westchester county sent Peter A. Jay, a noted lawyer, son of Governor John Jay. Dutchess county was well represented, among its delegates being Judge James Tallmadge, famous for his speech in Congress opposing the admission of Missouri as a slave State, and Peter R. Livingston. From Delaware county came Erastus Root. The members of the convention, according to Hammond, "presented an array of talent, political experience, and moral worth perhaps never surpassed by any assemblage of men elected from a single State." Proceedings were formally begun on August 28, 1821, Tompkins, vice-president of the United States, having been chosen president of the convention by a decisive vote. On motion of Rufus King, a committee was appointed to consider and report as to the manner in which business should be transacted, and the committee promptly reported in favor of the selection of a number of committees to which should be referred the following subjects: The Legislative Department, the Executive Department, the Judicial Department, the Council of Revision, the power of appointing to office, the right of suffrage, the qualifications of persons to be elected, and the mode of making future amendments to the constitution.

Several far-reaching changes were made by the Convention of 1821: (1) abolition of the council of appointment and the substitution of a new system; (2) abolition of the council of revision and transfer of the veto power to the governor; (3) extension of the elective franchise; (4) increase of the governor's powers; (5) reorganization of the courts.

The project of abolishing the council of appointment met with no opposition. The report of the committee upon

the council showed how enormous was the patronage—8,287 military and 6,663 civil officers held commissions from it, and these were generally revocable at its pleasure. Hammond declares, and justly, that the abolition of the council entitles the convention to the gratitude of its contemporaries and of succeeding generations. With the abolition of the council, the problem was the substitution of some other mode of appointment to office. The task of its invention fell to the committee on appointment to office, of which Van Buren was chairman. In order to curtail the sphere of action of the central appointing power, the committee proposed the election or appointment of officials in the several counties or towns, where their duties were local, and their selection by the legislature, where their functions were general. Of the vast number of military appointments controlled by the council of appointment, all except seventy-eight, consisting of officers of the highest rank, were to be elected by privates and officers of the militia. The committee unanimously decided that the highest military officers and all judicial officers, except surrogates and justices of the peace, should be appointed. Four modes of appointment, said Van Buren, had been considered: to create an elective council of appointment; to bestow the appointing power upon the executive; to give it to the legislature; or, lastly, to give it to the governor, with the advice and consent of the senate.

The arguments for and against these different plans were analyzed. A council elected by the people, which Justice Spencer happily styled "the ghost of the old Council of Appointment," was open to the objection of lack of responsibility so convincingly urged against the old council, and its election would cause tumultuous excitement in every part of the State. A council chosen by the legislature was subject to many objections. If the veto power of the executive were to be enlarged, to give him also control of appointments to office would be unwise, and it would be equally

unwise to lodge this vast responsibility in the legislature. Connection between the legislature and the appointing power was undesirable at best, but the least objectionable plan was to repose the power in the governor and the senate. The practice of the different States varied. In Pennsylvania and Delaware the governor made appointments; in Maine, Massachusetts, Maryland, North Carolina and Virginia the power was given to the governor and a council. In Connecticut, Rhode Island, Vermont, New Jersey, South Carolina, Georgia, Ohio, Tennessee, Mississippi and Alabama, the legislature made appointments. New Hampshire had a council chosen by the people, while in Kentucky, Louisiana, Indiana, Illinois and Missouri, the appointing authority was vested in the governor and senate. Having decided to confer the appointing power upon the governor and the senate, Van Buren stated that the committee proposed to give exclusive right of nomination to the governor, as the surest means of fixing responsibility. Conviction was unanimous in the committee that the construction put upon the old constitution by the Convention of 1801 had proved baneful, and this conviction was generally entertained throughout the State. Stability of tenure required that officials who did not hold during good behavior should not be removable at pleasure or without cause, as had been the unfortunate practice which had vacated every such office with every change of party, to the serious injury of public interests. To remedy the evil, no removals should be made except for cause publicly assigned; but the committee did not favor a regular trial of complaints, lest the entire time of the senate should be consumed in such investigations.

The report of the committee was adopted by the convention. Its chief merit was the abolition of the odious council of appointment. The substitute was a complex system which had at least the advantage of dispersing power. The secretary of state, comptroller, treasurer, attorney gen-

eral, surveyor general, and commissary general were to be appointed by the senate and assembly, either by separate agreement or on joint ballot. Their appointment was given to the legislature for the reason, as stated by Van Buren, that being officers entrusted with the public property, their duties more immediately connected them with that body.[2] Mayors of cities were to be chosen by municipal common councils, a method soon afterward to be changed.[3] Justices of the peace were to be nominated and appointed by a complicated system through the action of county boards of supervisors and judges of county courts. Concerning the appointment or election of justices of the peace, an acrimonious debate took place in the convention, and Hammond, who ordinarily treats Van Buren with the utmost fairness, claims, perhaps with justice, that Van Buren's insistence upon the appointment rather than the election of these officials, was motived by his desire to perpetuate the new appointing power which was gradually springing up in the State with ramifications into every township and county. In a few years the constitution was changed to make these justices elective.[4]

The committee upon the council of revision reported without a dissenting vote in favor of its abolition, and the report was unanimously sustained. But in the debate upon the veto power it became apparent that the reasons for this determination were various. The convention was composed of radicals, among whom were Root, Livingston and Tompkins; extreme conservatives under the lead of the chancellor, the judges, and Van Vechten; and moderates like Van Buren, Edwards, Duer and Wheaton. Each class had its own reasons for abolishing the council.

With the convention unanimous in its condemnation of

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[2] The state treasurer under the first constitution was chosen by the legislature upon the initiative of the assembly (page 54).

[3] See pp. 143, 261.

[4] This amendment was made in 1826.

the council, the problem seemed merely to be as to the substitute, if the majority should favor the deposit somewhere of a revisory power over legislation. The solution, however, did not prove to be simple. In argument, eulogies were pronounced upon the work of the council, which were followed by unsparing criticism of its most important vetoes. The chancellor and the judges, wincing under the hot censure that fell from the radical wing, defended their motives from unjust imputations. For a time, in the midst of denunciations and laudations of the council, the real issue was obscured; but it came again into clear light and was ultimately discussed with fullness and wisdom. Probably no similar assemblage has more exhaustively treated every phase of the veto power—the necessity of some qualified control over the legislative body, the extent of that control, and the branch of government in which it should be reposed.

The debate started with a motion by Peter R. Livingston to substitute a majority vote of each house in lieu of the two-thirds vote proposed by the committee for the passage of a bill over the governor's veto. Livingston's motion was ultimately defeated by a vote of 95 against it to 26 in its favor, and the committee's substitute for the third article of the old constitution approved by a vote of 100 to 17. The constitution as thus amended remained unchanged until 1875, when an amendment went into effect requiring a vote of two-thirds of the members elected to each house to give vitality to any measure vetoed by the governor.[5] Spencer favored the abolition of the council of revision, but with the qualification that the governor, if given the veto power, should be rendered independent of the legislature in the matter of salary as well as tenure of office. A provision was accordingly placed in the new constitution, that the governor's compensation should be neither increased nor

[5] As to the full extent of the amendment that went into effect January 1, 1875, see pp. 218, 235.

diminished during the term for which he was elected, thus relieving him from the temptation of subserviency to the wishes of the legislature.

The qualified negative lodged in the council of revision by Article III of the constitution of 1777, is said to have been adopted at the suggestion of Robert R. Livingston. This is only partially true, for under Livingston's plan vetoed bills would have been returned to the senate in all cases, Livingston's idea doubtless being to make the senate the citadel of the landed interests and thus protect land owners against hostile legislation. On Hobart's motion, Livingston's draft was amended by the Convention of 1777 to require a disapproved bill to be returned to the house in which it originated.

Those members of the Convention of 1821 who asserted that Article III was designed to give the council of revision power to veto only unconstitutional legislation were mistaken, as was conclusively shown by Justice Jonas Platt upon the floor of the Convention of 1821, and as plainly appears in the article itself. Chief Justice Jay, author of the first veto, objected to the bill then under review by the council, not on the ground that it was unconstitutional, but that it was "inexpedient and inconsistent with the public good"; and the remaining members of the council—Governor George Clinton, Chancellor Livingston, and Justices Yates and Hobart—concurred in this objection. The practice of the council from the outset had been to treat the revisory power as adequate for the veto of measures inimical in its judgment to the public welfare. As was repeatedly shown in the Convention of 1821, the right of the bench to pronounce laws unconstitutional in suits involving those laws was not conferred by Article III, but existed independently of it. The council of revision in its later years, when its objections to measures ardently desired by the houses aroused indignant opposition, usurped no function in disapproving bills on other than constitutional grounds.

Spencer, who had sat in the council since his appointment to the supreme court, in February, 1804, spoke of its duties as "arduous and painful," duties "which no judge would be anxious to perform." Impelled by the conviction that the executive, judicial and legislative powers ought to be kept separate, he voted for abolition. Judge Platt, whose encomiums of the council led to the opening of the floodgates of denunciation, while admitting the evils and inconveniences of giving to the council veto power, declared that it "would never be exercised with so much wisdom and firmness in any other hands." Van Buren put the real objection in lucid form: "I object to the council, as being composed of the judiciary, who are not directly responsible to the people. I object to it, because it inevitably connects the judiciary—those who, with pure hearts and sound heads, should preside in the sanctuaries of justice, with the intrigues and collisions of party strife; because it tends to make our judges politicians and because such has been its practical effect." The council of revision was, in effect, a life chamber having no accountability to the people, yet endowed through the widely ramifying influence of the judiciary with extraordinary ability to make its qualified negative absolute. It was indeed wisely abolished.

History betrays a constant tendency of representative assemblies to pass hasty and ill-considered legislation in times of intense public excitement. A second house, less immediately responsible to the electorate, constitutes a partial check upon a more popular body. An executive veto upon the legislature was a legacy of the Roman government to modern Europe. In theory, the English crown, in analogy to the Roman tribunes, enjoys an absolute veto upon the Lords and the Commons, although the prerogative has been in abeyance since 1692. In both proprietary and royal colonies, the governor possessed an equally absolute negative upon acts of the colonial legislature, and the crown had a corresponding power over the governor. Despotic exer-

cise of the royal prerogative was the cause of one of the most formidable indictments against the British sovereign in the Declaration of Independence. The States started with a distrust of the executive veto. Jefferson's repugnance to it seems never to have been overcome, for in the constitution prepared by him for Virginia, he provided that the governor, two councillors of State, and a judge of each of the superior courts should be a council to revise all legislative bills, which, after disapproval by it, should be passed only by a vote of two-thirds of each house. Several States refused to give any veto power at all to the governor; and others were unwilling to concede it, unless reviewable by a majority in the legislature. It was for the "right of the majority" to override the governor's veto that Peter R. Livingston argued in the Convention of 1821. No veto, he said, was allowed either in Rhode Island, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, or Ohio. In Connecticut, Kentucky, Tennessee, Indiana, Missouri and Alabama, a majority of the legislature could overcome the veto. Seven States—Maine, New Hampshire, Massachusetts, Pennsylvania, Georgia, Louisiana and Mississippi—required a two-thirds vote for the purpose. Illinois lodged the veto with the governor and a council, but a majority of the legislature could nevertheless pass a bill over their objections. In Vermont the veto was placed in the governor and council, and any bill objected to had to lie over for consideration one year.[6]

[6] Four of the States — Delaware, North Carolina, Ohio and Rhode Island—have never given their governors the veto power. In eight others, a very limited veto power has been given, which may be overridden by a majority of the whole number elected to each house. These are as follows, the year in which the veto was granted being added: Alabama, 1819; Arkansas, 1836; Connecticut, 1818; Indiana, 1816; Kentucky, 1799; New Jersey, 1844; Vermont, 1836; West Virginia, 1872. In twenty-four others, a two-thirds vote is required to override the veto; California, 1849; Colorado, 1876; Florida, 1865; Georgia, 1789; Illinois, 1870; Iowa, 1846; Kansas, 1859; Louisiana, 1812; Maine, 1820; Massachusetts, 1780; Michigan, 1835; Minnesota,

Majority rule should have limitations, or the minority would be at its mercy. The convention wisely decided for a two-thirds vote. The example of the United States government in this respect has been generally followed throughout the Union; in a majority of the States, the votes of two-thirds of the elected members are required to override a veto. One argument which had weight in bringing about the decision of the New York convention to give a veto to the governor was the infrequency of its use by the President of the United States, and governors of sister States. Washington used it twice, Madison three times, Monroe only once; whereas neither John Adams, Thomas Jefferson nor John Quincy Adams employed it in a single instance. Under the first six presidents the veto was used only six times. Jackson was the first to make liberal employment of it; he vetoed eleven measures of great public consequence, and seven of his vetoes, being unaccompanied by any message of explanation, received the name of "pocket" vetoes. The qualified veto of the governor has

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1857; Mississippi, 1817; Missouri, 1875; Nevada, 1864; New Hampshire, 1792; New York, 1821; Oregon, 1857; Pennsylvania, 1790; South Carolina, 1865; Tennessee, 1870; Texas, 1836 (republic), 1845 (state); Virginia, 1870; Wisconsin, 1848. In Maryland (1867) and Nebraska (1875) a three-fifths vote is requisite. But one State (Kentucky) has changed from a two-thirds vote (1792) to a majority vote (1799). The following States, now requiring a two-thirds vote, as above, required only a majority vote at first: Florida, 1838; Illinois, 1848; Missouri, 1820; Connecticut, Maryland, South Carolina, Tennessee, Virginia and West Virginia were without the veto power until it was granted in the years mentioned above. In Nebraska a two-thirds vote only was needed from 1866 until 1875. In Illinois, 1818-1848, the veto power was given to the governor and supreme court judges, to be reversed by a majority vote; and in New York, 1777-1821, to the governor, chancellor and supreme court judges, to be reversed by a two-thirds vote. In Vermont, 1786-1836, a suspensory power until the following session was given to the governor and council. In the States the tendency generally has been to increase the strength of the veto power by making the votes of two-thirds of all the members elected requisite to override it, and further, by giving the power to veto single sections of appropriation bills. (Article on "Veto" in Lalor's Cyclopædia, III, 1067.)

become an integral part of the American constitutional system. No convention held in this State since it was conferred has shown an inclination to take the power away. Indeed, it has been extended so as to give the governor the right to veto measures after the close of a legislative session, and to veto separate items in appropriation bills.[7]

The new veto and appointing power rendered the governor so much more of a factor than he had been under the old constitution that the convention deemed it wise to shorten his term of office so as to increase his responsibility to the electors of the State. Advocates of a one-year term were not wanting, but the more conservative members, at the head of whom was Van Buren, favored, and the convention approved, a two-year term as giving the governor sufficient time to qualify himself for the administration of his office, while holding him sufficiently accountable to the people. Under the constitution of 1777 a citizen had to be a freeholder to be eligible to the governorship. The Convention of 1821 retained the freehold restriction, and added a provision that no one could be governor unless he was a citizen of the United States of the age of at least thirty years, resident within the State at least five years prior to election. Absence from the State during that period on business of the State or the United States was, however, not to render a candidate ineligible.

Extension of the suffrage was effectuated, first, by enlarging the number of persons eligible to vote for assemblymen, and, secondly, by making the qualifications of electors of senators and governor the same as those of electors of assemblymen.

At the outset it was proposed to limit the suffrage to white men only. The act recommending the convention had recognized the right of all free male citizens of the State with some restrictions irrespective of color to vote for dele-

[7] P. 235.

gates. When it was proposed to adopt this principle in the convention, Young moved to amend by limiting the franchise to white men. Jay strenuously opposed the restriction and a vigorous debate ensued. The decision of the convention was a compromise, but the attempt to disfranchise negroes then enjoying the suffrage failed. The convention resolved to give the vote to all male whites of the age of twenty-one years, inhabitants of the State for one year preceding an election and for six months resident of a town or county, who, within the year, had served in the militia or paid a tax to the State or county upon real or personal property. But no vote was to be given to a man of color unless he had been a citizen of the State for three years and for one year next preceding any election had owned a freehold estate of the value of two hundred and fifty dollars free and clear, upon which he had been rated and paid taxes. Had colored citizens been denied the suffrage altogether, as was urged by some delegates, a privilege exercised under the old constitution by about thirty thousand colored citizens would have been taken away. Happily no such injustice was done. As Jay well said, the convention had been summoned to extend the franchise—not to disfranchise anybody.

Under the first constitution, the State presented the anomaly of colored men held in slavery and free colored persons exercising the right to vote. Such an anomaly could not long be maintained, and before many years the legislature enacted a law giving freedom to every child born of a slave within the State after July 4, 1799, and to every slave born after that date elsewhere, but brought within the State by any person intending permanently to reside within its limits. In 1817 [8] a statute was passed declaring that every negro or mulatto born within the com-

[8] A few days before his resignation of the office of governor to enter upon the vice-presidency, Tompkins in a special message urged the passage of this legislation.

monwealth before July 4, 1799, should be free after July 4, 1827.

Nor was extension of the elective franchise in the case of white citizens obtained without a battle. The convention act of 1821 awakened landed proprietors to the conviction that they were to lose control of the assembly. They then determined to retain control in the senate. Chancellor Kent, Judge Spencer, Abraham Van Vechten and Stephen Van Rensselaer were sent as chiefs of a powerful contingent to resist any change with respect to the upper house. The conflict was precipitated by a motion by Judge Spencer to keep the vote for senators from the broader electorate. The senate, declared Spencer, was intended "as the guardians of our property generally and especially of the landed interest, the yeomanry of the State." Kent was equally outspoken. "I wish to preserve our Senate as the representative of the landed interest. I wish those who have an interest in the soil to retain the exclusive possession of a branch in the legislature. * * * I wish them always to be enabled to say that their freeholds cannot be taxed without their consent. The men of no property, together with the crowds of dependents connected with great manufacturing and commercial establishments, and the motley and undefinable population of crowded ports, may, perhaps, at some future day, under skillful management, predominate in the assembly; and yet we should be perfectly safe if no laws could pass without the free consent of the owners of the soil. That security we at present enjoy; and it is that security which I wish to retain."

Lecky, Maine and other disbelievers in democracy have added little to the arguments made by Kent and Spencer upon the floor of the convention, but the judges were in error; opposition to democracy was opposition to the entire mental and material development of the time. The vote in favor of the committee's report to enlarge the suffrage for

both houses and the governor (100 to 19) shows how irresistible was the demand for extension of the franchise.[9]

The senate, as the bulwark of the landed interest, would have had an absolute negative on all legislation inimical to that interest. It would have used its veto power with the freedom of the old council of revision. Collisions between the upper and the lower house would have been inevitable, and the deadlocks might have proven dangerous to the State. Root was on sound ground when, in reply to Kent, he declared that the senate and assembly ought not to be elected by different persons "with genius (sic) and feelings hostile to each other." "The extreme democratic principle," which, according to Kent, "had been regarded with terror by the wise men of every age," was, however, not fully adopted by the convention. Van Buren, whose argument has received and merits praise, hesitated to go so far as to admit every citizen to the privilege of the ballot, but manhood suffrage was bound to come; and in 1826 the constitution was amended so as to concede it to all excepting colored citizens.

In various other particulars, the constitution departed from the first form of government. The State was subdivided into eight senatorial districts instead of four, because the old districts were altogether too large. But, as formerly, the governor was required to be a freeholder. This was a concession to the conservative feeling.

When the first constitution was framed, the English

[9] "I took strong ground against the adoption of that constitution, for, while I approved of many of its provisions, I dreaded the effect of extending and cheapening the suffrage. While it was evident that the constitution would be adopted, I continued my opposition to the bitter end. I had great veneration for the opinions of Mr. Jefferson, and believing with him that large cities are 'ulcers on the body politic' I feared then, as I have ever since feared, that universal suffrage would occasion universal political demoralization, and ultimately overthrow our government. With such convictions, I was willing to incur all the responsibility of resisting a popular delusion." "Autobiography of Thurlow Weed," I, pp. 89, 90.

law of criminal libel, which then became the law of the State, was extremely illiberal, for it was the province of the jury simply to ascertain whether the so-called libel had been published and to assess damages. The question whether the publication was defamatory and libelous was left to the court, nor could the truth be urged by way of defense. Through the efforts of Erskine, Pitt and Fox, the English law was ameliorated in 1792. In the case of the People v. Croswell, in which the defendant was indicted for a libel upon Thomas Jefferson, President of the United States, two of the judges (Kent and Thompson) considered that the truth should be received in evidence and the jury should judge both of the facts and the law. The contrary view was maintained by Chief Justice Morgan Lewis and Justice Brockholst Livingston. Kent's learned and exhaustive opinion shows that before the days of the Star Chamber the common law rule accorded with the view ably contended for by Hamilton, of counsel for defendant. There were, said Kent in the Convention of 1821, only four judges on the bench at the time; the court being equally divided, the matter rested there, and the defendant went unpunished. In April, 1804, the legislature sent to the council of revision a bill framed along the lines of Kent's opinion in the Croswell case. The council objecting to parts of the bill, William W. Van Ness (afterward justice) introduced a new bill which passed both houses unanimously and became law April 6, 1805. This declared that on the trial of every indictment or information [10] for a libel the jury should determine the law and the fact under the direction of the court in like manner as in other criminal cases and should not be directed to find the defendant guilty merely on proof of publication, and that in every such prosecution

[10] Informations seem to have been prohibited by the constitution of 1821, for the language of the fifth amendment to the United States constitution was employed in the Bill of Rights adopted by the convention of that year.

the defendant might give the truth in evidence as a defense. The Convention of 1821 incorporated the substance of the statute into the organic law of the State.[11]

The convention also corrected a defect in the first constitution by providing a method for amending the new organic law. Only one mode of amendment, however, was adopted. Amendments were first to be approved by a majority of the members elected to each of the two houses, and then agreed to by two-thirds of all the members elected to each house of the succeeding legislature. They were then to be submitted to the electors qualified to vote for members of the legislature, and, when ratified by a majority of the electors voting thereon, were to become part of the constitution. But no provision was made for the call of a convention to revise or amend the new constitution. The absence of such a provision led to considerable discussion in 1845 and 1846.

Section 9 of Article VII of the new constitution made the consent of two-thirds of the members elected to each branch of the legislature essential to the passage of every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering or renewing any body politic or corporate—the only provision respecting corporations to be found in the constitution.

If the council of appointment used its vast powers to reward party friends and take vengeance upon party enemies, a like spirit seemed to pervade the legislature in the disposition of franchises. According to more than one his-

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[11] This was one of the last causes argued by Hamilton. Of his presentation, Kent, in the Convention of 1821, declared that a more able and eloquent argument was perhaps never heard in any court. In closing his opinion in the Croswell case he adopted as perfectly correct "the comprehensive and accurate definition of one of the counsel at the bar (General Hamilton) that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy or individuals."

torian, the scandals attendant upon the grant of bank charters blackened the fame of the State in early days. The legislative prerogative to bestow special privilege seems almost certain to give birth to corruption, and the only remedy may lie in further checks upon legislative authority. Human nature is to-day as greedy of special privilege as ever, and the utmost vigilance is essential to protect the public interest.

Banks entered into politics early in the last century. The Bank of New York was incorporated on March 21, 1791. In its earliest years, while under the control of Federalist stockholders, it is said to have refused banking accommodation to Republicans. Burr and his friends accordingly planned the incorporation of the Manhattan Company to give money facilities to merchants of the Republican party. Boldly to ask a Federalist legislature to charter a bank under Republican control would have been to court refusal; the promoters decided therefore to conceal their real purpose.[12] The scourge of yellow fever from which New York City had recently suffered aroused a demand for a better water supply. Burr's friends accordingly petitioned the legislature to grant a charter to a company ready to furnish it. The whole of the proposed capital of two million dollars might not, it was conceded, be required for water purposes, but it was better to have ample funds. Authority was therefore asked to invest the surplus capital in any way not inconsistent with the laws or constitution of the United States or of the State of New York. The bill passed both houses, but, in the council of revision, Chief Justice Lansing strongly criticised the comprehensive terms of the clause for the use of the surplus. His adverse vote was overruled. Governor Jay, Chancellor Livingston, and Judge Benson approved the measure and it became law.

[12] The legislature, says Hammond, "had to be blindfolded, and in that condition induced to do that which they would not do with their eyes open."

The Bank of Albany had been incorporated in 1792, and the Bank of Columbia at Hudson in 1793. The Federalist managers of the Bank of Albany are said to have proscribed Republican merchants. Accordingly, a charter was sought in 1803 for another bank at the capital, the applicants pleading the necessity for its incorporation because the business of the Bank of Albany was so conducted "as to be oppressive to those business men who belonged to the Republican party." The applicants offered to pay large sums into the school fund and the literature fund of the State, to lend the State a million dollars for its new canals, and to advance a like sum to farmers for the improvement of real estate, if immunity from any new bank charter were secured for twenty years. Among those interested in the enterprise were Ambrose Spencer, Thomas Tillotson, Elisha Jenkins, and John Taylor, all leading Republicans. Charges that corruption had been employed to obtain the necessary votes in the legislature were freely made at the time. The new bank was incorporated on March 19, 1803.

The act of April 11, 1804, forbade any person, not authorized by law, to subscribe to or become a member of any association or proprietor of any bank or fund for the issuing of notes, receiving deposits, making discounts, or transacting any business lawful for incorporated banks to undertake. It prohibited under penalty the passing of bank bills of less than the nominal value of one dollar. This stringent enactment rendered it impossible for any banking institution not theretofore incorporated to carry on its business. The alternative was either to make application for a special charter, or to wind up its affairs. This statute would unquestionably be held unconstitutional at the present time. Individuals and associations had embarked their funds in the banking business in the best of faith; nevertheless, the legislature restrained them under severe penalty from continuing a business perfectly lawful at its outset and forced them to wind it up, however great the loss.

Among the institutions affected by this law was the Merchants Bank, and it was therefore impelled to press for a charter, which it did at the session of 1805. The bank officials argued that larger banking facilities were necessary in the city of New York; that when the company put its capital into business, such use of its funds was legitimate; and that the recent enactment would cause serious loss to the proprietors unless a charter were granted. Unfortunately for the applicants, Republicans were interested in the Manhattan Company, and also in the State Bank of Albany. DeWitt Clinton and his New York City associates on the one hand, and Justice Spencer and other influential Republicans of Albany on the other, earnestly opposed the bank's application, the *American Citizen* and the *Albany Register* assigning as reasons why a charter should be refused that the applicants were "Federalists and Tories." Resort to corruption seemed almost a necessity to the applicants if a charter were to be secured; and it was openly charged by Cheatham in the *American Citizen* that senators had received bribes. In the council of revision, Justice Spencer, who was interested in the State Bank of Albany, naturally objected to its approval. But the bank obtained its charter despite his opposition.

No further bank charters were sought for some years. The refusal of Congress in 1812 to renew the charter of the Bank of the United States led to an endeavor to secure a charter from New York State for a new bank in the metropolis under the name of the Bank of America, with a capital of six million dollars. The capitalists behind this project felt confident of Federalist support, and equally confident of Republican hostility. To overcome opposition, they entered upon a course of bribery and corruption of members, which it is to be feared was in some instances successful. It becoming apparent to Governor Tompkins that the bill would pass both houses and that a majority of the council of revision was favorable to it, he took the bold and

unexampled step of proroguing the legislature for sixty days. But when that body met again in May it passed the bill, which was approved by the council of revision despite the objections of Spencer, who evidently saw in the new corporation a formidable rival of the State Bank of Albany. The capital of the new bank, he contended, was so great as to be a menace to smaller institutions. In his vehement and bitter hostility to the charter, he urged Clinton to take an unqualified stand against it. But Clinton, who was then seeking a nomination for the presidency and who looked to the bank's friends for support, was unwilling to do so, and his refusal to accede to Spencer's wishes led to the rupture of their intimate political relations.

Uncertain of Clinton, but resolved to defeat the bank charter, its enemies sought to increase the judicial force so as to obtain the necessary votes for a veto in the council of revision. This attempt shows the appalling extent to which politics affected every branch of the government, for the advocates of an enlarged bench must have felt certain that the council of appointment stood ready to pack the court with judges hostile to the charter. A bill for the addition of two new judges was passed by the assembly. Its passage in the senate was averted when it became known that a majority of the council of revision would veto it, Kent and Lansing leading the opposition. Apart from the motive behind it, the measure was sound, and the objections of the council were unsound. These objections were that because under the English common law and the colonial government of New York the number of judges in the highest tribunal had never exceeded five, the constitution of the State intended that number to be the maximum. Tompkins, in the Convention of 1821, declared that the judges had resolved to limit the court in order to retain their control of legislation.

Whether the solution of the franchise problem which the convention formulated was sufficiently far reaching—

and that may be doubted [13]—its abrogation of the two councils and its general treatment of constitutional questions were wise and were applauded by the people. The sins of a system were to be visited upon the judges themselves, as will be seen in the next chapter.

[13] "The intention of the convention was good, but the clause failed to accomplish the object intended. Witness the proceedings in passing the law to incorporate the Chemical Bank and other institutions in 1825. The only effect of the restrictive clause in the constitution has been to increase the evil, by rendering necessary a more extended system of corruption in some form than was before indispensable." Hammond, I, 337.

CHAPTER VII

REORGANIZATION OF THE COURTS IN THE CONVENTION OF 1821—RADICAL ELEMENT INSISTS UPON DESTRUCTION OF EXISTING SUPREME COURT—REPORT OF THE COMMITTEE ON THE JUDICIARY—ROOT'S AMENDMENT AND PROPOSED MERGER OF LAW AND EQUITY—REJECTION OF ROOT PROGRAM—THE TOMPKINS AMENDMENT, AIMED DIRECTLY AT EXISTING JUDGES—GENERAL DEBATE; ROOT ATTACKS, VAN BUREN DEFENDS, THE COURTS—TOMPKINS' AMENDMENT REJECTED—SELECT COMMITTEE FRAMES A NEW PLAN, THAT IS NOT SATISFACTORY—CARPENTER'S PLAN FOR THE ABOLITION OF THE EXISTING SUPREME COURT AND THE CREATION OF NEW TRIBUNALS, IN REALITY A REVIVAL OF ROOT'S ATTACK UPON THE JUDGES—CARPENTER PLAN CARRIED—THE NEW TRIBUNALS—EARLY AGE LIMIT FIXED FOR RETIREMENT OF JUDGES BY FIRST AND SECOND CONSTITUTIONS—KENT—BRIEF REVIEW OF COURTS UNDER THE SECOND CONSTITUTION—THE SUPERIOR COURT OF NEW YORK CITY—THE COURT OF COMMON PLEAS, NEW YORK COUNTY, AND ITS HISTORY—SUMMARY OF CONVENTION'S WORK—ITS ADDRESS TO THE PEOPLE—STATUTORY REVISION OF 1830—TREATY BETWEEN NEW YORK AND NEW JERSEY.

In the reorganization of the judicial department, the supreme court was destined to fall, as the animosities it had aroused were implacable. The odium in which the council of revision had become involved attached to the judges as members of it. To condemn the system did not satisfy the radical element in the convention; it demanded the political

immolation of the judges themselves. The committee on the judiciary department, under the leadership of Peter Jay Munro, a nephew of John Jay, proposed a moderate measure of reform with few alterations of the old system. The committee's plan retained the court for the trial of impeachments and the correction of errors, the supreme court, and the court of chancery. It contemplated the enlargement of the supreme court to a maximum of four justices, and the creation of a superior court of common pleas, to relieve the supreme court judges of *nisi prius* and *oyer* and *terminer* duties. Besides these superior tribunals, there were to be county courts and courts of general sessions of peace, and such other inferior courts as the legislature might establish. The court of errors was to be rendered even more unwieldy by the addition of the justices of the superior court of common pleas.

In order to aid the chancellor, "whose duties were so arduous that perhaps no other man in the State would have been equal to their performance," it was proposed to create a vice-chancellorship in or near the city of New York, and to permit the vice-chancellor not only to preside in equity trials, but to sit in the court of errors, and the legislature was to be empowered to create a vice-chancellorship for the western part of the State. The acts and decrees of the vice-chancellor were to be reviewable upon appeal to the chancellor himself. The business of the supreme bench had grown beyond the ability of the judges to manage it; not more than one-third of the cases on the calendar in New York City were usually tried. Two-thirds of the causes were necessarily passed. The demands of former years for a larger judiciary force were well grounded, yet these had always met apparently invincible opponents in the judges sitting as members of the council of revision. The committee proposed also to vest all probate and estate jurisdiction in the county courts, excepting in New York county, which was to have a separate court for the probate

of wills and the grant of letters of administration. The committee's measure did not satisfy the wish of a majority of the convention. The people in the western part of the State desired more common law judges and readier opportunities to invoke equitable relief. Suitors in chancery ought not to be obliged, they argued, to visit the capital in order to obtain chancery aid. Law and equity powers should be united in one set of tribunals.

By way of amendment, Root proposed to eliminate the supreme court judges and the chancellor from the court of errors. He advocated a supreme court to consist of a chief justice and not more than four nor fewer than two associate justices. He favored the creation of circuit courts; the number of circuit judges to be determined by the legislature, their powers to be the same as the powers of supreme court judges at chambers. They were to try issues joined in the supreme court, and to preside in courts of *oyer* and *terminer,* and, if required by law, even in the courts of common pleas and general sessions of the peace.

Root's radical program would have clothed the supreme court justices with jurisdiction in all cases of law and equity (first accomplished in 1847). It contemplated the abrogation of the existing supreme court. Upon Young's suggestion, he agreed to continue the court of chancery, with its existing organization subject to legislative pleasure. This proposed amendment started an animated debate. Young, Radcliff and others urged the union of chancery and common law jurisdiction in one set of tribunals. Even Kent was willing to favor it in a limited degree. But Munro, Williams, Van Vechten, Wheaton, Duer, Jay and Van Buren supported the committee's report and opposed Root's plan, and Van Buren went so far as to declare that "no judge of a court of law could feel himself at home in a chancery suit."

Sanford offered an amendment giving the legislature power to modify or abolish courts of law or equity, and to

transfer their functions or jurisdiction from one tribunal to another. This would have put the judiciary under legislative control, and have measurably blended two departments of government which should be kept entirely distinct. Root in reply disclaimed any intention to dispossess the court of chancery of its power unless the legislature should think proper to abolish it. King insisted that the higher courts ought to repose upon a constitutional basis, beyond legislative modification. The Root plan was rejected by a vote of 73 to 36. The question was then taken on the first section of the committee's report—as to the constitution of the judiciary department—and the section was rejected by a vote of 79 to 33. The conflict thus far seems to have been mainly between the friends of a separate chancery court and the advocates of a merger of common law and equity powers in one tribunal, either by constitutional fiat or in legislative discretion. On October 25, Tompkins moved an amendment in which the hostility of the more democratic element to the existing judges was plainly revealed. It provided a court for the trial of impeachments and correction of errors, a court of chancery, a supreme court with a chief justice, and not fewer than two and not more than four associates, courts of common pleas and general sessions, and such other courts as the legislature might establish. Tompkins' motion at once aroused the friends of the existing judiciary. Its object, said Edwards in opposing it, was "so to frame the constitution as to drive the present judges from their stations." Root answered, that as the convention had voted to disband the existing senate and to reduce the term of the first judges of the county courts from a life tenure to five years, the amendment would administer like treatment to the supreme court judges, and no complaint had been made of the treatment of senators or first judges of county courts. "Let the supreme court judges," he said, "be left, like the first judges of the courts of common pleas, senators, justices

of the peace, and other officers of the government, to the appointing powers, to say whether they have so behaved in their official stations as to entitle them to reappointment."

Van Buren, in reply, trenchantly exposed the sophistry of Root's argument. Was the convention prepared, he asked, to insert an article in the constitution for the sole purpose of vacating the offices of the chancellor and judges of the supreme court? In the select committee the advocates of it had "thrown off all disguises." The rule they would apply to the chancellor and members of the supreme court had no analogy to the case of the first judges of the county court. Those judges had not been removed; their office, as an office during good behavior, had been abolished. If the offices of the existing senators were to be vacated before the close of their constitutional term, that was necessitated by the reconstitution of the senate, which was to cease to be the seat of representatives of freeholders only. If he correctly interpreted the purpose of the Tompkins amendment, was it wise, he asked, to take this extreme step? Might it not endanger the ratification of the constitution? He exhorted the delegates to rise superior to feeling. Their constituents demanded no such measure. The convention had altered the impeaching power from two-thirds to a bare majority, and had provided for removal of the chancellor and the judges by a vote of two-thirds in one house and a majority of the other. The judicial officer, who could not be reached in either of these ways, ought not to be touched. No public reasons called for the proposed amendment, and it ought not to be adopted from personal feelings. If personal feelings might influence any one, he, above all others, might be excused for indulging them. Through his whole life he had been "assailed from that quarter by hostility, political, professional and personal, hostility which had been most keen, active and unyielding. * * * Am I on that account to avail myself of my situation as a representative of the people, sent here to make a

constitution for them and their posterity, and to indulge my individual resentments in the prostration of my private and political adversary?" It was unnecessary for him to say that he should forever despise himself, if he could be capable of such conduct. That sentiment, he trusted, was not confined to himself alone. The convention should not ruin its character and credit by proceeding to such extremities.

The Tompkins amendment was rejected by a vote of 64 to 44. From motives of delicacy, Kent and Spencer abstained from recording their disapproval of it. This vote and the previous rejection of the committee's plan left the whole subject in chaos. A select committee consisting of Munro, Tompkins, Root, Buel, Nathan Williams, Van Buren, and Schenck was then appointed to report a new plan. By a majority of one the committee favored the division of the State into circuits and the appointment of circuit judges with many of the powers of the supreme court justices. These judges, and also the chancellor and the justices of the supreme court, were to hold office during good behavior, or until the age of sixty years, and were to be ineligible to any other office or public trust during their respective terms. The legislature was authorized to create equity tribunals subordinate to the court of chancery.

The committee's report was not satisfactory to the convention. Finally, on November first, Carpenter proposed to create a new supreme court to consist of a chief justice and two associates. The State was to be divided into not fewer than four and not more than eight districts, for each of which a district judge should be appointed to hold office upon the same tenure as the justices of the supreme court, with the powers of such justices at chambers. They were to try issues joined in the supreme court, and to preside in *oyer* and *terminer*. They were also to enjoy such equity jurisdiction as the legislature might see fit to confer, subject to appeal to the chancellor. Chief Justice Spencer,

who seems to have forecast the determination of the convention to destroy the existing supreme court, suggested that the legislature be authorized to appoint circuit judges of like tenure with the supreme court judges, to hold terms in such counties as it might designate, and to sit in the court of impeachment and court of errors in like manner as supreme court judges. Spencer's plan involved only a slight departure from the Carpenter plan for the appointment of district judges. He had, he said, received his appointment from the venerated first governor of the State; he had been in office eighteen years; his term would expire by constitutional limitation in less than five years, and, as his friends knew, he had often contemplated resigning it. The defects of the system had occupied the attention of the judges, and while he believed that with the addition of one or two to their number, they would be able for years to come to transact all their business, he would favor the plan of appointing circuit judges, provided they were to hold office during good behavior. With an adequate salary and such a tenure, men of the requisite legal requirements and of integrity and character might be obtained. As for himself, if the public good required his removal, he should say "amen, to it." Root supported Carpenter's plan, as did Livingston. In order to preserve the existing supreme court, Wheaton, foreseeing the possibility of its abrogation and resolved upon procuring an explicit vote, tried to add to the Carpenter resolution a provision that would have kept the existing judges in office.

Duer, who had voted against the Tompkins amendment, opposed the Wheaton proviso; Van Vechten advocated it; the convention rejected it 66 to 39, and passed Carpenter's amendment, 62 to 53. Thus the party of Root, Livingston and Tompkins, whose constant aim had been to depose the judges then in office, won by the substitution of a court that necessitated new appointments. It may be, as was charged, that there were men in the convention who aspired

to succeed Spencer and his associates. Subsequently, the word "circuit" was substituted for "district," and as amended the judiciary article was carried.

Thus the judges were forced out of office because of public irritation against a vicious system for which they were not responsible. The constitution of 1777 tended to make them political partisans. The tenure of their office secured them from removal and from the fate of other political partisans, but that very immunity, as Hammond well says, emboldened them to be guilty of greater violence as partisans. And although they could not be removed from office, they were free to accept nominations for other offices. Jay, in 1792, while still Federal chief justice, ran for the governorship, although with reluctance. Joseph C. Yates was elected to that office, as the first governor under the second constitution, shortly after the loss of his commission as supreme court judge. Smith Thompson, before his elevation to the supreme court at Washington, had been district attorney of the old middle district, associate, and, afterward, chief justice of the State supreme court, and secretary of the navy under President Monroe. Tompkins was successively judge, governor, vice-president of the United States. Lewis and Marcy also found the bench the stepping-stone to high political office. Judges ought not to court political preferment. The gain to the bench would be great if its members, in the spirit of Kent, should consider that ambition can ask no place of loftier dignity or larger usefulness.

The second constitution created a new court of errors, with substantially the same jurisdiction as had been possessed by the court organized in 1777, but the senatorial membership was enlarged to 32. The court, which lost its aristocratic tinge when the freehold restriction for senators was abolished, continued, however, until January 1, 1847. The State was divided into circuits not fewer than four nor more than eight in number, as the legislature

might determine, for each of which a circuit judge was to be appointed in the same manner and to hold his office by the same tenure as the justices of the supreme court. Each circuit judge was to possess the powers of a supreme court justice at chambers, and in the trial of issues joined in the supreme court and in courts of *oyer* and *terminer*. The legislature was authorized to clothe the circuit judges and subordinate courts with equity powers, subject to the appellate jurisdiction of the chancellor. Neither the chancellor, nor the justices of the supreme court, nor any circuit judge could hold any other office or public trust. To interdict the use of judicial place as the pathway to other office, the constitution provided that all votes for any elective office given by the legislature or the people, for the chancellor or a justice of the supreme court or circuit judge during his continuance upon the bench should be void.

The provision of the first constitutions terminating judicial activity at sixty has frequently been criticised. Hamilton, in the *Federalist,* in 1788, after declaring that of all the faculties of the human mind the judgment is most improved and refined by age, said: "In a republic where fortunes are not affluent and pensions not expedient, the dismission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it would be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench." That this limitation should have been continued under the second constitution was, according to Mr. William Johnson, Kent's intimate friend and the first State reporter, cause for unfeigned astonishment. "We might," he said, "search in vain the history of mankind from the first institution of civil government to the formation of the constitution of the State of New York for a similar limitation. It is opposed to the opinions of the greatest law-givers, statesmen, and political

writers in all those States and countries to which we are accustomed to look for the lights of wisdom and the lessons of experience. It is a satire on the intellect of the bar and a standing reproach to the discernment and integrity of those to whom is entrusted the power of appointment to office, for it is almost certain that one fit to be a judge at forty will be equally, if not more, competent at sixty years of age." [1] It is a well-known fact that the celebrated Commentaries were the fruit of Kent's post-judicial years.[2]

[1] In an address before the Association of the Bar of the City of New York, "The Revision of the Statutes of the State of New York and the Revisers," January 22, 1889, the late William Allen Butler, son of Benjamin F. Butler, one of the revisers, said: "The first draft of the Judiciary Article of the Constitution of 1821 extended the tenure of the judicial officers to seventy years of age, but by some sinister influence the unreasonable limitation of sixty years was substituted by the Convention."

[2] The modern lawyer is bewildered with a multitude of precedents, but the early bar of the State regretted the paucity of decisions. Not a single opinion by Jay or his associates, or by Chancellor Livingston or Lansing, is to be found in the books. There was no authorized law reporter until 1804. "When I came to the bench," says Kent, "there were no reports or State precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own and nobody knew what it was. I first introduced a thorough examination of cases and written opinions. * * * This was the commencement of a new plan and then was laid the first stone in the subsequently erected temple of our jurisprudence. I gradually acquired a preponderating influence with my brethren, and the volumes in Johnson after I became the chief justice in 1804 show it. The first practice was for each judge to give his portion of opinions when we all agreed, but that gradually fell off and for the last two or three years before I left the bench I gave the most of them. I remember that in the 8th Johnson all the opinions for one term are *'per curiam.'* The fact is, I wrote them all, and proposed that course to avoid exciting jealousy and many a *'per curiam'* opinion was so inserted for that reason."

The practice which Kent inaugurated as judge he carried into equity when, in 1814, he was appointed chancellor to succeed John Lansing, junior, the successor of the distinguished Robert R. Livingston. The seven volumes of Johnson's Chancery Reports bear ample testimony to Kent's study and erudition. "In February, 1798," he naïvely tells us, "I was appointed to the office of judge of the Supreme Court. This was the grand object of my ambition for several years past. It appeared to me to be the true situation for the display of my knowl-

Under the second constitution, the State for twenty-four years enjoyed the benefit of a judiciary appointed by the executive with the approval of the senate. Many of the judges under the first constitution were learned jurists,[3] but it is an undeniable truth that those who came to the higher courts by the governor's appointment after 1822 were lawyers of conspicuous learning and ability, whose opinions shed a lustre upon our jurisprudence which has not been dimmed by any brilliancy of the bench in later years.

Of the governor's appointees, Woodworth was the first to retire. He was followed, in 1829, by William L. Marcy, who resigned in 1831 to enter the senate of the United States. During his occupancy of the bench, says Hammond, "he acquitted himself in a manner satisfactory to the bar and the public, and afforded decisive evidence of integrity and impartiality." The great jurist who succeeded Marcy was Samuel Nelson. He had been a judge of

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edge, talents and virtue, the happy means of placing me beyond the crowd and pestilence of the city, of giving me opportunities to travel and to follow literary pursuits,—a taste which is after all the most solid and permanent of all sublunary enjoyments. By the acceptance of this office I renounced all my offices in New York with all their accumulated income and all my prospects of wealth, for a moderate but permanent support, for leisure to study, for more rational enjoyments, for a more dignified reputation. Whether or no I judged well for my happiness must be left to the event to decide, and this depends also in a great degree upon my own taste and disposition. This is certain that the mere men of business and pleasure, who estimate happiness by the income, and by the splendid luxuries of city life, all condemned my choice as mad and absurd. But men of patriotism and reflection, who thought less of riches and more of character, if they did not approve, were yet more slow to condemn. My present impression is so unfavorable to public liberality and public justice and to the belief of the eventual success and credit of firm and upright government, that I think it questionable whether I calculated well or ill when I abandoned the office of recorder and master and took that of judge."

[3] "Judge Hobart, who for twenty years had aided to give the decisions of the court such strength and character as they had, was not a lawyer—he had not been educated to the profession of law" (D. D. Barnard on Ambrose Spencer, p. 47).

the Sixth Circuit, where he had made a splendid record. In 1845 he was nominated by President Tyler to the supreme bench at Washington,[4] where he remained until his resignation in 1872, when he was succeeded by Ward Hunt, who had sat in the New York Commission of Appeals. Esek Cowen succeeded Sutherland, in 1835, and Greene C. Bronson took his seat in the court in the same year, upon Chief Justice Savage's resignation. Samuel Beardsley, who obtained Bronson's place as attorney general, was subsequently appointed to the supreme court. The office of attorney general was often the avenue to judicial distinction. Down to 1845, four of the State supreme court justices had been honored with seats in the supreme court of the United States—John Jay, Brockholst Livingston, Smith Thompson, and Samuel Nelson. Since that date the State has given to the highest Federal tribunal Ward Hunt, Rufus W. Peckham and Charles E. Hughes.[5] Robert R. Livingston was Jefferson's minister to France in 1801, and Marcy received the portfolio of war in Polk's cabinet. The circuit judges were notable jurists—Ogden Edwards, Samuel A. Betts, William A. Duer, Reuben H. Walworth, afterward chancellor, Nathan Williams, a brilliant advocate, William Kent, the great chancellor's son and biographer, Charles H. Ruggles, Hiram Denio and Amasa J. Parker, the last three of whom afterward sat in the Court of Appeals. The recollection of such distinguished men and of their famous successors should arouse the bar to a sense of the duty of always maintaining a high standard in the judiciary, for the

[4] Tyler had first tendered to Silas Wright, then a senator at Washington, the vacant seat of the late Smith Thompson, but as Wright declined it, he offered it to Chancellor Walworth. The senate refused to confirm Walworth, and Tyler's next choice was Judge Nelson.

[5] Roscoe Conkling, who was appointed by President Grant, never qualified. Associate Justice Samuel Blatchford went from the United States Circuit Court.

bar is no less potent to-day than formerly. It has only to make its influence felt.

The old superior court of the city of New York, which had been organized in 1828, was one of the tribunals that derived advantage from the new system of appointment. Governor Pitcher appointed to the chief judgeship Samuel Jones, once chancellor of the State, and as associate judges, Josiah Ogden Hoffman, a former attorney-general and ex-member of Congress, and Thomas J. Oakley, who had been surrogate of Dutchess county, attorney-general and an antagonist of Wirt and Webster in the case of Gibbons v. Ogden. Oakley became chief judge when Jones resigned in 1847 to enter the court of appeals. The superior court, the judges in which became elective in 1847, was enlarged in 1849, and John Duer became one of its members. Lewis H. Sandford, William W. Campbell,[6] Joseph S. Bosworth, Murray Hoffman, Lewis B. Woodruff and Edwards Pierrepont, not to prolong the list, also sat in that court. A bench of this distinction naturally attracted a great volume of important litigations, in which eminent members of the city bar participated.

The new judicial system was in many features a compromise. As might have been anticipated, it failed to give full satisfaction, and Governors DeWitt Clinton, Marcy and Seward advocated reforms in it in their various messages to the legislature. In the message of 1841, Governor Seward set forth that the administration of justice was retarded and made oppressive by the defective organization of the courts; that the court of chancery was incapable of performing its duties; that causes remained on its calendar two years; that its patronage was too great to be reposed in a single judge; that the supreme court was in arrears in its business; that fees were excessive and legal forms and proceed-

[6] Father of Douglas Campbell, author of "The Puritan in Holland, England and America." Judge Campbell himself wrote the "Annals of Tryon County."

ings unnecessarily tedious and prolix. The necessity of reorganizing the courts and simplifying judicial procedure was a leading motive to the call of the Convention of 1846.

The supreme court was first established in 1691, but the court of common pleas of the city of New York is far older, and traces its lineage through the mayor's court back to the Dutch period.[7] In every town and village in Holland, long prior to the settlement of New Amsterdam, there had been a local tribunal combining dual functions,—judicial and municipal. This court consisted of the burgomaster and *schepens,* usually elected, the former a sort of mayor, and the latter having a resemblance to aldermen, and with these were associated an official known as a *schout,* who, besides acting as a prosecuting officer, performed some of the duties of a sheriff. Local courts of this description, from which appeals lay to the supreme council of the province, may be traced as far back as 1650, despite the disposition often evinced by the governors to assume their powers. The "worshipful court of the *schout,* burgomaster and *schepens,*" with its remarkable knowledge of Dutch law, which Stuyvesant in one of his proclamations contemptuously styled the "little bench of justice," was in the main permitted to exercise its judicial functions without interference by the governor. It acted also as a court of admiralty and as a court of probate. It had its criminal side, the *schout* acting as a district attorney. Similar courts existed at Breucklen, Jamaica, Albany, and other places, although in those portions of the province in which the patroons enjoyed manorial privileges the patroons' court exercised practically all judicial power, as they were authorized to establish within their territory courts of justice with unlimited civil and criminal jurisdiction, with the right of appeal to the director general and council of New Amsterdam.

When New Amsterdam surrendered to the English in

[7] Judge Charles P. Daly, in an Introduction to 1 E. D. Smith.

1664, the judicial system of the province consisted of these local courts, the patroon courts, and a supreme or appellate court composed of the governor and council. The terms of capitulation preserved the tenure of the inferior civil officers and magistrates, and the administration of justice in the court of the burgomaster and *schepens* continued under English rule almost as though there had been no change of government. The Duke's Laws provided for justices of the peace in the various towns, and courts of sessions composed of all the justices living within any one of the three "ridings" into which the province was divided. These courts had both civil and criminal jurisdiction, and were also courts of probate. From the judgment of a court of sessions an appeal lay to the court of assize, then the highest tribunal in the province, held by the governor and his council.[8]

On June 12, 1665, Nicolls by proclamation abolished the court of burgomaster and *schepens,* and conferred its powers upon the mayor, aldermen and sheriff, which became the corporate name of the city of New York.[9] The magistrates who formed the previous tribunal were reappointed, and the court of burgomaster and *schepens* became the mayor's court, which title it held until 1821. This court was distinctly recognized by the charter granted to the city by Governor Dongan, the charter providing that the mayor, recorder, and aldermen might hold a court of common pleas within the city every Tuesday for the trial of all actions of debt, trespass, or trespass upon the case, detinue, ejectment, or other personal action according to the rules of the common law and the acts of the general assembly of the province. The mayor or recorder, or three or more aldermen, not exceeding five, were clothed with the powers of justices of the peace, and might hear and determine all manner of petty larcenies, riots, routs, oppression and ex-

[8] Out of this court grew the colonial legislature, but the legislative powers and the judicial functions were not allowed to conflict.

[9] City Charter and Kent's Notes, p. 108.

tortions and other trespasses and offences in the city. The charter effected a distinct separation between the legislative and judicial functions of the mayor, recorder, and aldermen, the common council having the legislative power, the mayor's court having jurisdiction of civil actions, and the court of sessions, consisting of the mayor, recorder, and aldermen, having criminal jurisdiction exclusively. The mayor's court was afterward stripped of its probate and prerogative powers. Prior to the Revolution, a judge of probate was appointed for the province, and by the act of 1778 all powers which had been vested in the governor of the colony as judge in probate matters were vested thereafter in the court of probates, and in 1787 an act was passed authorizing the governor, with the consent of the council of appointment, to commission a surrogate for every county.

The county courts were recognized by the first constitution, and were reorganized after the ratification of the second. The mayor's court was continued, the mayor and the recorder sitting in it, and also in the court of sessions. Such distinguished mayors as Edward Livingston and DeWitt Clinton, and such eminent recorders as Samuel Jones, James Kent, Maturin Livingston, Josiah Ogden Hoffman, and Peter A. Jay presided at the trial of causes in that tribunal. The mayor's court had a brilliant history, and was hardly exceeded in importance by the supreme court of the State. During the early years of the nineteenth century, renowned judges presided in the mayor's court, and the greatest of lawyers practiced there,—the most notable being Alexander Hamilton, Aaron Burr, Robert Troup, Edward and Brockholst Livingston, Egbert Benson, Morgan Lewis, Josiah Ogden Hoffman, and John Jay. The celebrated cause of Rutgers v. Waddington, perhaps the first in the history of the country to involve discussion of the principles of constitutional law and the law of nations, and one of the first in which a State law was adjudged invalid,

was tried in that court before Judge James Duane. The importance of the tribunal led in 1821 to its reorganization under the name, the court of common pleas for the city and county of New York, with a first judge to hold office during good behavior or until he should attain the age of sixty years. When, by the constitution of 1822, power of appointment of judicial officers was lodged in the governor, the tenure of office of the first judge was changed to five years, but the mayor, recorder, and aldermen still sat as justices. John T. Irving, a brother of Washington Irving, was appointed first judge by Governor Yates. In 1834, owing to the growth of business, the office of associate judge was created, and Michael Ulshoeffer, the distinguished member of assembly in 1820, who crossed swords with Chancellor Kent about the convention bill of that year, was appointed to the position of associate judge with all the powers of the first judge. After the adoption of the constitution of 1847 the judges of the court became elective. It had a long and distinguished history, for besides the mayors and recorders who have presided in it, may be mentioned John T. Irving and Michael Ulshoeffer, the late Daniel P. Ingraham (father of Presiding Justice George L. Ingraham), Charles P. Daly, and Lewis B. Woodruff.

The Convention of 1821 was an unqualified victory for popular rights. It enfranchised a large and deserving class of citizens. It made the governor a real power. It differentiated the government more clearly into three departments, —executive, legislative, and judicial,—all of which were fused under the first charter. It gave the people control over the senate as well as the assembly. While it retained the framework of the old judicial fabric, it increased the judicial force. It incorporated into the organic law a bill of rights. But its report was not unanimous, nine of the delegates voting against it.

The constitution was submitted as a whole, for reasons stated in the address of the delegates to the people, Novem-

ber 10, 1821, said to have been composed by Erastus Root. This course was adopted "from a sense of the great difficulty, if not impracticability, of submitting to the people for their ratification, in separate articles, the various amendments which have been adopted by majorities of the convention. This difficulty is very much increased by the reflection that the adoption of some articles, and the rejection of others, might greatly impair the symmetry of the whole. The convenience of having the amendments incorporated with those parts of the constitution which are to remain unaltered, will readily be perceived. We therefore submit to the people the choice between the old and the amended constitution." The submission took place January 15-16-17, 1822. By the act of March 13, 1821, recommending the convention, every person entitled to vote for delegates was made eligible to vote upon the convention's work. The returns, as filed in the office of the secretary of state in February, showed that there were 75,422 votes for the constitution, and 41,497 against it. By it, as Governor Yates said in his message to the legislature in January, 1823, "the government had been adapted to the feelings and views of the community, the only proper standard by which a good government can be formed."

The history of this period would be incomplete without brief reference to the revision of the statutes of the State, necessitated in large measure by radical changes of polity in the new constitution. The revisers named in the statute authorizing the revision (April 21, 1825) were John Duer, Benjamin F. Butler, and Henry Wheaton, two of whom had been leading members of the convention. With them for a time was associated Erastus Root, "but, as an active and veteran party leader and an able advocate of the older type, he was neither adapted nor inclined to the work of a pioneer in legal reform." Wheaton, in April, 1827, became chargé d'affaires of the United States to Denmark, and to his place Governor Clinton appointed John C. Spencer, son

of Chief Justice Ambrose Spencer. In the interval that had elapsed since the passage of the statutes, a *projet* or outline of revision had been prepared by Duer and Butler, and upon its lines the revision was subsequently executed. This monumental undertaking, comparable with the work entrusted by Justinian to Tribonian and his associates and with the codification of French law by Napoleon when First Consul, antedated all efforts in Great Britain for a scientific and orderly arrangement of jurisprudence. DeWitt Clinton, with his comprehensive cast of mind, had in 1825 not only urged a revision of the statutes, but had also favored the preparation of a complete code of law, and Edward Livingston had drafted for the State of Louisiana a code largely based upon the Code Napoleon. In England the inertia of the legal profession still tolerated the inconsistencies and intricacies of the common law system, whose criminal jurisprudence was a sort of Draconic code, and it is to the merit of New York that, while Sir Samuel Romilly, Bentham, Brougham, and Austin were engaged in exposing the defects of the English system, the legislature should have authorized an enterprise fraught with such vast consequences to jurisprudence in this State and in other States of the Union.

The fundamental idea of the revisers was clarification and simplification of law, and its emancipation from the many harsh and almost uncivilized rules of the common law. They proposed to reduce the volume of law by the employment of concise, simple, and intelligible language, and the elimination of "uncertainties and obscurities arising from the long and involved sentences and from the intricate and obsolete diction" in which the law had been written, and thus facilitate acquisition of knowledge of it as a science. It was their hope also that the successful execution of their plan might lead other States to emulate New York's example. The revision as outlined subdivided the statutes under several heads,—one relating to the territory,

political divisions, civil polity, and internal administration of the State; another to the acquisition, enjoyment, and transmission of property, to domestic relations and private rights; a third branch concerned itself with the judiciary and procedure in civil causes; a fourth embraced the whole subject of crime and punishment, criminal procedure, and prison discipline; and the last dealt with public laws of a local and miscellaneous character, among them the laws of the city of New York, acts incorporating cities and villages, and other acts of incorporation. This comprehensive scheme was executed with remarkable celerity, and at an expense so small that the labors of the revisers might be said to have been almost gratuitous.

The complexities of the law of real estate, with its innumerable subtleties and refinements, the outgrowth of centuries, were supplanted by a simple and comprehensive code containing few radical departures from the prevailing system, and perhaps no portion of the undertaking of the revisers was more splendidly accomplished. Almost unchanged has it withstood the criticism of generations.[10] Chancellor Kent, who declined an appointment as reviser, declared in an eloquent tribute to the revisers' work that "much of the labor, the plan and order of the work, the correctness of its style, the learning of the notes, the marginal references, and the admirable index, should be ascribed to the skill and matchless assiduity of Mr. Butler." [11] The appearance of the revised statutes was, as William Allen Butler has felicitously said, "an event of the first magnitude," coming almost as a surprise to "the profession

[10] The lethargy of the professional mind is amusingly described by Mr. William Allen Butler in his monograph "The Revision of the Statutes of the State of New York and the Revisers," 1889, 48, in the story told about Peter A. Jay and the abolition of the rule in "Shelley's Case."

[11] Id., page 52. See also I, Revised Statutes of New York, 1st ed.; Revisers' Reports and Notes, vol. V, New York Statutes at Large, edited by Hon. John W. Edmonds.

at a time when the earlier agitation of the question of reform in England had demonstrated the need of change and improvement, without introducing any new methods to supersede old abuses."

The attempt in the revised statutes to determine the boundaries of the State aroused anew the claims of New Jersey to a portion of the territory of New York, and led to a treaty between the two States.

The controversy between New York and New Jersey dated from the colonial period. The Dongan Charter, granted by James II. to the city of New York in 1686, conveyed ownership of and jurisdiction over all the waters of the Bay of New York and of the Hudson River west of Manhattan Island, and south of Spuyten Duyvil Creek to low-water mark on the New Jersey shore. According to the Montgomery Charter of 1730, the territorial limits of the city of New York extended across the North River to low-water mark on its west side. Statutes passed both by the colonial and the State legislature acknowledged and confirmed these rights of the city. The colonial legislature passed such an act on October 1, 1691; acts of the State legislature followed on October 14, 1732, March 7, 1788, and February 28, 1791. The city's jurisdiction over Bedloe's Island and other islands west of the middle line of the bay was further acknowledged by statutes passed in 1800, 1803, 1813, 1825, and 1829. New York's claim may not have been always unequivocally asserted, but it was never abandoned. New Jersey consistently disputed New York's contention.

In 1807 commissioners were appointed by the two States to settle the dispute, but they separated without reaching any result. In June, 1829, New Jersey filed a bill in the supreme court of the United States against the State of New York to have the boundary line determined, but the suit was dismissed (New York State refusing to appear) because of agreement upon the treaty of 1834. Under

laws passed by the respective States authorizing such action, the governor of each State appointed three commissioners to negotiate and agree with a similar number of commissioners appointed by the other State "respecting the territorial limits and jurisdiction" of the two States. The commissioners on behalf of New York were Benjamin F. Butler, who had recently completed his work of revision of the statutes, Peter Augustus Jay, and Henry Seymour (father of Horatio Seymour); on the part of New Jersey, Theodore Frelinghuysen, James Parker, and Lucius Q. C. Elmer. The agreement or treaty was signed by the commissioners on September 16, 1833, was confirmed by New York on February 5, 1834 (Laws of 1834, Chapter 8, page 8), and by New Jersey on February 26, 1834 (Laws of 1834, page 118), and was approved by Congress by act of June 28, 1834 (Chapter 126, 4, Statutes at Large, 708).

This treaty was construed in 1862 in State v. Babcock (30 N. J. Law, 29), and in 1867 in People of the State of New York v. Central Railroad Company of New Jersey (42 N. Y., 283). It is an interesting fact that Judge Elmer, author of the opinion in the New Jersey case, who had been one of the commissioners for that commonwealth, took a more favorable view of the rights acquired by New York than did the majority of the judges of the court of appeals. Exclusive jurisdiction not only over the water but over the land to the low-water line on the Jersey shore was, in his opinion, "in plain and unmistakable language, granted to, or rather acknowledged to belong to the State of New York." The treaty has recently been under consideration by the supreme court of the United States in Central Railroad Company of New Jersey v. The Mayor and Aldermen of Jersey City (209 U. S., 473), in which the court upheld New Jersey's contention that she had the right to tax lands under water lying between the middle of New York Bay and low-water line on her own shore.

Slaves were familiar figures in New York households in

the earlier part of the nineteenth century. The last vestige of this "institution" disappeared with the emancipation of July 4, 1827. A few years afterward, the State abolished imprisonment for civil debt (1831),[12] inaugurated needed reforms in prison discipline, and expanded its common-school system.

Ten separate propositions of amendment to the second constitution were at different times submitted by the legislature to the voters of the State, six of which were adopted. The most important were the amendment of 1826, abolishing all property qualifications for white voters; the amendment of 1834, giving the electors of the city of New York qualified to vote for other municipal officers the right to vote for mayor, the appointment of that official thus being taken away from the common council of that city; and the extension in 1838 of a like privilege to voters in all other cities of the State.

[12] This was the outcome of the "Stilwell Bill," which had been urged by a petition from New York City and referred to a select committee of which Stilwell was made chairman. Weed declares that the bill elicited "long and animated debate in both houses." It was seriously argued in opposition that if the old law were repealed poor men would no longer be able to obtain credit. "Dickens might have found in any of our county jails materials as touching as those upon which the story of 'Little Dorrit' was founded." Thurlow Weed, Autobiography, I, 379, 380.

CHAPTER VIII

CANALS—TOPOGRAPHY OF NEW YORK STATE AND EARLY EFFORTS FOR A CANAL FROM THE HUDSON TO THE GREAT LAKES—CONSTRUCTION OF ERIE CANAL AUTHORIZED—LATERAL CANALS—STATE AID TO RAILROADS—ERIE ENLARGEMENT PROPOSED—INTERNAL IMPROVEMENTS—PUBLIC DEBTS—STOPPAGE OF WORK UPON THE CANALS—ACT OF 1842 AND ITS POLICY—ATTEMPT AT REPEAL—GOVERNOR WRIGHT'S VETO AND ITS EFFECT UPON HIS POLITICAL CAREER—PUBLIC DEMAND FOR A CONSTITUTIONAL CONVENTION AND FOR CONSTITUTIONAL RESTRICTIONS UPON STATE DEBTS AND PROHIBITION OF LOAN OF STATE CREDIT TO PRIVATE ENTERPRISES, AND FOR JUDICIAL REFORM—PASSAGE OF LAW RECOMMENDING A CONSTITUTIONAL CONVENTION—VOTE FOR A CONVENTION—THE APPORTIONMENT OF 1846.

The constitution, which took effect, as a whole, on January 1, 1823, remained in existence for twenty-four years. During a large part of the time, the State enjoyed almost unexampled prosperity. Men of ability and sagacity, most of whom afterward acquired national reputation, filled its gubernatorial chair. Its judiciary numbered some of the most exalted names in the annals of its jurisprudence. The advancement of the State was, however, largely due to its canal system, which attracted immigration, augmented the revenues of the State, imparted value to the land in its middle tier of counties, and summoned villages and towns into life. The Appalachian range, which in the States south of New York raises a barrier between the Atlantic Ocean

and the Mississippi Valley, falls away almost to a level between Lake Erie and the Hudson River. That nature had made it possible for the river and the Great Lakes to be united by a canal through New York State, whereby commerce might be floated to and from the great inland water system and the ocean, had impressed the imagination of far-seeing men even in the eighteenth century, but it was reserved for DeWitt Clinton to give such conceptions practical form. Clinton himself, writing under the *nom de plume* "Tacitus," declared that the idea of a connection would almost naturally occur to the visitor to the western country. The merit lay in the initiation of a procedure to carry it into execution. Here Clinton was concededly pre-eminent. The defeat of his aspirations for the presidency kept him at home and gave him opportunity to devote his zeal and talents to the cause of the canals.

The value of a canal as a unifying force, linking the States into closer relationship, was appreciated by Washington. The success of Fulton's "Clermont," in 1807, was also a factor in canal development, as by shortening the sailing time between New York and Albany it aroused desire in the newer regions of the State for quicker transportation to the seaboard.[1] In 1808 the legislature appointed a joint committee to "take into consideration the propriety of exploring and causing an accurate survey to be made of the most eligible and direct route for a canal to open a communication between the tide waters of the Hudson River and Lake Erie," and the committee was expected to obtain aid from Congress. By a concurrent resolution, March 13 and 15, 1810, the senate and the assembly appointed a commission to explore a route from the river to Lake Ontario and Lake Erie, procure surveys, and report estimates. This commission, of which Gouverneur Morris was chairman, made a report, largely his draft, estimating the cost at

[1] "Artificial Waterways and Their Development," A. B. Hepburn, 23.

$5,000,000. A new commission appointed under an act passed April 8, 1811, to provide for the improvement of the internal navigation of the State, vainly sought to enlist the aid and co-operation of Congress. Upon this body served ex-Chancellor Robert R. Livingston, Robert Fulton, Peter B. Porter, Gouverneur Morris, and DeWitt Clinton. During the War of 1812 the canal enterprise naturally languished, but at its conclusion fresh energy was infused into the project. Petitions were presented to the legislature of 1816 by many of the leading towns in the western and northern sections of the State, where the sentiment for the canal was always powerful, and an eloquent memorial containing a fund of information obtained from personal inspection of the route, said to have been almost entirely the work of DeWitt Clinton, was submitted on behalf of the merchants of New York City.[2] The assembly proposed to equip a commission to begin work at once, but the senate, at the instance of Van Buren, limited its functions to preliminary investigation and report. The new commission, with Clinton as its president, reported to the legislature at an extra session in November, 1816, and in a later communication advocated the construction of the Champlain Canal as well. The legislature, by act Chapter 262, Laws of 1817, the passage of which Senator Van Buren aided by his talents and influence, continued the former commissioners and authorized the construction of the Erie, Oswego, and Champlain canals. Notwithstanding the apathy shown by Congress in 1811, it was still hoped that the general government might contribute to the canal fund, but it is to the credit of the State that this splendid achievement, ere long

[2] "It may be confidently asserted," said the memorial, "that this canal, as to the extent of its route, as to the countries which it connects, and as to the consequences which it will produce, is without a parallel in the history of mankind. It remains for a free State to create a new era in history, and to erect a work more stupendous, more magnificent and more beneficial than has been achieved by the human race." Alexander, "A Political History of New York," I, p. 244.

destined to become of national significance, was executed solely through its own resources. Despite Clinton's memorial, despite Elisha Williams' prediction of the benefits of the canal to the metropolis, and despite Van Buren's advocacy, all the senators from New York City were against the bill, and a large majority of the city's representatives in the assembly also were hostile. "From the outset, Tammany, by solemn resolution, had denounced the canal project as impractical and chimerical, declaring it fit only for a ditch to bury Clinton." [3] Of the eighteen senators who favored the bill, five were anti-Clintonians whose votes were mainly ascribable to Van Buren's influence. The ground for the construction of the Erie Canal was broken at Rome, July 4, 1817, in the presence of Clinton, who in the spring had been triumphantly elected governor, and whose inauguration had occurred July 1.

The building of the canal was not merely a physical and engineering problem; the canal commissioners were intrusted with the duty of expending upward of $5,000,000; the influence and patronage of the commissioners' offices were political prizes, and the canal therefore became an element in politics. In the course of a few years the canal board was reorganized in the interest of the Bucktails, who ill-brooked Clinton's presence in it. As the work neared completion, Clinton, by a bold and unexpected coup of the Albany Regency, was deposed from his place (April 12, 1824), although no charge of mal-conduct was even hinted. A resolution for his removal was introduced in the senate in the closing hours of the last day of the session, was immediately passed, all but three senators voting in the affirmative, and was carried in the assembly, 64 to 34. The removal, declares Hammond, "could not have been devised or advised by Van Buren," although plainly the work of his political lieutenants. But, however originated, it operated

[3] Alexander, "A Political History of New York," I, 251.

like an electrical shock to the whole community. Public sentiment throughout the State stigmatized it as "a cruel outrage" to one of the greatest benefactors of the commonwealth. Clinton's renomination for governor was widely demanded, and he was re-elected in the fall of 1824 over Samuel Young, by a majority of 16,000.[4]

The Erie and Champlain canals, extending a distance of 427 miles, had been so far completed in October, 1823, as to allow navigation through their whole extent. Almost from the time of their inception, the canals became an important factor in the politics of the State, and remained such for sixty years. The people are indebted to their artificial waterways not only for unbounded material prosperity, but for salutary lessons in financial and economic principles. About 1820 the general government became definitely committed to the doctrine of internal improvements, which led to the evolution of parties for and against the principle in national affairs. In the State, party distinctions were not sharply drawn upon this subject, for while it was a cardinal theory of the Whigs that it was the duty of the commonwealth in the interest of the public welfare to develop canals and promote railway enterprises with State aid, many influential Democrats were marshalled under the same banner. It was a seductive proposition, and the ablest politicians of the Democratic faith were too shrewd not to appreciate its strength with the people. Although in later years the Whigs were the chief sufferers from the effect of the debt caused by canal expansion, the responsibility for the debt belongs to both parties, who were simply obeying popular desire. Several distinct phases may be observed in the history of the commonwealth: the period of canal ex-

[4] The vote for Clinton was 103,453; for Young, 87,093.

"With twenty-four years of experience and observation, I have never heard the removal of Mr. Clinton defended or excused in halls of legislation, in the press or by an individual." "Autobiography of Thurlow Weed," I, 113. Hammond gives similar testimony.

tension and State aid to railroads, with the inevitable consequence of large indebtedness; the era of discontent with debt accumulation culminating in the call for the Convention of 1846 and the insertion in the organic law of restrictions upon the creation of debt by the State; and the adoption thirty years later of like constitutional prohibitions upon city, county and town indebtedness.

Scarcely had the Erie Canal become an accomplished fact before two conflicting systems of canal policy sprang into full vigor, one proposing an expensive scheme of internal improvements including the construction of lateral canals intersecting the chain of lakes in the centre of the State, at the expenditure of many millions, to be obtained, if need be, by loan of the credit of the State; the other deprecating the creation of this vast debt and, while not opposed to canal improvement, insisting that the work could safely be undertaken and carried on only out of surplus canal revenues as they should accrue. The advocates of the debt-contracting policy were sanguine believers that the canal tolls would keep constantly augmenting, that the interest on the debt would surely be met out of revenue, and therefore that no necessity would ever arise for direct taxation. They maintained ascendency in the State government long enough to secure legislation providing for the Cayuga and Seneca, the Crooked Lake, the Chemung, and the Chenango canals, and others, the expense of construction of which was onerous, without promise of corresponding revenue.[5] The friends of the debt-paying policy counselled

[5] In the period between the second constitution and the convention of 1846, the legislature ordered surveys of forty canal routes. Besides these it chartered thirty-one companies with power to construct canals, and authorized the construction of two others by private or municipal means. It actually authorized the construction of fifteen other canals by the State in addition to the great canals, which were already in full operation. Lincoln, "Constitutional History," II, p. 48.

The canal commissioners made extravagant predictions as to future tolls, placing the amount at $1,000,000 for 1836; $2,000,000 by 1846; $4,000,000 by 1856; and $9,000,000 within fifty years. The tolls in 1836

moderation in expenditure, and opposed the lateral canals. As might have been expected, public sentiment in counties remote from the canals, which could not see benefit to themselves from canal construction, did not support the canal policy. To overcome their objection, the State was drawn further into the system of internal improvement. At first the project was to build a State highway in the southern counties; this was abandoned, and in its place the State lent its aid to the construction of the New York and Erie Railroad Company.

After ten years of use, it was found that the Erie Canal needed enlargement and improvement; and in 1835, at the suggestion of Governor Marcy, a law was passed which not only authorized but directed the canal commissioners to enlarge and improve the Erie Canal and construct a double set of lift locks therein as soon as the canal board should be of the opinion that the public interest required the improvement. No limitations were placed upon the extent of the enlargement, which was left solely to the discretion of the board. The act clothed the commissioners with great and perhaps questionable powers, but it was shorn of much of its danger by the clause which forbade the contracting for any improvements the cost of which could not be defrayed out of the surplus revenues of the canals. In March, 1838, the canal commissioners reported to the assembly that, by an expenditure of about $12,500,000, the canal could be made seventy feet in width and seven feet in depth, and supplied with adequate gates and locks. The legislature thereupon passed and Governor Marcy approved a bill au-

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exceeded the amount predicted by $440,000, and in 1846 by almost half a million. "With the comparatively limited expenses of the state government at that time, and the relatively large income from the canals, the people had begun to think that taxes need never be imposed again, for the waterways were looked upon as a veritable treasure house for supplying funds." Whitford, "History of the Canals." See also "Waterways and Canal Construction in New York State," by Hon. Henry W. Hill, p. 152.

thorizing the commissioners to borrow $4,000,000 on the credit of the State for the enlargement of the canal.[6] The act further directed the commissioners to prepare and put under contract, with as little delay as possible, such portions of the work as were mentioned in their report to the assembly, and also such other portions as, in the opinion of the canal board, would best secure the completion of the entire enlargement, with double locks on the whole line. The interest on the money borrowed was to be paid out of canal tolls until the legislature should otherwise determine. This measure received considerable Democratic support. Thus empowered, the canal commissioners made contracts, pledging the State treasury to an expenditure of about $12,500,000, nearly all of which sum was made payable before May 1, 1842. Laws were also passed for the construction of the Black River and Genesee Valley canals, and the public credit was liberally extended to various railroad enterprises, among them the Erie Railroad, to the amount of $3,000,000. When the Convention of 1846 met, the loans made by the State for railroad purposes exceeded $5,000,000. Opposition to this policy of lending the State credit to railroad associations had been rapidly crystallizing, and it resulted in the decision of the convention to forbid in future all State aid to private enterprises.

In the year 1839 the canal commissioners were asked to revise their estimates and report again to the legislature. It was then discovered that the expenditure necessary to complete the improvements on the scale contemplated in their previous report had risen to $23,000,000—double the original estimates—and that, with other public improvements undertaken or assisted by it, the State had involved itself in a possible indebtedness of $30,000,000.[7] These facts were

[6] Chapter 269, Laws of 1838.

[7] "The estimated cost of the enlargement was $23,402,863.02. It was not completed until 1862, and cost $31,834,041.30." Hill, "Waterways and Canal Construction in New York State," 151.

mentioned by Governor Seward in his annual messages to the legislature in 1840, 1841, and 1842, but faithful to the policy of internal improvements of which he was an ardent and somewhat indiscriminate advocate, the governor argued in favor of continuing the work which had been undertaken, keeping the expenditures therefor within an amount the interest upon which could be paid from the surplus revenues of the canals.[8]

These events followed shortly upon the commercial panic of 1837. The credit of most of our sister States was then at the lowest ebb. Foreign confidence in all American securities had been seriously impaired by the policy of partial repudiation which some of them had adopted. The revelations of the canal commissioners had a disastrous effect upon the credit of New York State. Its stocks rapidly depreciated, its treasury became practically empty, money could not be borrowed for public uses for long terms, and it was with great difficulty that temporary loans could be procured to meet pressing emergencies. In 1842 the Democrats regained ascendency in the State legislature.[9] Alarmed at

[8] As Congress had voted a distribution of the proceeds of sale of public lands among the States, the governor recommended that all future revenues from the national domain should be pledged as a sinking fund to the extinguishment of the principal of the public debts; and asserted his belief that if seventeen millions of dollars were still to be required for the completion of the canals, the whole debt might in this manner be discharged by 1855. "Viewed in the light of subsequent history, perhaps Governor Seward's faith was justified, and it may be that the better way would have been to have pushed the work to completion at the expense of increasing the debt, but the State's best financiers of the time could see no way out of the difficulty, but to precipitately suspend operations and order a tax to satisfy the creditors of the State." Whitford, "History of the Canals of New York." See also Seward's Messages, and his "Notes on New York," published in Seward's Works, vol. II.

[9] Azariah C. Flagg became comptroller, Samuel Young, secretary of state, and George P. Barker, attorney-general. These officers were not elected by the people, but were chosen by the legislature. Flagg, in his first report to the legislature, "boldly laid bare the financial condition of the State; he adverted to the rapid decline of the pub-

the magnitude of the debt and the prospect of its increase, the legislature, under the leadership of Michael Hoffman, of Herkimer, passed the celebrated finance bill of 1842, to which the governor gave reluctant approval.[10] Hoffman had been a member of Congress and also a canal commissioner. With his experience in this last office and his signal talents as a lawyer and debater, he was exceptionally qualified to explain the intricate details of finance and to lead the movement to stop expansion. The policy of this act, called the Suspension Act, was summary. It put an end to all work on the canals except such as was strictly necessary to preserve and render useful what had already been completed. To meet the State's immediate necessities, it imposed a direct tax upon real and personal property, and pledged one-half of the tax to canal purposes. It authorized the issue of bonds, and pledged surplus canal tolls to the redemption of the canal debt. As Governor Wright subsequently declared, the effect was electric; "it was felt not merely throughout the State, but throughout the Union. * * * From this time the credit of the State rose rapidly."

While the "pay-as-you-go" policy of the act of 1842 was maintained, completion of the contemplated enlargement of the Erie Canal was impossible. It was not long before the Democrats themselves began to divide upon the question of maintaining the law in all its strictness. The failure of the Democratic National Convention at Baltimore to renominate Van Buren in 1844, and differences among party leaders upon national issues, split the party into two factions: one branch, the Radicals, or "Barnburners," were for rig-

lic credit, and if he did not demonstrate that the ship of State was aground, he proved that she was on the point of foundering." Hammond, "Life of Silas Wright," 274. See also picture of financial embarrassment of the State, 268.

[10] Whig votes, especially in the senate, seem to have been essential to the passage of the act. For the motive for Whig support of the measure, see "Life of Silas Wright," by Hammond, 284-5.

idly upholding the system of 1842 and applying all surplus tolls to the extinction of the public debt; the Conservatives, or "Hunkers," siding with the Whigs, urged that the surplus should be devoted to the completion of the public enterprises suspended by the act of 1842. But, whatever conflicting opinions were held as to the desirability of finishing the incomplete public works, public sentiment had awakened to the necessity of maintaining the pledge of canal revenues to the payment of canal debt, and of limiting the debt-contracting power of the legislature. Resolutions embodying these ideas were introduced in successive legislatures, and barely failed of the vote required to permit their submission to the people.[11] It was felt that the credit of the State would not be safe unless the act of 1842 was followed by constitutional checks upon legislative action, and the conviction had forced itself upon the public mind that State aid to railroad enterprises must terminate. Memorials from a large number of counties urged the legislature to pass a law for a popular vote upon the holding of a convention.

That voters discriminated between national and State issues, and that many Whigs had cast their ballots against debt enlargement, is shown by the official returns in 1844. Wright polled 241,090 votes, against 231,057 for Fillmore. His majority over Fillmore was 10,033, whereas the national ticket had a majority of only about 5,000. As Alvan Stewart, the candidate of the Liberty party for governor, polled almost the same vote as Birney, its candidate for the presidency, Wright's vote was plainly swelled by Whig accessions. As he wrote President Polk, December 20, 1844, the Democratic party had not been united upon questions of State policy for several years. State debts and public

[11] Arphaxed Loomis of Herkimer, after conference with Hoffman and Flagg, introduced resolutions of this tenor in the assembly of 1841 and of 1842. They were known as "the people's resolutions." See *inter alia* Hammond, "Life of Silas Wright," 286-288. Lincoln, "Constitutional History of New York," II, 82, 83. Loomis was subsequently a delegate to the convention of 1846.

expenditures had constituted the grounds of the division. Wright's first message elaborately reviewed the events which had brought the State to the necessity of issuing a direct tax. His intimacy with the subject was profound. As a State senator in 1825, and later as State comptroller, he had zealously supported the debt-paying policy. Uncompromising adherence to that policy had been the keynote of the State Democratic Convention, which had commended the constitutional amendments adopted at the previous session of the legislature. "By them," said the platform, "the pledges and guarantees of the act of 1842 are confirmed, and a salutary restriction upon the power of the legislature to involve the State in excessive debts or liabilities is imposed."

The assembly of 1845 organized with the youthful Horatio Seymour as speaker. Seymour ardently believed in the earning power of the canals, and sanguinely expected that surplus revenues could be counted upon to meet the expense of improvement. A coalition, tacit or actual, was effected with the Whigs. The canal committee appointed by the speaker was favorable to enlargement, and accordingly, within a few days after the commencement of the session, the legislature approved a bill appropriating $197,000 from canal revenues to various improvements in the Crooked Lake, the Genesee Valley, the Black River, and the Erie canals. The bill was an effort to undermine the statute of 1842, and it therefore met with a prompt and emphatic veto from Governor Wright. The following portions of the governor's veto message are quoted, because they help to explain the circumstances which led to the Convention of 1846:

"Another reason why I consider the present an unfortunate time to make this change of policy, is the evidence before us of a determinate disposition in the public mind to remodel our constitutional system, in reference to expenditures of this description. Ever since the prostration of the credit of the state in 1841, and the consequent suspension of the public works and establishment of the financial system

adopted by the legislature of 1842, the attention of our people has been drawn to the necessity of some further constitutional protection against the danger of enduring debt and perpetual taxation. Extended discussion for two years resulted in action by the last legislature, originating and submitting to the people, previous to the last election, specific amendments to the constitution, taking two most important positions in reference to the further increase of our public debt for these objects, namely:

"1. That no debt should be hereafter contracted for expenditures like these, until the law authorizing the loans should have been submitted to the people and expressly approved by them, by their direct votes at the polls; and

"2. That no law submitted to the people for their approbation, should contain authority to make loans for but a single work or object of expenditure, and should contain irrepealable provisions for a sinking fund to meet the interest and pay off the principal of the debt within a specified period.

"This legislature, elected with reference to these provisions as amendments proposed to the constitution of the state, has expressed its sense, the one house by the constitutional vote of two-thirds, and the other by a majority in their favor, thus reflecting most truly, as I believe, the deliberate sense and wish of a majority of the people of the state. The propositions, however, having failed to receive the constitutional vote of two-thirds of the assembly, cannot be submitted to the people, according to the provisions contained in the constitution for its amendment, and have therefore failed. This failure, together with that of other amendments similarly proposed and similarly failing, has secured the passage of a law for the call of a convention of the people of the state to amend the constitution."

Believing that the convention would be held, the governor declared that the resumption of public works and the making of new contracts would embarrass its proceedings. The measure not receiving the requisite vote in either house to pass it over his veto, was defeated. Wright's adamantine stand for the public faith prevented his re-election. Another cause was his treatment of the anti-renters. Paradoxical as it may seem, the people, in the canvass in which they defeated Wright, approved the calling of a constitutional convention. Wright had been elected in 1844 by a majority of 10,033 over Fillmore, yet was beaten in 1846 by an adverse majority of 11,572 in favor of John Young. The anomaly is that in the election of 1846 his views were

nevertheless sustained, and his and Michael Hoffman's policy of having the substance of the law of 1842 incorporated in the organic law of the State was approved by about 130,000 majority. Wright's veto may have been impolitic, but its explanation is his firm adherence to principle. His friends complained that the real object of the bill was the accomplishment of his overthrow; in many quarters his defeat was ascribed to "the old Hunkers."

Public sentiment urged the incorporation in the constitution of the essence of the act of 1842; the legislature of 1844 approved the proposed amendments, yet the legislature of 1845 withheld requisite consent. The senate was favorable, but in the assembly the resolutions for amendments were defeated. This resulted not from opposition to the principle of the amendments but from the determination of the majority to force the holding of a constitutional convention. The Hunkers opposed a convention unless all amendments were separately submitted to the people. Many radicals, including Hoffman, favored a convention as the only sure means of obtaining constitutional guarantees against additional indebtedness. The Whigs generally desired a convention, and this was the attitude of the native Americans and the Anti-Renters. In the assembly the Whigs, under John Young's leadership, succeeded in defeating the amendment resolutions, despite Seymour's brilliant opposition, and this forced the call of a convention.[12]

The constitution of 1821 provided only one method of amendment. Amendment might be had after approval by two successive legislatures, followed by popular ratification. There was no express authority for the summoning of a convention. On May 13, 1845, an act was passed by

[12] The Native American party came into existence after the great emigration from Europe began. The coalescence of the Democratic party in the city of New York with foreign born voters awakened some of the native born element to temporary revolt. The party elected James Harper mayor in 1844.

the legislature recommending a convention and providing for a referendum at the annual election in November of that year.[13] If the canvass of votes showed that a majority were in favor of a convention, the act recommended the citizens of the State, on the last Tuesday of April, 1846, to elect delegates to meet in convention for the purpose of considering the constitution and of making such alterations therein as the rights of the people should demand, and as they might deem proper. The number of delegates was to be the same as the number of members of assembly, and all persons entitled to vote for assemblymen were to be eligible to vote for delegates. The delegates were to convene at the capitol in the city of Albany on the first Monday of June, 1846. All amendments to the constitution submitted by the convention to the people for their adoption or rejection were to be voted upon at the annual election to be held in November, 1846, and every person entitled to vote at that election might vote upon the amendments. The call of a convention was approved by popular vote on November 4, 1845, the vote for a convention being 213,257, against it, 33,860.

At the time of the passage of the act of 1845 membership in the assembly was regulated by the apportionment which had been made in the spring of 1836. In the spring of 1846 a new apportionment was, pursuant to the constitution, made by the legislature. On April 22, 1846, the legislature passed a law declaring that the number of delegates to be chosen in and by the respective cities and counties of the State should be the same as the number of members of the assembly to be chosen in and by said cities and counties respectively, in pursuance of the act passed on May 30 of

[13] The act recommending a convention was by some Democrats regarded as unconstitutional; Seward and other leading Whigs believed it valid. The vote in the senate was 18 for, to 14 against; in the assembly, 83 in favor, to 33 in opposition.

that year for the apportionment of members of the assembly.[14]

Inasmuch as the questions which had led to the vote for a convention aroused party and factional differences, and as an election of delegates under the apportionment of 1846 would give to certain interests a preponderance which they might not have had under the apportionment of 1836, the assembly sought the opinion of the justices of the supreme court upon the constitutionality of the act of 1846. The justices unanimously declared that the legislature was without power to compel delegates to be chosen under the later apportionment.[15] The number of members from the respective counties under the apportionment in force when the act of 1845 was passed was, said the court, to be determined by the apportionment of 1836, and although a new apportionment of members of the assembly had been made, it could not take effect for any purpose until the fall of that year. The people "have not only decided in favor of a convention, but they have determined that it shall be held in accordance with the provisions of the act of 1845. No other proposition was before them and, of course, their votes could have had reference to nothing else." The opinion of the learned judges was, nevertheless, disregarded by both the legislature and the people, for the election took place under the later apportionment.

The popular vote in favor of holding the convention preponderated, yet the total vote upon the subject was not

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[14] "In other words, the act calling the convention was proposed to be modified by the body which had originally passed it, after it had been voted upon by the people." Jameson, "The Constitutional Convention," Sec. 390.

[15] The judges were Bronson, Beardsley, and Jewett. Judge Jameson vigorously dissents from that portion of their conclusions in which they seemed to hold that where express authority to call a convention has not been given by the constitution, a legislature has no power to do it.

much more than half the vote for the governor. Public indifference to constitutional questions appeared also in the vote upon the convention's work and has, as a rule, been a notable characteristic of later votes upon constitutional matters.

CHAPTER IX

CONVENTION ASSEMBLES AT ALBANY—JOHN TRACY, PRESIDENT—PERSONNEL OF CONVENTION—CHIEF WORK OF CONVENTION—PROVISIONS AS TO CANALS, PUBLIC REVENUE, AND PUBLIC DEBTS—EVILS OF SPECIAL LEGISLATION—PROVISIONS AS TO CORPORATIONS—THE LOCO-FOCO PARTY AND ITS DECLARATION OF PRINCIPLES—EFFECT UPON CONVENTION—POLICY OF CONVENTION EXTREME DECENTRALIZATION—INCREASE IN NUMBER OF SENATORIAL DISTRICTS—ABOLITION OF COUNTY REPRESENTATION IN THE ASSEMBLY—PROVISION FOR ARBITRATION TRIBUNALS—CREATION OF NEW SUPREME COURT WITH LAW AND EQUITY POWERS—ADOPTION OF ADDITIONAL MODE OF AMENDING THE CONSTITUTION—ADDRESS OF THE CONVENTION TO THE PEOPLE—ESTIMATE OF ITS WORK—THE CANAL BILL OF 1851, DECLARED UNCONSTITUTIONAL—AMENDMENT OF CANAL PROVISIONS OF CONSTITUTION IN 1854—ORIGIN AND PROGRESS OF ANTI-RENT CONTROVERSY AND LIMITATIONS UPON AGRICULTURAL LEASES IN NEW CONSTITUTION.

The convention assembled at the capitol on June 1, 1846, and John Tracy, of Chenango county, was chosen president. The representation was of a high order. There was a large proportion of lawyers in the assemblage, whose work called for supreme legal talent. Seward was not a delegate, his county being unfavorable to his selection. Charles H. Ruggles (afterward chief judge of the court of appeals), Michael Hoffman, Charles O'Conor, Samuel J. Tilden, Churchill C. Cambreleng, Charles P. Daly, Ira Harris, later

United States senator, Henry C. Murphy, Charles P. Kirkland, Samuel Nelson, John K. Porter, Lorenzo B. Shepard, Alvah Worden, Ambrose L. Jordan, Lemuel Stetson, and ex-Governor William C. Bouck were among its leading members. Both James Tallmadge and Judge Nelson had been delegates to the Convention of 1821.

The Convention of 1846 was the first constitutional convention ever assembled in this State which fully deserved to be styled a people's convention. The delegates were elected substantially upon the basis of manhood suffrage. The truly popular origin of the convention may explain its apotheosis of the notion that all power emanates from the people. The cardinal distinction between this convention and its predecessors is that its work seemed chiefly to be a revesting of delegated power in the people of the State. It was remarkable, no less in regard to the power which it bestowed than in regard to that which it resumed. The chief innovation of the constitution of 1846 was in limiting the sphere of legislative action. It deprived the legislature of power to incur debts or undertake costly schemes of public improvement without direct popular consent, and forbade its loaning the credit of the State to private capital, thus putting into the organic law the principles for which Michael Hoffman had earnestly and successfully contended in 1842. The restraints which the constitution of 1846 placed upon the legislature may be ranked as the most valuable service performed by the convention.

The convention reported a new constitution which embodied the greater part of the old. The radical changes related to: (1) canals, internal improvements, public revenue, and public debts; (2) incorporations; (3) election of State, judicial, and local officers; (4) enlargement of the number of senate districts, and substitution of district for county representation in the assembly; (5) reorganization of the judiciary, and reformation in the system of legal procedure; (6) methods of amending the constitution.

The subject of public improvements and public debts, which was the chief cause for the summoning of the convention, is treated in Article VII of the constitution of 1846. As originally ratified, the article first provided for keeping the canals of the State in repair out of its revenues. It then set apart $1,300,000 of the surplus revenues every fiscal year until June 1, 1855, to the liquidation of the principal and interest of the canal debt, and thereafter devoted $1,700,000 of such revenues annually to the same purposes.[1] It set apart annually $350,000, and, after the extinguishment of the canal debt, $1,500,000 every year to the redemption of the principal and interest of that part of the State debt called the general fund debt which it was claimed in the convention had been incurred for the canals and which therefore the canal revenues ought equitably to defray. These provisions in the main had been embodied in the report of the Committee on Canals and Public Debts, headed by Hoffman and Tilden. The convention also proposed to render the canals inalienable and require the people to operate them, for the constitution which it framed declared that these should never be sold, leased, or otherwise disposed of. Thus was extended to the canals the policy concerning the salt springs adopted by the Convention of 1821. Prohibition of sale of the salt springs was withdrawn in 1894.

As in the legislatures of 1842 and 1844, so in the convention, were to be found advocates and opponents of the enlargement and completion of the canals.[2] With the majority the extinguishment of debt in the shortest period, at least within the period contemplated by the act of 1842, was the paramount idea. Others were animated by the desire to

[1] This assumed the revenues would continue adequate for these purposes, and they did.

[2] A majority of the delegates to the convention, according to statements made in the course of debates, were instructed to engraft the main features of the law of 1842 upon the constitution.

see the canals completed and enlarged so as to produce the fullest benefit to the State, and to prevent diversion of western trade to other Atlantic ports,—even at the cost of delaying the liquidation of the debt—and their effort was to secure provision out of the canal revenues for the requisite completion and enlargement. The constitution made provision for necessary work, and so fortunate was the State that it was able to pay the debts then charged upon the canal revenues in as short a time as was anticipated by those most desirous of seeing them promptly extinguished.

But the most important provisions of the article were contained in sections 8 to 14 inclusive. With few substantive changes these sections have remained intact to the present day. Section 8 forbade the payment of money or funds of the State except in pursuance of appropriations by law. Section 9 declared that the credit of the State should not in any manner be given or loaned to or in aid of an individual, association, or corporation, thus preventing subsidies to railroads or to other enterprises originated by private capital. Section 10 empowered the legislature to contract debts in order to meet casual deficits or failures in revenue or expenses not provided for, but provided that no such debts, direct and contingent, singly or in the aggregate, should at any time exceed one million dollars. Moneys raised to pay such debts were to be rigidly applied to the specific purposes for which they had been obtained. These limitations were not to apply, however, in extraordinary emergencies. The State was left free to contract debts in any amount in order to repel invasion, suppress insurrection, or defend itself in war; but moneys raised for any of these objects were sacredly to be devoted to their accomplishment. Section 12 ordained that with the exception of the debts specified in the tenth and eleventh sections the State should contract no debt except in pursuance of a law specifying the sole work and object for which the debt was to be incurred; that the law should also

provide for the collection of a direct annual tax, sufficient to pay the interest on the debt as it fell due, and the principal within a period of eighteen years from the time when the debt had been contracted; and that before it could take effect every such law should be submitted to the people and be sustained by a majority of all the votes cast for and against it. Even after popular sanction was thus had, the legislature might repeal the law or stop the work. To prevent the enactment of such laws in moments of public excitement, no such measure was to be voted upon by the people within three months after its passage through the legislature. Nor was a vote to be taken upon any such law when any other enactment or bill, or any amendment to the constitution, was to be voted upon by the people. Section 13 provided that every law imposing, continuing, or reviving a tax should distinctly state the tax and the object to which it was to be applied, without reference to any other law, in order to fix the tax or object. Section 14 required that the vote in either house upon all such measures should be taken by ayes and noes, to be entered on the journals, and that whenever such measures were voted upon, a quorum should consist of three-fifths of all the members elected to either house.

Article VIII contained the second class of restraints on the State legislature, namely, those which relate to the creation of corporations. The State had long suffered from the evils of special legislation. The constitution of 1822 had aimed to supply a remedy by providing that the assent of two-thirds of the members elected to each branch of the legislature should be requisite to every bill appropriating public money or property, for local or private purposes, or creating, continuing, altering, or renewing any body politic or corporation. Henry Wheaton, one of the delegates to the Convention of 1821, offered a resolution in that body making it imperative upon the legislature to enact general laws regarding private corporations, but his wise resolution

was not adopted. The provision approved by that convention failed to remedy the evil; it merely led to greater scandals in the legislature, since more money was required to secure the necessary two-thirds vote. The vice lay in the permission of special legislation. Additional bank charters were sought after it became known that Congress would not for a second time renew the charter of the Bank of the United States. The State law restraining the use of capital for banking purposes was repealed in 1838 and superseded by a general banking law, but the power to grant special bank charters still existed, and special charters were sought for insurance companies and railroad enterprises.[3]

The sentiment against special privileges took concrete shape in New York City in 1835 in the formation of a party known as the Equal Rights party, to which was soon afterward given the sobriquet of the Loco-Foco party. In a convention held in that city, this party promulgated a "declaration of rights" asserting its hostility to the grant of special privileges, which brought upon it almost universal censure from the press, *The Evening Post* alone, among the city papers, approving most of its principles. The platform adopted at a State convention held in 1837 advocated in addition the election of all judges by the people, the abolition of capital punishment, and the punishment of all frauds as felonies. The career of the party was ephemeral, but

[3] Many applications for bank charters were made to the legislature of 1824. From the City of New York, two were successful, one for the Fulton Bank, the other for the Chemical Bank. One came from Rochester, and this Thurlow Weed engineered through the legislature. While declaring that nothing was paid for this, he states in his "Autobiography" that the charter of the Fulton Bank "owed its success to a clause contributing a large amount, $200,000, I believe, for the benefit of the then vice-president, Daniel D. Tompkins. The other, the Chemical Bank, it was alleged, purchased its charter. Such at least were the charges and a legislative investigation showed that a large amount of money had been expended, and with damaging effect upon several members of the legislature." "Autobiography of Thurlow Weed," I, 106.

its hostility to special legislation and special privileges had its influence upon the new constitution.[4]

Article VIII of that constitution, which was the outcome of the work of three separate committees—the Committee on Municipal Corporations, the Committee on Banking Corporations, and the Committee on Other Corporations—was a feeble protest at best, and in its adoption the convention did not take an adequate forward step. While in one clause it forbade special charters for private corporations, in another it practically nullified this by allowing such incorporation where in the judgment of the legislature the objects of the corporation could not be attained under general laws. This "judgment," as has well been said, is not judicial, but legislative, and therefore not reviewable by the courts. Special charters for banking purposes were prohibited; the legislature was forbidden to sanction in any manner the suspension of specie payments by any person or association issuing bank notes, and required to provide for the registry of all bills issued to circulate as money and for their redemption in specie. Stockholders in banks of circulation were made individually responsible for corporate debts to the extent of their shares, and bill holders were, in the event of the insolvency of a bank, given a preference over all its other creditors. As the Dartmouth College decision had placed corporate charters theretofore granted above revocation, the constitution wisely reserved to the legislature the power of altering or repealing all such charters as should thereafter be granted.

Next in importance to its restrictions upon the law-making power was the change made by the constitution in the system of appointment. The first constitution vested the power of appointment, in all its amplitude, in the council of appointment; the second constitution clothed the gov-

[4] Hammond, "Political History of New York," II, 489-503, Byrdsell, "History of the Loco-Foco Party." "Martin Van Buren," by Edward M. Shepard, 293.

ernor and the senate with this power except in the case of State officers elected by the two houses of the legislature. The policy of 1846 was extreme decentralization. It gave the people the election of officers theretofore appointed by the governor, and of State officials previously chosen by the senate and assembly. It preserved and extended local self-government. The power of removal, which the constitution of 1822 had divided between the governor and the legislature, was retained in the same control, but greatly increased in scope. Thus while the tendency in electing was decentralizing, the power of removal was centralized. The people were to elect, but either the governor and the senate or the legislature might remove for misconduct in office.

The convention changed the tenure of the senatorial office and the mode of electing senators and assemblymen. The State was divided into thirty-two senatorial districts instead of eight, and each district was to choose a senator. The term of senators was reduced from four to two years. County representation in the assembly was abolished, and district representation substituted, the new constitution directing that members of assembly should be apportioned among the several counties of the State as nearly as might be according to the number of their respective inhabitants, excluding aliens and persons of color not taxed, and be chosen in single districts. Every county except Hamilton was insured at least one member. Hamilton was to elect with Fulton until its population should entitle it to a member. Provision was made for a new census and a new reapportionment every ten years. The restrictions upon colored citizenship, for the removal of which Peter A. Jay had gallantly pleaded in 1821, were unfortunately continued.

The constitution authorized the establishment of tribunals of conciliation to hear cases voluntarily submitted by parties and to render judgment thereon, the hope, which

has never been realized, being that this would tend to reduce the volume of litigation. Also the legislature first thereafter to be convened was required to revise the system of court practice, which resulted in the simplified procedure subsequently adopted in this State, and substantially copied in many other States, and in England. Measures were provided to secure the codification of the substantive law of the State, but, although the commissioners charged by the legislature with this duty reported a code of the substantive law many years ago, so great was the hostility it encountered from the bar that it was never enacted.[5] Partial revision upon code lines has, however, been made, several branches of the law have been reduced to a codified form, and codes of procedure have been established.

The new constitution retained the court of impeachment, but abolished the court for the correction of errors. Chancery courts as separate organizations also ceased to exist, and the old, expensive and tedious methods of taking testimony in equity cases were abolished. A new supreme court was created with general jurisdiction in law and in equity. The State was divided into eight judicial districts, of which New York City, as then existing, was to be one, the others to be bounded by county lines, and to be as compact and nearly equal in population as possible. Four supreme court justices were allotted to each district, except the district coterminous with the city and county of New York. This district was to elect as many such justices as the legislature might prescribe. The term of office of supreme court justices was fixed at eight years. The constitution established a court of appeals of eight judges, four of whom were to be elected by the electors of the State for eight years, the remaining four to be selected from time to time by methods to be provided by law from the justices of the

[5] The constitution of 1894 finally eliminated these provisions (Sec. 17, Art. I).

supreme court having the shortest time to serve.[6] The judges of the court of appeals were to be so classified that one should go out of office every year. In the twenty-three years during which the constitution was in force these extraordinary provisions brought into the court of appeals more than one hundred judges, creating a most unstable and fluctuating tribunal.[7]

Although the constitution of 1822 made provision for its amendment by legislative resolutions approved by the people, it did not authorize the calling of a constitutional convention. Despite its silence upon this point, the act of 1845 provided for the submission to popular vote of the question whether a convention should be held, and if the vote were favorable, for the election of delegates and the holding of a convention. Two views were entertained as to this enactment: one, that although extra-constitutional, it was justifiable as a peaceful revolution. The other and the sounder opinion, endorsed by such constitutional lawyers as Rufus Choate and Marcus Morton in the Massachusetts Convention of 1853, upheld its fundamental constitutionality, upon the theory that the right of amendment by convention is a popular right underlying the constitution of every free people, which has not been renounced, although the constitution may furnish other methods of amendment. This interesting discussion was set at rest in this State by article XIII of the constitution of 1846, which provided for ascertaining the popular desire for a convention, at least once in every twenty years, and for the holding of a convention at shorter intervals should the people so will. Thus the constitution of 1846 furnished two methods of amendment,—the one by legislative initiative sustained by

[6] This mode of selection doubtless was based upon the assumption that the justices of the supreme court having the longest judicial experience were, as a rule, better qualified to sit in the court of last resort than their colleagues who had enjoyed shorter service upon the bench. (See also Secs. 4, 5, 6, Chap. 280, Laws of 1847.)

[7] For a fuller account of the judiciary, see Chapter X.

popular vote, the other by a convention called after a vote by the people to hold it. This dual method is now found in the constitutions of many States, and the history of this State demonstrates its usefulness.

There is little of permanent value in the opinions of the members of the Convention of 1846 regarding its work. It is within the power of few to view their own achievements impersonally. Taggart, somewhat in the spirit in which Jay spoke of the first constitution, and Washington of the Federal constitution, said that there was much in the work of the convention that he disapproved. Believing that as a whole it would give the State the best constitution it had ever had, he moved that the proposed constitution be read, adopted, and signed. In seconding the motion, Patterson, the eminent Whig, expressed the hope that it would receive a unanimous vote; the constitution had defects, but there was far more in it to approve. Henry C. Murphy thought the good over-balanced the evil, but protested against provisions which, he feared, authorized private property to be taken for certain private purposes. Worden considered the document on the whole an improvement in the science of government. Stow believed it would not meet the first expectation of the State or the country. Dana protested against the principle of making constitutional distinctions between citizens on account of color. Chamberlain frankly confessed that he had voted against the convention, and, while he dissented from part of the constitution, yet there were bright spots in it and he should sustain it as a whole with pleasure. He would have given the people an opportunity to express their judgment upon each article; but the convention, following the example of the Convention of 1821, declined to submit each article separately, and the fourteen articles were therefore submitted for popular approval as a whole. Hoffman, elated by his success in embodying the guarantees of the act of 1842 in the constitution, declared that the new or-

ganic law contained more excellent matter than any other constitution. Ira Harris pronounced it the best ever framed. Cambreleng said that it had made the legislative, judicial, and executive departments distinct in reality as well as in name. But Charles O'Conor, who had dissented from the work of the judiciary committee, and who seems to have disapproved many features of the constitution, did not hesitate to call it a signal failure.[8]

To Hoffman the convention assigned the duty of drafting its address to the people. The address thus sums up the work of the delegates:

"In these fourteen articles, they have reorganized the legislature, established more limited districts for the election of the members of that body, and wholly separated it from the exercise of judicial power. The most important state officers have been made elective by the people of the state; and most of the officers of cities, towns and counties are made elective by the voters of the locality they serve. They have abolished a host of useless offices. They have sought at once to reduce and decentralize the patronage of the executive government. They have rendered inviolate the funds devoted to education. After repeated failures in the legislature they have provided a judicial system, adequate to the wants of a free people rapidly increasing in arts, culture, commerce and population. They have made provision for the payment of the whole state debt and the completion of the public works begun. While that debt is in progress of payment they have provided a large contribution from the canal revenues towards the current expenses of the state and sufficient for that purpose when the state debt shall have been paid; and have placed strong safeguards against the recurrence of debt and improvident expenditures of the public money. They have agreed on important provisions in relation to the mode of creating incorporations and the liability of their members and have sought to render the business of banking more safe and responsible. They have incorporated many useful provisions more effectually to secure the people in their rights of person and property against the abuses of delegated power. They have modified the power of the legislature with the direct consent of the people to amend the constitution from time to time and have secured to the people of the state the right once in twenty years to pass directly on the question whether they will call a convention for the revision of the constitution."

[8] Regarding the new constitution, Daniel Webster wrote Weed in November, 1846, as follows: "There is much in it that is wrong in my judgment, but then there is much in it that is right, and the good, I think, is likely, in time, to root out the evil."

In the sober light of history, the address seems a panegyric. Much was indeed accomplished, yet much then done has since been undone. Decentralization was carried to an extreme. Whether important State officers should be elected by the people or appointed by the executive in accordance with the plan of the Federal government has often since been discussed. The convention itself was not a unit in its treatment of the judicial system, and changes since made show that it had not reached the ideal. Its hybrid court of appeals was a mistake, and its creation of an elective judiciary holding for brief terms was an error partially repaired after twenty years' experience. Longer terms for judges have since been adopted, but their choice by popular vote is still continued. The constitutional enunciations forced by the anti-rent sentiment have been declared unnecessary and in some instances unwise. The convention contributed almost nothing to the solution of municipal problems. The subject of municipal government was superficially treated—as Governor Tilden pointed out in his municipal reform message in 1875. Henry C. Murphy pleaded in vain for provisions for the incorporation of cities under general laws. And in less than a decade the carefully formulated canal policy was to undergo radical change.

In 1851, upon the recommendation of Governor Washington Hunt, a bill was passed to anticipate the revenues of the canals by the issue of certificates amounting to $9,000,000 for the immediate enlargement of the Erie Canal and the completion of the Genesee Valley and Black River canals. The constitutionality of this measure was upheld not only by Attorney General John C. Spencer, who had been one of the members of the statutory revision commission of 1830, but also by Daniel Webster and Rufus Choate. It was not carried in the regular session, as eleven Democratic senators prevented a quorum by resigning their seats. In the extra session, re-enforcements to the cause were ob-

tained as a result of the elections held to fill the senatorial vacancies occasioned by these resignations. Despite the formidable array of opinion in favor of the measure, it was deemed by many to be a palpable violation of the constitution. Tilden, who had been a colleague of Hoffman's in the canal committee of the convention, powerfully attacked it in a letter to the *Albany Atlas,* in April, 1851, in which he emphasized the necessity of adhering to the salutary policy of the constitution, and declared that he owed it to the memory of Michael Hoffman, "by whom these provisions of the constitution were mainly prepared, and to whom they were an imperishable monument," to show that his work was not so imperfectly done that the measure proposed could ever be invested with the authority of law while the constitution remained unchanged. The canal auditor refusing to draw a warrant for the payment of a claim that had been allowed by the canal commissioners, a mandamus was sought, which was granted in the courts below, but the court of appeals, after elaborate argument by most eminent lawyers, pronounced the statute unconstitutional, only one judge dissenting.[9] The defeat of this legislation stimulated the Whigs to renewed efforts; a resolution was carried through two successive legislatures for an amendment to section 3 of article VII of the constitution, and this was ratified by the people at a special election February 15, 1854. The amendment put at the disposition of the canal commissioners the sum of two and a half million dollars annually for four years for canal improvements. There was wisely added to the section a provision that all contracts for work or materials on any canal should be made with the person offering to "do or provide the same at the lowest price with adequate security for their performance." Canal contracts had constituted a valuable source of party patronage. Abuses grew and

[9] Newell v. People, 7 N. Y., 9.

flourished until the canals became a public scandal. The Convention of 1867 sought a remedy by changing the method of their administration, but all the work of that convention, save its judiciary article, failed of public approval. Later, Governor Tilden vigorously undertook to stop the "canal frauds."

Allusion has been made to the sections added to the bill of rights at the instance of the anti-renters. The Convention of 1846, following the language of the Convention of 1821, declared all lands within the State to be allodial. It added two new sections: one providing that no lease or grant of agricultural land for a longer period than twelve years thereafter made in which any rent or service of any kind was reserved should be valid, and the other declaring that all fines, quarter sales, or other like restraints upon alienations reserved in any grant of land thereafter made should be void. This latter provision in particular was demanded in order constitutionally to guarantee the permanence of the legislation of 1846, which had been secured by the tenants of the great estates in obedience to sentiment generally entertained throughout the State.

The origin and progress of the anti-rent controversy may briefly be explained. The dispute between New York and Massachusetts had been settled in 1786 by the cession by Massachusetts to New York of certain land [10] in the western part of this State, now including the city of Buffalo, and Massachusetts was given the right to extinguish the Indian title by treating with the native Indians. In 1791 it made conveyances of about five million acres to the famous banker, Robert Morris, of Philadelphia, who in turn conveyed to the Holland Land Company. The leases made by this company were similar in many features to the leases made by the patroons and owners of manors. During the Dutch rule, vast estates had been acquired by the patroons

[10] The cession included what was then known as "The Genesee Country," and also the counties of Broome and Tioga.

in counties fringing the Hudson River, particularly Albany, Columbia, and Rensselaer. Enormous grants had been made by some English governors to themselves and their favorites, which were the subject of letters from Lord Bellomont, when governor of the colony, to the Board of Trade. In one of these letters (January 2, 1701) he declared that seven million acres of land had been disposed of in thirteen patents. In many instances Indians had been persuaded into parting with their title to large speculators. Thus a great portion of the fertile territory of the State had become concentrated in the hands of a few persons. At the date of its independence, the State still owned more than seven millions of acres of unappropriated land. In 1791 the legislature, to supply needed funds, passed a law authorizing the commissioners of the land office (of whom Aaron Burr, then attorney general, was one) to dispose of this enormous territory in such parcels, on such terms, and in such manner as they should judge most conducive to the public welfare. Under this law more than five and a half million acres of land were transferred to a few large investors at trivial prices. One sale seemed the climax of prodigality—3,635,200 acres were sold to Alexander McComb at eight pence per acre. Payment was to be made in five annual instalments, without interest or, at his option, for cash at a discount, which made the net price about seven cents per acre. The action of the commissioners was bitterly criticised, but the house by a vote of 35 to 20 approved their conduct and declared the sales judicious.[11]

[11] "Memoirs of Aaron Burr," by Matthew L. Davis, I, 320, 329. The extent to which the people's patrimony, the land of the state, was sold at absurdly low prices or was allowed by officials to pass into private ownership is simply appalling. From the days of the colonial governors down almost to the end of the eighteenth century, valuable forest and arable tracts and mines and ores were disposed of in this manner. But history keeps constantly repeating itself. If today there are no broad acres for the public to retain it has nevertheless resources

The manor lords and capitalists, to whom this imperial domain had passed, usually made leases in fee or for long terms, reserving the old rights of feudal service. George C. Clyde, of Columbia county, in the Convention of 1846, in depicting the evils suffered by the lessees, spoke of the "cunningly devised" clauses which reduced the tenants to mere serfs and vassals of their feudal superiors. "The restrictions on the right of alienation—the reservation of wood, water, minerals, mill streams, and privileges—the quarter sales, the two fat fowls and day's labor drawing manure—the covenants requiring the tenant to go to the landlord's mill on pain of forfeiting his whole estate—and the thousand and one other little mean, degrading covenants, a violation of any *one* of which by the tenant works a forfeiture of the whole estate—the right stipulated for by the landlords to do whatever they please and the covenants exacted of the tenants that they shall do nothing as they please,—is all of a piece from beginning to end." Mixed with some rhetorical exaggeration, there was much truth in Clyde's denunciation. Rents due to the patroon Stephen Van Rensselaer had long been in arrears, as his policy to tenants was one of leniency, and the accumulations had surpassed the ability of tenants to pay. Upon his death in 1839, the attempts of his successors to enforce the harsh covenants and conditions of leases, which would have resulted in evicting great numbers of the yeomanry from their homes, brought the anti-rent controversy to a head. It grew in violence during the administrations of Governors Marcy and Seward, and culminated in bloodshed and the calling out of the militia by Governor Wright in 1846.

As has so often happened in history, while one side was within its strict legal rights, an overwhelming public sentiment was opposed to its assertion of them. The proprie-

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of untold wealth to conserve, yet these are too often dealt with as our ancestors dealt with public lands. Whilst inveighing against them for their errors we follow the like evil and reckless policy.

tors stubbornly insisted on enforcing covenants and conditions as to rent, fines, and quarter sales which had been inserted in the deeds or leases made by them and accepted by their tenants and by purchasers. The grantees and tenants contended, on the other hand, that the principles of feudal ownership were hostile to the constitution and the policy of the State, and tended to retard its development and create class distinctions. Such feudal regulations, it was urged by the occupants, would, if enforced, deprive tenants of all sense of manhood and independence. These differences were on their way to adjustment months before the Convention of 1846 assembled. The legislature of 1845 was flooded with petitions from the representatives of the tenants, who appeared before a committee of the assembly, of which Samuel J. Tilden was chairman, and advocated taxation of the interests reserved in long-term leases; abolition of distress for rent; and a law enabling the tenant to dispute the title of his landlord. Tilden, as chairman of the committee, presented to the assembly a report containing a thorough and dispassionate review of the issues between the tenants and the landlords. The report approved the first two measures advocated by the tenants and disapproved the third.

Two bills drafted by the committee were enacted into law, the one providing for taxation in the locality where the land lay, of the rents reserved upon perpetual leases, leases for lives and for twenty-one years or more; and the other abolishing all distress for rent. The committee also matured a bill prohibiting future leases of agricultural land for a period exceeding ten years. The bill, said Tilden, proposed: "by the exercise of the unquestionable power of the legislature over the statutes of devises and descents, to provide at a future and not very distant period for the commutation on equitable principles in chancery of the rights and interests of the landlords, and the conversion of them into mortgages payable at once or in reasonable in-

stalments." [12] As to the reservation of quarter and other proportional sales and charges upon alienation, which was a common feature of these harsh leases in fee, the report declared that they were not believed to be valid. "A general condition in a conveyance in fee not to alien was settled in this State to be void, as contrary to public policy." There is an interesting resemblance between Tilden's reasoning and that of Chief Judge Ruggles, of the court of appeals, some years later, when that court declared such restraints upon fee ownership absolutely void. Tilden's report and the legislation which followed it were undoubtedly potent in bringing anti-rent troubles to an end.

The legislation of 1846 really supplied adequate remedy, but the feeling prevailed in the manor counties that a constitutional declaration was essential to guarantee its permanence. Discussion of Clyde's resolution was brief, as the lawyers of the convention seem to have felt little interest in the subject. Ruggles, afterward author of the opinion in DePeyster v. Michael, wished to hear what benefit would result from such constitutional provisions to those who demanded relief. The legislature had ample power to deal with the subject, and there was no likelihood that it would ever assume to re-establish feudal tenures. Judge Brown objected to the prohibition of the right of an agricultural owner to lease his land for a long term, as an unconstitutional limitation upon free alienation of property. Others affirmed that these tenures were disastrous to agriculture and had a tendency to degrade the character of tenants—an opinion expressed more than once by Governors Marcy, Seward, and Wright. The length of permitted agricultural leases reserving rent or service was reduced to twelve years. The law of tenures is elaborate and perplexing; the judgments which support the invalidity of these restraints upon free alienation of land differ in their as-

[12] Bigelow, "Life and Letters of Samuel J. Tilden."

sumptions and reasoning. It was Judge Ruggles' opinion that the statute, *quia emptores,* had never become part of the colonial law of New York, and was first introduced into the civil polity of the State in 1787. In the celebrated case of Rensselaer v. Hays, Chief Justice Denio decided on the contrary that the statute had always been in force in the colony, and that its re-enactment in 1787 did not tend to show that it had not the force of law prior to that time. Since 1846 the last vestige of feudal tenures has disappeared, but whether the restraint upon agricultural leases which has ever since been retained in the constitution is wise, remains to be seen.

CHAPTER X

FLUCTUATIONS IN CONSTITUTION OF JUDICIAL DEPARTMENT —PERMANENT TENURE IN THE HIGHER COURTS UNDER THE FIRST CONSTITUTIONS—UNCERTAINTY OF TENURE IN COLONIAL DAYS—ENGLISH JUDICIARY BEFORE WILLIAM III—REMOVALS OF INFERIOR JUDGES BY COUNCIL OF APPOINTMENT—DEFECTS IN THE JUDICIARY UNDER CONSTITUTION OF 1821—UNWISE SOLUTION ATTEMPTED IN 1846—POPULAR ELECTION THE CREED OF THE TIME —BRIEF ANALYSIS OF JUDICIAL SYSTEM AS RECONSTITUTED IN 1846—RIGHT OF JUDGES TO SIT IN REVIEW OF THEIR OWN DECISIONS—NEW YORK NOT THE FIRST STATE TO ADOPT ELECTIVE JUDICIARY—REACTION SINCE 1846 IN VARIOUS STATES IN FAVOR OF APPOINTIVE SYSTEM OR LONGER JUDICIAL TERMS—TREATMENT OF THE JUDICIARY BY THE CONSTITUTIONAL CONVENTION OF 1867—JUDICIARY COMMITTEE OF THE CONVENTION—THE MAJORITY AND THE MINORITY REPORT TO THE CONVENTION—LENGTHENING OF JUDICIAL TENURE—DALY UPON THE CONVENTION OF 1846 AND ITS ADOPTION OF THE ELECTIVE SYSTEM WITHOUT DISCUSSION—EVARTS ADVOCATES TENURE DURING GOOD BEHAVIOR—VOTES OF THE CONVENTION OF 1867 UPON THIS SUBJECT—QUESTIONS AFFECTING THE JUDICIARY SUBMITTED BY THE CONVENTION TO THE PEOPLE—ORGANIZATION OF NEW COURT OF APPEALS.

"There seems," says a recent historian of the Constitutions of New York,[1] "to be no permanency in our judicial

[1] Charles Z. Lincoln.

system. Its fluctuations have been very marked, both in organization and detail. In this respect it presents a striking contrast to the other great departments into which our government is divided." The truth of this observation must impress every student of the history of the State judiciary.

The best feature of the judiciary system under the first two constitutions was the permanent tenure of the judges of the higher tribunals. There had been no permanency during the colonial régime. The province had its court of chancery and its supreme court; the governor, who sat as chancellor, was removable at the king's pleasure, and the judges of the supreme court were at first appointed by the governor, and held office at his will. During the administration of Lord Bellomont, Attwood was appointed chief justice by the sovereign, his appointment being by warrant or mandamus (which was the usual mode of appointing judges for the colony), requiring the governor to commission him by letters patent under his own signature and the seal of the province. This mode of appointing the chief justice was with one exception followed thereafter, his tenure depending upon the sovereign's will. The puisne judges continued as before to be commissioned by the governor and to hold office during his pleasure. "A tenure so precarious was productive of very injurious consequences. It not only lessened the independence of the judges, but as they were generally members of the council, and consequently mixed up with all the political questions of the day, they were liable to be removed, and many were removed upon the change of parties." [2]

Upon the death in 1760 of Chief Justice Delancey, whose commission had by way of compliment run during good behavior, the assembly, with the idea of rendering the judges independent of either governor or king, passed an act for the reappointment of judges upon the like tenure,

[2] Hon. C. P. Daly in 1 E. D. Smith, lxi.

but Lieutenant Governor Colden refused his assent to it. In 1763 the assembly petitioned George III. to make the appointment of judges run during good behavior. This memorial, which urged the example set by William of Orange upon his accession to the British throne, was referred to the Treasury Board,[3] of which Lord North was a member, but his influence was successfully exerted against the colonists. Throughout the residue of the colonial period, the tenure of the judges as well as their salary remained dependent upon the crown. The Convention of 1777, as has been seen, provided that the chancellor, the judges of the supreme court, and the first judge of the county court in every county should hold their commissions during good behavior or until they respectively attained the age of sixty years. With these exceptions the tenure of all judicial officers was unfortunately during the pleasure of the appointing power. Inasmuch as the establishment of the Federal judiciary did not take place until 1789, Jay and his associates in the Convention of 1777 must have derived their idea of permanency in the judicial office from English models.

The principle of a tenure for judges to continue during good behavior had its inception under the Act of Settlement in 1689, after the accession of William of Orange to the English throne. In Lord Coke's time the barons of the exchequer had been created to hold office during good behavior, and Charles II. signalized his restoration to the crown by issuing commissions to common law judges *quamdiu se bene gesserint,* but all such commissions were revocable at his pleasure. James II., bent upon securing judicial sanction for his exercise of a palpably unconstitutional power, found even the Tory judges of Westminster inflexible in their opposition. "Jones," says Macaulay, "the chief justice of the common pleas, a man who had never

[3] Which had charge of the affairs of the colonies (see Bancroft, "History of United States," II, 556).

before shrunk from any drudgery, however cruel or servile, now held in the royal closet language which might have become the purest magistrate in our history. He was told that he must give up either his opinion or his place. 'For my place,' he answered, 'I care little; I am old and worn out in the service of the crown, but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give.' 'I am determined,' said the king, 'to have twelve judges who shall be all of my mind as to this matter.' 'Your Majesty,' answered Jones, 'may find twelve judges of your mind, but hardly twelve lawyers.' He was dismissed, together with Montague, Chief Baron of the Exchequer, and two puisne (associate) judges, Neville and Charlton." The constitutional guarantee against future subversion of judicial independence erected by parliament upon William's accession stimulated other European nations to follow England's example, and rescue the judiciary from Montesquieu's reproach,—that it was the weakest department of government.

It was fortunate, indeed, that authority to remove judges of the upper courts was not vested in the council of appointment, which for acts of pitiless, machine tyranny has never been surpassed in the annals of the State. This political guillotine was constantly busy. Inferior magistrates were often made to feel its fatal power. When, in 1804, Radcliff resigned his place in the supreme court, the council raised Ambrose Spencer, attorney general, to his office and deposed Van Ness, a young Federalist lawyer of eminence, from the place of surrogate of Columbia county; yet this same Van Ness, notwithstanding his removal from the post of surrogate, was judged worthy to sit alongside of Spencer in the supreme court in after years. Van Buren, who was appointed surrogate of the same county in 1808, underwent similar deposition in 1813, when the Federalists obtained control of the council. This sys-

tem of reprisals was maintained until the second constitution abolished the council. The framers of that organic law, while providing that the chancellor and supreme court judges should hold office during good behavior, ought to have abolished the early-age retirement. A further mistake was made in limiting the term of county judges to five years. The defects which the Convention of 1846 found in the judicial system were, according to Judge Charles P. Daly (as stated in a speech made by him in the Convention of 1867), that the union of legislature and judges in the court of errors was incongruous; that a separate court of chancery was unnecessary; that the scheme devised in 1821 by which the circuit judges tried causes while the supreme court justices heard appeals, had worked badly and been universally condemned; and that a supreme court of three justices holding sessions at four different places in the State was insufficient for public business and inconvenient to the profession. The remedy adopted in 1846 was the creation of a supreme court of many branches, with justices sitting simultaneously in different parts of the State, and a court of appeals, one-half of whose members sat for eight years while the other half changed every year, and it was vainly hoped that by the establishment of courts of conciliation the volume of litigation would be diminished. But the solution proposed in 1846 proved no panacea, for litigation grew in amount, reported cases multiplied beyond anticipation, and suitors rarely attempted arbitration of their differences. Besides reconstituting the courts, the convention made judges elective, and required their election at short intervals, with the mistaken idea of making them directly responsible to the people.

The disordered condition of the finances of the State prior to the act of 1842, and the necessity for making that law irrepealable by a constitutional pledge of State revenues to the redemption of the State debt and for putting a constitutional check upon the loan of State credit to pri-

vate capital, were the chief motives for the popular decision to call a convention. Deeper and more general causes than widespread desire to get rid of debt were simultaneously at work, and these causes profoundly influenced the convention's proceedings. In the seventy years of its existence, the political character of the State had undergone a revolution. Under the first constitution the vote for governor and for senators was limited to owners of land in fee or freehold, and in the choice of assemblymen only property-holders participated. In 1826 the suffrage was placed upon a broader foundation, but it remained partly theoretical under the second constitution. The democratic movements that swept over America within the succeeding twenty years, and were felt in Europe also, produced a creed that declared frequent popular election the solvent for all political ills. The incumbent of every office should be elected by the people, and to preserve responsibility to the electors the tenure of office should be short. The new cult attacked the judiciary. Hence, the Convention of 1846 reported in favor of electing judges, and of substituting for the tenure of good behavior a fixed term of eight years, thus overlooking the most fundamental consideration—the independence of the judge—which is completely attainable only with full immunity from removal during good behavior, within a reasonable age limit, whether the removing power be governor, legislature, or people.

This was the most radical change proposed by the convention. The members of the judiciary committee, numbering some of the most eminent lawyers in the State, among them David Dudley Field, Charles O'Conor, Charles H. Ruggles, and John W. Brown, were not in accord in their views as to the reconstitution of the judicial system. This part of the work of the convention was largely a matter of compromise, and was pronounced by O'Conor a "signal failure." The court of impeachment was preserved, with the substitution of the judges of the court of appeals

for the chancellor and the supreme court justices; but the ancient court of errors was abolished. A clearer notion of the distinction between legislative and judicial functions had developed since this tribunal, partly modeled on the English House of Lords, was created, and legislative duties became more engrossing. It was said that the court had never declared an act of the legislature invalid, and how, it was asked, could senators who had taken part in framing laws be expected, as members of the court of errors, to pronounce unfavorable judgment upon their own work? The council of revision had a substantial veto upon legislation, but the second constitution, although it had abolished that council, provided no corresponding check, for the chancellor and the three supreme court justices formed, in the court of errors, a comparatively uninfluential minority. The new court of appeals bore a rough analogy to the former court of errors, consisting partly of judges elected at large, and partly of judges designated from the supreme bench, the latter corresponding to the chancellor and the judges of the old supreme court. All the senators had not been lawyers, and it was not intended that all the judges elected at large should be drawn from the bar. According to Ruggles, an advocate of the plan, it was meant to preserve a popular feature of the old court, and the presence of laymen not educated in the legal profession might in many cases be useful. O'Conor unsuccessfully argued for a scheme to make the new court consist of the lieutenant governor, eight to twelve judges elected at large, and two justices of the supreme court, the latter to have no voice in reviewing their own decisions. The office of circuit judge was abolished, for it was believed to be better, said Ruggles, that judges who assemble to re-examine the decisions at the circuits should themselves hold the circuit courts, and thus be brought into direct contact with the people and their business. After a trial for fifty years of the substituted plan, the State, in 1895, in a measure re-established the old sys-

tem of circuit judges—in the distinction made in that year between appellate divisions and trial justices.

The Convention of 1846 created a new supreme court, not with the malevolent purpose of wreaking vengeance on any judge by abolishing his office, as had been done in 1821, but because the election of justices rendered a new court necessary. For the old term to continue during good behavior, with its absurd age limit, the convention unwisely substituted a short term of eight years, and dropped the age limit altogether. In the organization of the court, the State was divided into eight districts. All chancery and common-law jurisdiction was vested in this new tribunal. Intermediate appellate courts, designated as general terms, were created, but serious conflict of opinion was made possible by the establishment of eight such courts with co-ordinate jurisdiction. The duties and functions of the circuit judge and of the chancellor were confided to the supreme court justices sitting either at *nisi prius* or at special term. The convention also erected surrogates' courts into constitutional tribunals, but scarcely extended their powers. It would have been, and it would now be, wise to abolish these courts, and merge them in the supreme court. Practice in the surrogates' courts, with their limited jurisdiction, is beset with technicalities and pitfalls at almost every step, and the settlement of estates is thus rendered unduly expensive.

When the ancient court of errors fell, there fell also the interdict forbidding the chancellor and the supreme court justices from voting to support their own judgments in cases which had previously come before them. In the first reported case in the new court of appeals,[4] the right of a judge to sit and vote in review of his own decisions was enunciated. After holding that there was no disqualification upon judicial officers not expressly contained in the new

[4] Pierce v. Delamater, 1 Comst. 17.

constitution, Judge Bronson said: "There is nothing in the nature of the thing which makes it improper for a judge to sit in review upon his own judgments. If he is what a judge ought to be—wise enough to know that he is fallible, and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors—he is then the very best man to sit in review upon his own judgments. He will have the benefit of a double discussion. If right at the first, he will be confirmed in his opinion, and, if wrong, he will be quite as likely to find it out as any one else." The reporter adds that Chief Judge Jewett and Judges Ruggles and Jones subsequently took part in reviewing their own decisions in the tribunals from which they had come. That human nature, even upon the bench, should discard pride of opinion does not conform with experience. All history testifies to the inflexibility of individual opinion, and there is nothing to exempt the wearer of the ermine from subjection to the general law. The constitution had taken a backward step in expecting the judicial mind to emancipate itself from preconceptions. The Convention of 1867, in revising the judiciary article in the light of intervening history—most interesting history, since it showed how far the judges fell below this impracticable standard—provided that no judge or justice should sit at a general term or in the court of appeals in review of a decision made by him or by any court of which he was at the time a sitting member, and this provision, changed in 1894 by the substitution of the words "appellate division" for the words "general term," has ever since remained in the organic law.

New York was not the first State to elect its higher judges. The elective system had previously taken root in other States. In 1832 Mississippi, by her second constitution, provided for the election of all judges by the people; those of the court of errors and the chancellor for six years,

the circuit judges for four years. Within the next four years eleven other States—Illinois, Wisconsin, Arkansas, California, Pennsylvania, Missouri, Virginia, Alabama, Connecticut, Kentucky, and Michigan—followed the example of Mississippi. Between 1850 and 1860 nine more States were added to the list. The convention which, in May, 1846, framed Iowa's first constitution made supreme court judges elective for terms of six years and district judges for terms of four years, and its work was ratified by the people of the State in the following August. The Iowa convention assembled a month before the New York convention.

In an address delivered before the New York State Bar Association, January 18, 1887, Mr. Henry Hitchcock said: "In 1860, twenty-four of the thirty-four States then composing the Union had introduced an elective system to a greater or less extent." But this movement attained its maximum in the course of a few years. "The changes since 1860 indicate an opposite tendency—either in the lengthening of judicial terms in States still retaining the election, or in the abandonment of that system by some States," notably Virginia, Louisiana, Florida, Maine, and Connecticut. "In Pennsylvania, by the new constitution of 1873, the term was lengthened from fifteen to twenty-one years for supreme court judges and from five to ten years for other judges. In Missouri, the term of supreme court judges was lengthened, in 1875, from six to ten years, and that of the judges of two intermediate appellate courts, more recently created, was made twelve years; in Ohio, where, since 1851, the constitutional term was five years, the legislature were authorized, in 1883, to fix any term not less than five years; in California, the term of supreme court judges was changed from ten to twelve years; in Maryland, that of all judges from ten to fifteen years." It would have been surprising had New York long remained insensible to

influences operating so widely in favor of a more stable judicial tenure.

In accordance with article XIII of the constitution of 1846, the question was submitted to the people of the State, at the general election held in 1866, whether a convention should be called to amend and revise the constitution. The decision was in the affirmative, by a vote of 352,854 in favor of a convention, to 256,364 against it. The legislature thereupon passed a law (chap. 194, Laws of 1867) for the election, on the fourth Tuesday of April of that year, of 128 delegates, four from each senatorial district, and 32 delegates for the State at large. As no elector was permitted to vote for more than sixteen of them, the delegates-at-large belonged equally to each of the two parties. The convention assembled at Albany on June 4, 1867. Of the district delegates the Republicans had a majority, so that they were able to elect the president of the convention, and, to a certain extent, to control its committees. The time was not favorable for the holding of a constitutional convention, as partisan feeling ran very high. The conflict between President Johnson and the Congress of the United States was nearing its culmination, and the country was disquieted. The presidential election was approaching, and it was evident to political managers that slight circumstances might turn the scale.

In this convention the lawyers were in a large majority, and among them were some of the most prominent in the State. Horace Greeley, George William Curtis, Erastus Brooks, and George Opdyke were also delegates.[5] Some of the ablest men in the convention had been chosen delegates-at-large. Hon. William A. Wheeler was elected permanent chairman. The convention assembled on the first Tuesday of June, 1867, and closed its sessions on the 28th of February, 1868. The judiciary committee included some of the

[5] Ira Harris, Charles P. Daly, and Samuel J. Tilden had been members of the Convention of 1846.

foremost members of the bar—George F. Comstock, William M. Evarts, Charles P. Daly, Joshua M. Van Cott, Theodore W. Dwight, Francis Kernan, Amasa J. Parker, Matthew Hale, Edwards Pierrepont, Charles J. Folger, and Charles Andrews, the last two, with Sanford E. Church, also a delegate, destined to take seats in the court of appeals. It would have been difficult to select a committee more fully representative of the best elements of the profession. Evarts, then in the meridian of his practice, shortly afterward called to the post of attorney general under President Johnson, was pre-eminent, and his arguments before the convention rank among the best specimens of his forensic oratory.

A majority of the committee on the judiciary reported for the election of judges to hold office during good behavior or until the age of seventy had been reached. Their report proposed further that at the general election in the year 1870 there should be submitted to the people, under proper provisions to be determined by the legislature, the question whether future vacancies in the court of appeals, the commission of appeals, the supreme court, and the superior city courts should be filled by appointment by the governor with the advice and consent of the senate. This report bore the signatures of Charles J. Folger, chairman, William M. Evarts, Joseph G. Masten, George Parker, Joshua M. Van Cott, Charles P. Daly, Waldo Hutchins, Francis Kernan, Theodore W. Dwight, Amasa J. Parker, Charles Andrews, Edwards Pierrepont, and Matthew Hale. A minority report was submitted by Milo Goodrich favoring the election of court of appeals judges for fourteen years, and of justices of the supreme court for twelve years. Life tenure, he argued, would involve practical denial of the benefits of the elective system. He dissented from the recommendation of the majority to refer the question of the future election or appointment of judges to popular vote.

It would be difficult to present a brief sketch of the dis-

cussion of these topics in the convention. The prevailing opinion was that a court of last resort, composed of four justices of the supreme court having the shortest terms to serve, and of four judges elected at large throughout the State, lacked the necessary elements of permanence and stability. Constant changes in its personnel had impaired its efficiency and made its decisions uncertain and conflicting. It was found in practice to take almost half a year before the supreme court justices could work efficiently with their more permanent brethren of the court, and when the desired efficiency was attained, they were obliged to retire in favor of new members recruited from the court below. But the convention found criticism easier than constructive work. Various schemes were proposed. Baker suggested a court of appeals of nine members, to hold office for twelve years; Wakeman, a court of seven members to hold for the same period, six to be elected by the people, the chief justice to be appointed by the governor and senate. Beckwith proposed that the chief judge be appointed by the governor and senate for fourteen years, and that six associate judges be elected by the people for twelve years. Rumsey wished the judges of the existing court of appeals to be members of the new tribunal. Judge Comstock favored a court of seven members, all to be elected by the people for fourteen years; the judges not to hold office beyond the age of seventy, nor be eligible to re-election. Pond suggested a court of ten judges, composed of the four elective members of the existing court and of six additional judges—each voter to vote for four. Judge Landon proposed to abolish the court of appeals and make the supreme court the ultimate judicial tribunal of the State. The final decision was for a court of seven members, consisting of a chief judge and six associate judges.

In the debate upon the constitution of the appellate branch of the supreme court, the frequently expressed conviction was that in the creation of eight general terms the

Convention of 1846 had erred. Eight co-ordinate tribunals with their divergent opinions had made the law uncertain; had increased the number of appeals to the court of appeals, and augmented the volume of litigation. The convention therefore voted to reduce the number of general terms to four. But these conclusions were reached only after prolonged and heated discussion.

The convention decided to lengthen the judicial tenure, and there was a strong feeling in favor of the substitution of an appointive for an elective judiciary. Upon the subject of judicial tenure, opinions were divided, some advocating the continuance of the eight-year term; many, including some of the ablest lawyers in the convention, favoring a tenure to continue until judges should have attained the age of seventy years; others urging a term of fourteen years as a compromise. The terms of court of appeals judges, of justices of the supreme court, and judges of the superior city courts were fixed at fourteen years.

The opinion that the adoption of the elective system had proved a mistake and that judges should be nominated by the governor and confirmed by the senate was powerfully voiced by prominent lawyers. Matthew Hale asked whether the decisions since the radical and sweeping change made by the Convention of 1846 had commanded greater respect than the decisions of James Kent, Ambrose Spencer, Savage, Sutherland, Cowen, and Bronson. He pronounced the experiment of the previous twenty years a failure in every respect. The judges were perhaps the equals in learning and in natural ability of their distinguished predecessors, but the fault was with the system. His opinion, he said, might be unpopular in the convention; nevertheless, he believed that a great error had been committed in 1846 in making judges elective; there was no democracy in it. If it were not possible to substitute the appointive method, he favored either a life tenure or a term of fourteen years. Joshua M. Van Cott declared his preference for appointment. The

vice of the elective method was that it destroyed the independence of the judge after his election. "If there ever was a system devised by human wit to get a political man on the bench, the least man, the least revered in his character, the least impartial, the most under influences which ought never to affect the mind of a judge, that system is devised and is to be found embodied in the system of 1846."

The Convention of 1821, said Charles P. Daly, unanimously resolved to detach the judges from connection with party politics; the Convention of 1846 revived the evil, and in a worse form. This last convention had, he said, been summoned into being to remedy the defects of the judicial system. There was at that time "a restless desire for change in everything." It was a period of political theories not drawn from the experience and the teachings of the past, but having their origin in the fertile region of political speculation, and attractive from their novelty and plausibility. Among these was the theory that public officers of every class should be elected by the people and for very short terms, in order that they might be kept under a constant sense of their responsibility to the power which created them—a theory which had its foundation in an honest desire to secure faithful and efficient officers, but which in its practical operation had been attended with consequences that could never have been imagined, or would have been deemed absurdly improbable. In this unsettled, confused, and undirected state of political thought and action, the Convention of 1846 was called. Daly forcibly urged adoption of tenure during good behavior, which had prevailed until 1847. He had, he said, carefully re-read the debates in the Convention of 1846, and had discovered that the elective system had been approved by the convention almost without discussion,[6] only two or three pages of the debates having been devoted to this subject.

[6] See also article on judiciary by Dorman B. Eaton, 2 Lalor's Cyclopædia, 644.

This view the debates in 1846 do not fully confirm. The prevalent sentiment was reflected in the speeches of prominent members of the convention of that year. Jordan, although not conscious, he said, of any general popular desire for the election of judges by the people, was willing to have the principle tested to a limited extent, but admonished the convention that in no State in the Union, with the exception of Mississippi, whose example he would not emulate, were judges of the higher courts elected. Swackhamer favored the elective plan; Perkins also seems to have approved it; Ira Harris believed it an experiment that might safely be tried; Morris took similar ground; Hoffman asserted his belief that all judges should be elected, and his certain conviction that fully one-half should be. Murphy, and even O'Conor, favored election, O'Conor pointing out that the existing court of errors was composed largely of elected members (the senators); that the election of the entire court of appeals was but a moderate step in advance, and that since all the lower judges, and the higher judges, in large measure, were elective, the intermediate judges—i.e., the judges of the supreme court—also might be elected by popular vote. The subject of the judiciary was, according to Cambreleng, debated for twelve weeks in committee and in convention. But the question of election or appointment was never brought to a test vote.

Nevertheless, the elective system of 1846 was in a sense a natural evolution. Under the first two constitutions, the court of errors consisted partly of appointive and partly of elective judges, the chancellor and the justices of the supreme court having been appointed under the first constitution by the council of appointment, and under the second by the governor, with the advice and consent of the senate, the lieutenant governor and the members of the senate having been elected by popular vote. Justices of the peace had been made elective in 1826. Thus, when the Convention of 1846 sat, the elected judges in the highest appellate tribunal

greatly outnumbered those who owed their place to appointment. It seemed a comparatively simple step to make all the judges of that court elective. The real innovation lay in the extension of the elective principle to justices of the supreme court and of the superior city courts. The change, whether wise or unwise, was an evolution, not a revolution. When the Convention of 1867 sat, a revulsion of feeling had arisen; sentiment had reacted in favor of the appointive method and a longer tenure in the higher courts. Hamilton, in the *Federalist,* in eulogizing the system of appointing Federal judges during good behavior, had declared that nothing could "contribute so much to the firmness and independence of the judiciary as permanency in office." In the Convention of 1867 Evarts expanded the argument and developed the philosophical principles upon which it rests. Evarts, while a friend to the appointive system, in brilliant and conclusive fashion put the stress of his argument upon the proposition that a judge once seated in office should be absolutely independent of the appointing power, whatever that power might be. By fixing the age limit at seventy years, the term of office would not extend beyond the continuance of the powers of mind and body requisite for the performance of judicial duty. Establishing that as the term, "we then give to the incumbent the security, and to the public the advantage, of the continuance in office of a judge during that period." The debate, he said, had shown a remarkable unanimity of opinion as to what the public interests require, in the establishment and constitution of the courts. "The judiciary is the representative of the *justice* of the State, and not of its *power.* * * * The judge is not to declare the will of the sovereignty, whether that sovereignty reside in a crowned king, in an aristocracy, or in the unnumbered and unnamed mass of the people. * * * Justice is of universal import, of universal necessity under whatever form of society." This being the main policy of human society, as Burke had affirmed, every

society that fails to do justice stands self-condemned. "The judges declare the law, they do not impose it. It is the law of the land they are to declare, not the will of any power in the land." The proper discharge of this high duty necessarily falls upon men like ourselves, but to insure the choice of men who will independently declare the law, it is essential that the judge should be exempt from accountability for his judicial action. No action lies against him for anything that he does in the judicial office. The procedure of impeachment is the only means of correcting judicial misconduct. But to perform his duty with absolute independence it is necessary that the judge shall hold his office during the pleasure of no representative of power. Although these truths were unquestionable, they had almost entirely been ignored in the plan adopted by the Convention of 1846 of electing judges for short terms of office. "In the principle of short terms and recurring elections is included both the element of accountability for judicial action to all persons whose displeasure it has provoked, and of holding during pleasure." This was no mere dogma, for experience had shown that in short terms and recurring elections there was this pernicious vice of holding during pleasure. "When Chief Justice Bosworth made certain decisions against a great political character, that great political character's memory lasted till the recurring election brought around the nomination in his own party. Chief Justice Bosworth was succeeded by Judge McCunn, because such was the royal pleasure of that political character." Recent events have matched this case with another, for a few years ago in New York City, a judge who had refused to appoint referees at the dictate of a political boss was denied renomination because of his recusancy.

"Public office," continued Evarts, "is for the public service, and not for the private advantage of the incumbent," although "no people had departed more widely from this fundamental theory in the practice of politics than we."

He had, he said, "a very clear, a very thorough, and a very earnest conviction that the experience both of England and of this country in the past, and of this State in the past, showed that courts built upon the plan of a judicial tenure during good behavior, up to a period of age designated, give the best judges." The judge was, of course, to be taken from the bar, and (how refreshing and stimulating the doctrine!) "he is to have learning, integrity, industry * * * every quality of mind and heart, and every advantage of health and strength." Forty or forty-five years was the age at which the State might wisely ask the man to enter its service as judge. But he may expect at the bar an honorable and useful career for life. "You offer him *half* a life of judicial service in exchange for a *whole* life of professional service and duty to the community." Or, "will you postpone your proposition until he reaches the age of fifty-six, when he can take your fourteen years' tenure, and expect to serve out his career?" It was Evarts's belief that the people of the State expected the convention to revise the judiciary article completely. In exposing the fallacy that in proposing a judicial tenure during good behavior, the convention might be making a constitution better than the people desired, he said (and his words should indelibly be inscribed in the mind of every one who may be called upon to act in a similar capacity): "What is the trust reposed in us? It is the trust of framing a constitution such as we, upon our oaths, think best for the people. * * * If this convention does not frame these clauses according to its conscience and its wisdom, it frames them according to an unrepresented conscience and wisdom that is not here. * * * No man has the right to say what sort of constitution the people want, except this convention, made up of delegates chosen for the purpose."

The convention voted three times on a motion to recommend judicial tenure to continue during good behavior, or until seventy. On the first vote, the motion was rejected,

43 to 48; on the second, 56 to 58; and on the third, which took place in the closing days of the convention, by 45 to 51. The convention seems to have been almost evenly divided on each vote, with only a slight majority against the committee's recommendation. It modified the proposal of the judiciary committee to submit the question of appointment or election of judges in 1870, and resolved instead that at the general election in the year 1873, a date sufficiently removed to allow arguments for and against the proposed changes to be presented to voters, these questions should be submitted upon separate ballots: "(1) Shall the offices of chief judge and associate judge of the court of appeals and of justices of the supreme court be hereafter filled by appointment, and (2) shall the offices of the judges mentioned in sections 12 and 13 of article VI of the constitution [judges of the superior courts and of the county courts] be hereafter filled by appointment?" The resolution for submission of these questions was not carried without considerable dissent, for to many delegates it seemed inconsistent that the convention, after framing a judiciary article with an elective system which the people were asked to ratify, should ask the people to vote three years later upon the question whether they would return to the appointive method, and to that extent reject the plan of their new constitution. At the election of 1873, the vote to continue to elect judges of the court of appeals and of the supreme court was 319,979 in favor, to 115,337 against. For the election of county judges and judges of the superior courts the vote was 319,660; for their appointment, 110,725. The satisfaction which the newly reconstituted tribunals had given in the interval of three years undoubtedly contributed to this decisive approval of the elective system.

To dispose of the unfinished causes on the calendar of the retiring court of appeals, the convention created a commission consisting of the four judges of the old court, and a fifth commissioner to be appointed by the governor and

confirmed by the senate. The judiciary article continued the existing county courts, the judges thereof in office at the time of its adoption to hold their offices until the expiration of their respective terms. It further declared that their successors should be chosen by the electors of the counties for terms of six years, and that until altered by the legislature the county courts should have the powers and jurisdiction theretofore possessed. The constitution of 1847 had made the surrogates' courts constitutional tribunals. The judiciary article of 1869 continued them as such. For the relief of surrogates' courts it authorized the legislature to confer upon courts of record in any county having a population exceeding 400,000 the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate causes.

The judiciary article was submitted separately from the other work of the convention, and was ratified at the general election in November, 1869, the vote being 247,240 in its favor, to 240,442 against it—a vote corresponding fairly with the differences throughout the State upon political questions. But the ratification of the article at an election at which the remainder of the work of the convention was disapproved by a vote of 290,456 to 223,935, and in which the Democratic party won every department of the State government, is gratifying evidence how admirably the convention in its reconstitution of the judicial system had met public expectation.

In the following winter the legislature passed an act for the election on May 17, 1870, of judges of the new court of appeals. The election was on the basis of minority representation, an express requirement of the judiciary article being that at the first election of judges every elector might vote for the chief judge and only four of the associate judges. The members of the tribunal chosen at this election were Sanford E. Church, chief judge; William F. Allen, Rufus W. Peckham, Martin Grover, Charles J. Fol-

ger, Charles A. Rapallo, and Charles Andrews, associate judges. The chief judge and two of the associate judges (Folger and Andrews) had been among the most influential members of the convention. The judges assumed their office on the first Monday of July, 1870.

The new court of appeals was formally organized in the senate chamber, July 4, 1870, exactly twenty-three years after the old court began its labors. In an address to the court on behalf of the bar, it was aptly said that from the commencement of the State government the courts of final resort had been filled by men of unquestioned integrity whose opinions had commanded the respect of the world, and were cited at Westminster Hall and in all the States of the Union. Church, the new chief judge, had no previous judicial experience. He had been prominent in the politics of the State for many years, having entered the assembly in 1841, and was one of the original "Barnburners." As was said by his associate, Folger, upon his death, "he went through many stirring canvasses and many times of strong temptation; but when party strife was hottest, and aspersions were the usual utterances of partisans, not a breath that he was not upright ever settled on the mirror of his fame." [7] Allen had been a member of the assembly from Oswego county in 1843-4, then attorney for the United States for the northern district of New York, and subsequently was elected justice of the supreme court for the fifth district. From the position of State comptroller he was called to the place of associate judge of the highest tribunal. Rufus W. Peckham had for many years been identified with the judiciary of the State, having begun his judicial life as a justice of the supreme court. He was a member of Congress when the Missouri Compromise was abrogated, and was one of the Democrats who voted against its repeal. His death was the first breach in the member-

[7] 77 N. Y., 635.

ship of the original court. This tragic event occurred on November 22, 1873, when the *Ville du Havre* sank in mid-ocean. Martin J. Grover had been upon the bench from November, 1857, when he was first elected to the supreme court in the eighth judicial district. In power of observation, faculty of description, in quaintness of expression and quickness of humor, he was not unlike Abraham Lincoln. Folger had never had earlier judicial experience. In 1880 he was promoted to the chief judgeship of the court, upon Church's death, defeating Rapallo for the office, and was himself to suffer humiliating defeat in his aspirations for the governorship in 1882. Rapallo, perhaps the greatest jurist in a company of remarkable men, will long be remembered for the splendid opinions with which he has enriched the law. Charles Andrews, who with Church and Folger had been a member of the Convention of 1867, is the sole survivor of the famous tribunal. For a short time Judge Andrews held the place of chief judge, by appointment after Church's decease.

CHAPTER XI

FAILURE OF THE CONVENTION'S WORK OTHER THAN ITS JUDICIARY ARTICLE—CAUSES OF FAILURE, POLITICAL PASSIONS OF THE TIME—REPORTS OF COMMITTEE ON SUFFRAGE—NEGRO SUFFRAGE—SEPARATE SUBMISSION OF QUESTION WHETHER PROPERTY QUALIFICATIONS FOR COLORED VOTERS SHOULD BE RETAINED OR ABANDONED—VOTE UPON THE SUBJECT—WOMAN SUFFRAGE, AND SPEECH OF GEORGE WILLIAM CURTIS—MINORITY REPRESENTATION—REACTION FROM DECENTRALIZING SPIRIT OF 1846—CONVENTION FAVORS LARGER SENATORIAL DISTRICTS AND COUNTY REPRESENTATION IN THE ASSEMBLY—DEBATE UPON THE REPORT OF THE COMMITTEE ON STATE AFFAIRS—ARGUMENTS FOR ESTABLISHMENT OF CABINET OF STATE OFFICERS AND THE NOMINATION OF SUCH OFFICERS BY THE GOVERNOR—GOVERNOR'S POWER OVER BILLS AFTER CLOSE OF SESSION—EXTENSION OF VETO POWER—MUNICIPAL GOVERNMENT—CONVENTION'S REPORT DRAFTED BY JUDGE FOLGER—ADJOURNMENT OF THE SESSIONS OF THE CONVENTION, AND EFFECT—VOTE UPON CONVENTION'S WORK.

The Convention of 1867 suffered the singular fate of having all of its work except its judiciary article rejected by the people. All the proposals of the Conventions of 1821, 1846, and, as we shall see hereafter, 1894, were ratified at the polls. Inasmuch as the personnel of the Convention of 1867 was of a high order, explanation must be found to account for this defeat. Some of its suggestions were favorably reported by the constitutional commission

which sat in 1872, and were accepted by the people in the fall of 1874. The rejection of most of its work is due to the fact that it sat, and its results were submitted, at an inopportune time. It was called in an exciting political era. President Lincoln's assassination, the unexpected policy of his successor, the unwise reactionary legislation adopted in some southern States in the winter of 1865-66, the reconstruction measures of Congress, President Johnson's opposition, and wide differences of opinion as to negro suffrage, roused great intensity of party feeling, and the convention, which was preponderatingly Republican, became the subject of hostile criticism. The passions of the time were reflected in a degree in the debates in this body. Its refusal to depart from the conservative policy regarding negro suffrage adopted in 1821 and followed in 1846, led political opponents to taunt the Republicans with inconsistency and cowardice. It was charged that for partisan advantage they were giving a free ballot to the poor and uneducated negro of the south, while not daring to enfranchise the colored voter in New York. Reaction from the extreme decentralization of 1846, and comparative distrust of popular elections as the antidote for political evils, had become manifest. In England, government was on the point of widening the circle of parliamentary voters, and the wisdom of limiting the suffrage by educational or property tests was critically discussed. Educational or economic requirements had been adopted in several States of the Union. John Stuart Mill, in his "Representative Government" and his "Subjection of Women," had cogently presented the claims of women to vote. The first women's rights convention in this State was held at Seneca Falls, July 19, 1848, and the first national convention to urge the claims of the sex to the suffrage assembled at Worcester, Massachusetts, October 23, 1850. Concurrently the subject had been treated with ability in the *Westminster Review,* and agitation in its favor was earnestly maintained down to 1870. Minority or propor-

tional representation, one of whose first and most forcible exponents was Thomas Hare, was quite naturally cast into the crucible of debate. Problems of city government that had been kept in the background by the grave issues of civil war and reconstruction were looming into prominence. Governor Fenton, in his message to the legislature in 1867, declared that the large vote in favor of a convention was proof that the people believed some modification of the organic law to be essential to the general welfare. Reform, as the governor said, was needed in the judicial system, especially in the structure of the court of appeals; yet he somewhat paradoxically added that notwithstanding its defects, the constitution was an admirable instrument, as was shown in 1858 by the refusal of the people to call a convention.

The judiciary article has heretofore been considered. It is the unaccepted work of the convention which is here treated. Debate took a wide range, but the chief topics of discussion were the right of colored citizens to vote on equal terms with white men, woman suffrage, minority representation, the appointment instead of the election of judges, district attorneys and State officers, special legislation, the governor's veto power, bribery, education, intemperance, canals, State police, official corruption, emancipation of cities.

Two reports came from the committee on suffrage, of which Horace Greeley was chairman, the majority report proposing that the qualifications of a legal voter should be adult, rational manhood; citizenship in the United States of not less than thirty days standing, and residence in the State for one year, and in the election district for thirty days; freedom from crime, and exemption from dependence upon others through pauperism or guardianship. All discriminations based upon color were eliminated, for, said the report, men should be dealt with according to their conduct, without regard to color. The committee refused to

recommend extension of the elective franchise to women. "Public sentiment did not demand and would not sustain an innovation so revolutionary and sweeping, so openly at war with the distribution of duties and functions between the sexes, as venerable and pervading as government itself, and involving transformation so radical in social and domestic life." The committee would not impose a property qualification or extend the franchise to lads of eighteen years. Manhood suffrage for white voters had, it asserted, been adopted by the legislature of 1825 and ratified by an overwhelmingly popular vote in 1826—yeas 127,077, nays 3,215; and "we," said the report, "do not feel called upon to appeal from this judgment." Two of the committee dissented from the majority, mainly because they desired the separate submission to the people of the question whether the elective franchise should freely be accorded to colored men. Discussion upon this topic could not easily be limited, and before it was at end it involved the whole subject of racial differences and the fitness of the African for the ballot. Just as the fact that the disfranchised white yeomanry of the State had been called to the defence of the Union in 1812 was urged as a reason for extension of the suffrage to them in 1821, so, in 1867, the fact that colored citizens had, like their white brethren, taken up arms in the nation's cause and shed their blood in its service, was eloquently advanced as ground for the removal of all differences respecting white and negro suffrage in the State.

The convention decided to submit the question separately to the people at the fall election of 1869, when a majority of those voting upon it were found to favor the retention of the existing property qualifications for colored voters—249,802 persons voted in favor of the abrogation of these qualifications, 282,403 for their preservation. The figures show an advance in public sentiment in the course of two decades; the vote in 1826 to remove the property test for negroes was 85,306 in its favor to 223,834 against it. In

1860 the vote in favor was 197,503 to 337,984 against; in 1869 the vote indicated that public sentiment was quite evenly divided. The old restrictions on colored voters therefore continued in force until they were overridden by the adoption of the Fifteenth Amendment to the National Constitution. Had it been left with the convention to decide whether the color line should be erased and manhood suffrage established, its vote would have determined the matter favorably. The vote in the convention against Murphy's amendment to continue the old restrictions upon colored suffrage was 78 to 29.

The committee on suffrage declined to recommend an educational qualification. It declined to recommend woman suffrage or permit submission to the people of the question whether women should be allowed to vote. Although opinion in the convention was decidedly against giving women the ballot, they could not have had a more able or brilliant champion than George William Curtis. Curtis never spoke more eloquently or forcibly, and if oratory could have assured success, the vote would have been overwhelming in woman's favor. His speech deserves to be rescued from the oblivion in which it is buried in the convention debates. The measure which, said Curtis, the report of the committee on suffrage had declared to be radically revolutionary and perilous to the very functions of sex was, according to the most sagacious of political philosophers, John Stuart Mill, "reasonable, conservative, necessary, and inevitable." Mill had obtained for it seventy-three votes "in the same house in which out of about the same whole number of voters Charles James Fox, the idol of the British Whigs, used to be able to rally only forty votes against the policy of Pitt. The dawn in England will soon be day here. Before the American principle of equal rights, barrier after barrier in the path of human progress falls. If we are still far from its full comprehension and further from perfect conformity to its law, it is in that only like the spirit of

Christianity to whose full glory even Christendom but slowly approaches. From the heat and tumult of our politics we can still lift our eyes to the eternal light of that principle; can see that the usurpation of sex is the last form of caste that lingers in our society; that in America the most humane thinker is the most sagacious statesman."

The Curtis amendment was supported by a few conspicuous leaders in the convention, but there was an overwhelming sentiment in opposition. It secured only 19 votes, 125 being cast against it. The proposal advanced by Graves that the matter of woman suffrage should be determined by a vote of women only at a special election, had even less support, for it was negatived, 133 to 9. Little, if any, consideration seems to have been paid in the Convention of 1894 to the movement to give the franchise to woman.[1]

In the refusal of the committee on suffrage to recommend an educational qualification, the convention evidently concurred. Hale, one of the strongest advocates of minority representation, called attention to the fact that to the legislation under which they were assembled (which had permitted each voter to vote for only 16 of the delegates-at-large) was to be attributed the presence of some of the master spirits in the convention—Evarts, chairman of the Committee on Preamble and Bill of Rights; Greeley, chairman of the Committee on the Right of Suffrage; Church, chairman of the Finance Committee; Harris, chairman of the Committee on Cities; and Curtis, the eloquent and accomplished chairman of the Committee on Education. But minority representation was not popular, and the convention applied it only in respect to the associate judges of the new court of appeals to be chosen at the first election.

Although in 1821 freeholders alone voted for senators and governor, and a property qualification restricted the

[1] It has received such impetus within a year that it will probably be submitted to the voters of the State in November, 1915, for their approval or disapproval.

vote for assemblymen, the legislature of that year in submitting to the people the question whether a convention should be called, had, as we have seen, made all persons who paid taxes or worked upon the highways eligible to vote, and to be delegates. The Convention of 1821 adopted the test for electors that the legislature had enacted for delegates, and the constitution was submitted to this larger electorate—a circumstance essential to its ratification. In 1846 the legislature prescribed that persons qualified to vote for assemblymen should be qualified to vote for delegates to the convention held that year. In 1867 and also in 1894 every person could vote for delegates who was entitled to vote for an assemblyman. The Convention of 1867 decided that the qualifications of electors of constitutional delegates should be settled in the constitution itself, and therefore, in defining the qualifications of voters, it provided that every elector might vote not only for all officers chosen by the people, but upon all questions that might be submitted to the vote of the people of the State. This provision was incorporated in the constitution in 1894.

In some respects the Convention of 1867 exhibited a marked reaction from the decentralizing spirit which had animated the Convention of 1846. In its proposal to enlarge the senatorial district and the senatorial term, to restore county representation in the assembly, to lengthen judicial tenure, elect the entire court of appeals upon a general ticket, and appoint State officers and district attorneys, the centralizing tendency was marked. Upon the other hand, its proposal to confer increased legislative functions upon county boards of supervisors was a move in the line of decentralization and in accordance with the doctrine of home rule.

When the Convention of 1846 determined to break up the State into thirty-two senate districts, it did so in obedience to the demand of localities for separate representation in each house. It was then seriously argued that under the

constitution of 1822 candidates had been chosen to the senate for whom voters never intended to cast their ballots. One illustration frequently pressed into service related to a youthful candidate for senatorial honor, who was elected because some of his constituents in a distant part of his district had cast their suffrages for him in the belief that he was another and maturer person of the same name. With the development of increased facilities for the dissemination of news, such mistakes, if they ever occurred, were rendered well-nigh impossible. Under the system prevailing between 1822 and 1847, with the State subdivided into a small number of districts, men of great ability were chosen to the senate. Comparison of the lists of two or three generations ago with those of recent times shows a marked decline in the intellectual character of the upper house. Formerly men of the stamp of DeWitt Clinton, Ambrose Spencer, Martin Van Buren, William H. Seward, Silas Wright, Samuel Young, Samuel Beardsley, Alonzo C. Paige sat in the senate; but to-day their peers are rarely chosen to the same office. So pronounced had the decline become even in 1867 that many delegates to the convention of that year urged return to the small number of districts established in 1822. Among the leaders in this effort were Evarts, Andrews, Harris, Folger, Van Cott, and Professor Dwight. Small districts, they contended, were no more entitled to separate representation in the upper house than were counties. Large districts would render the senatorial office more important. This would tend to attract a higher type of candidates, and to banish, at least from the upper chamber, the spirit of local jealousies and of log-rolling so potent in securing local legislation.

Professor Dwight, in a philosophical argument, showed that the only justification for a bicameral legislature was in having the two houses represent entirely different constituencies and not reflect alike the passions of the people. General laws, he said, were comparatively few in number, and

since a senate elected from large districts would be more occupied with matters of great import than a senate representing smaller districts with their local requirements, the volume of legislation should be correspondingly less. He did not believe it possible to prevent special legislation; but if it could be done, "what would be the next step? Suppose we had only general laws, then the effort of an unscrupulous lobby would be to obtain special legislation under the guise of general laws.[2] If a man has a special provision which he wishes to have applied to a corporation in which he is interested, he will seek to alter the general law of corporations; if he wishes to release himself from a hated marriage tie, he will seek to alter the general law of divorce." Corruption could not be stopped by piety or philosophy. There should be men of the right character in the legislature; their election would be best assured with large districts.

To exalt the dignity of the senatorial office, it was proposed also to make the term four instead of two years, vacating one seat in each district every year, thus ensuring the choice of one-fourth of the senate at each annual election. The constitution proposed by the convention retained the thirty-two senate districts, but lengthened the senatorial term to four years. The first senators elected in odd-numbered districts were to vacate their offices at the end of two years, those in districts bearing even numbers at the end of four years, thus securing the election of one-half of the senate every second year.

When the subject of assembly representation came up for debate, a majority of the delegates voted to return to county representation as fixed by the constitution of 1821.

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[2] The convention so fully appreciated the evils of special legislation that it proposed to forbid the legislature from chartering any kind of stock corporation under special laws, and it proposed also to prevent the consolidation of railroad corporations owning parallel or competing lines of roads.

The constitution of 1777 had provided for the election of assemblymen by counties, but it made the size of the assembly dependent upon the growth of population, fixing the minimum membership at seventy and the maximum at three hundred. In 1801 the assembly was limited to one hundred members. In 1822 it was fixed at 128, the unit being the county. In 1846 a new unit of representation was adopted—the assembly district. Members of assembly were apportioned among the counties by the legislature, upon the basis of population, excluding aliens, and chosen in single districts, every county except Hamilton being entitled to one member—no new county to be erected unless its population should entitle it to a member. The clamor of small districts for separate representation, and the reluctance of the least populous counties to risk loss of such representation with the growth of other parts of the State in population probably compelled the adoption of this complicated system. Its chief defect was the impossibility of giving all districts equitable representation so long as county representation was adhered to and the assembly remained at a fixed number. County representation, it was cogently argued, would bring into the lower house a superior class of representatives corresponding to the better class to be obtained in the senate from large districts. A proposal to substitute the county for the assembly district as the unit of representation was carried in 1867 by the strong vote of 64 to 43. An attempt was made to increase the size of the assembly, but the convention finally decided to retain the number fixed in 1846.[3] Biennial sessions were favored by the committee on legislation, but by a vote of 62 to 38 the convention decided to adhere to annual sessions.

That the Convention of 1846 had made too many officers elective and had made their terms too short is well shown in the exhaustive and informing debate upon the

[3] This was changed in 1894.

report of the committee on State officers, proposing that State officers be elected at the same time and for the same term as the governor. Duganne wished to amend by providing for the appointment of the attorney general by the governor, subject to senatorial confirmation, and Democrats as well as Republicans came to his support. Francis Kernan hoped the amendment would prevail, not because of his distrust of the people, but of his belief that an efficient State government required the appointment of this officer by the governor and senate. In all governments, said Judge Daly, the executive head should have a cabinet in accord with him upon all public measures to be carried into effect by executive authority. The constitution of 1846 had altered the former system, but the alteration was not for the better. He would appoint all State officers excepting the comptroller.[4] Fuller, chairman of the committee on State officers, also was in favor of having all State officers appointed. In supporting Duganne's amendment, Cassidy said that the constitution of 1846 contained great errors. The plan he advocated was to elect the comptroller, as the head of the department of finance; have the treasurer appointed, as under the system of 1821, by joint resolution of the two houses; and have the secretary of State and attorney general appointed by the governor.

Numerous and able as were the friends of the short ballot, opinion in the convention was divided. Martin I. Townsend asked who it was that needed an attorney general —the governor or the people? Believing him to be the people's representative, he favored election; so also did Pierrepont, who declared that unless the convention was prepared to say to the people that its judges should no longer be elected, it should not propose to appoint the attor-

[4] Within a few years interest in this subject has been revived. Hoffman, as far back as 1872, advocated a cabinet of State officers, appointed by the governor, and in different forms the idea has been urged by Governors Roosevelt and Hughes.

ney general. The attorney general should be as independent as any judge in his opinions upon questions affecting the great interests of the State, and ought not to be a creature of the governor. Van Campen and Judge Andrews favored appointment, as did also Van Cott and Judge Church, Church arguing that the governor should have at least one officer with whom he could act and with whom he might consult upon terms of entire confidence. Lapham, Greeley, Curtis, Opdyke, Hale, and Folger also favored appointment; while Baker, M. H. Lawrence, and Gerry opposed it. Dwight, in arguing for it, said that he would love to see in the State of New York "some dim reflection of those great names that in English history had made illustrious the office of attorney general"—Mansfield, Ellenborough, Eldon—"men who, commencing with the attorney generalship, rose through all the grades of judicial office to the very highest position in the law." Such was, in fact, the history of the office in the State's earlier days, when Egbert Benson, Aaron Burr, Morgan Lewis, Ambrose Spencer, John Woodworth, Martin Van Buren, Thomas J. Oakley, Samuel A. Talcott, Greene C. Bronson, Samuel Beardsley occupied the place and ascended from it to higher political station or to the bench; or, like John Van Buren, became master spirits in party councils. After a two days' debate, Duganne's amendment was lost, the vote being 50 in its favor to 66 against it.

The Convention of 1867 sought also to remedy defects in the provision of the constitution (section 10, article IV) relative to the power of the governor to veto bills sent him by the legislature. This provision, which had its origin in the Convention of 1821, upon the abolition of the council of revision, was almost identical with the clause of the federal constitution giving the President a qualified veto power over bills passed by Congress. But the practice which had grown up in this State was different from that which had uniformly been followed by the President—to treat the ten-

day limitation as requiring his action during the session of Congress. In this State the governor had often signed bills after the adjournment of the legislature. In 1860, in the case of People v. Bowen (21 N. Y., 517), the court of appeals expressly held that the governor had power to approve and sign a bill more than ten days after adjournment of the legislature. There were two opinions from the court in support of this view, the more exhaustive coming from the pen of Mr. Justice Clerke. To hold that the legislature by adjournment could prevent the governor from vetoing a bill would, he argued, be to deprive him of his constitutional prerogative. It was to meet the contingency of a veto that the ten-day provision was inserted. A bill is returned by the governor only when he has vetoed it. In providing that adjournment within ten days should not prevent a "return" of the bill, the constitution was looking to its veto, not its approval. There could be no object in declaring a bill passed by the two houses, but signed after adjournment, to be no law. In different States, said the justice, the practice varied; in this State it had been the practice of many governors to sign bills after the adjournment of the legislature.

The Convention of 1867 proposed to embody the substance of this decision in the organic law. It proposed also to strengthen the veto power by an express provision that no bill should be passed over a veto save by a two-thirds vote of all the "members elected" to each house. Ever since 1821 a bill could be repassed by a vote of two-thirds of the "members present" in each body. In its report to the Convention of 1867 the committee on governor and lieutenant governor, in favoring the change, said that the existing provision "not only greatly weakened and in a manner rendered powerless the objections of the executive, but also virtually annulled that part of the section requiring in the first instance a majority of all the members elected."

In one of his messages, Governor Fenton had suggested that the time for signing bills left over at the end of the session should be extended to thirty days. In the year 1867, 135 were presented to him on the day of adjournment, and he afterward actually signed 494.[5] The convention, instead of approving this suggestion, decided to recommend a ten-day period. No bill was to become law by the governor's approval after the final adjournment of the legislature, unless "sent by him to the office of the secretary of State, within ten days (excluding Sundays) after the end of the session." The convention, however, did not approve the proposal, made by Thomas C. Alvord, that the governor should have power to veto distinct items in tax and appropriation bills. But as will be seen in the next chapter the constitutional commission of 1872 not only planned to make the consent of two-thirds of all the members elected to each house a pre-requisite to the passage of a measure over executive veto, but also proposed that no bill should become law after the final adjournment of the legislature, unless approved by the governor within thirty days after such adjournment, and that he might reject any one or more of the items of an appropriation bill, while approving the rest. Its recommendations after receiving the necessary legislative approval were ratified by the people at the fall election of 1874, and became part of the constitution.

The subject of municipal government received much consideration. The debate upon the conflicting reports from the committee on cities was protracted and to a certain extent partisan. The speeches of Harris, chairman of the committee on cities, and of Opdyke, also a member of the committee, presented in a clear and striking light the evils of city government, and proposed remedies therefor. The majority report advocated a great enlargement of the powers of mayors of cities. It recommended that the mayor be

[5] Lincoln, Constitutional Hist., II, 336.

given exclusive power to appoint heads of departments, and to remove at his pleasure all his appointees—a principle embodied in many city charters to-day. It proposed to confer on cities absolute power of self-government and to forbid the legislature from interfering with their affairs except by passing general laws. In a minority report, Opdyke urged the restriction of the elective franchise in local affairs. He proposed that the mayor and a portion of the common council be elected by citizens having the right to vote for State officers, and that comptrollers and boards of aldermen be chosen by persons owning property valued at not less than one thousand dollars. Such a limitation upon suffrage would, he argued, be sanctioned by the people of the State; without it he should be constrained to vote against every increase of governmental power of cities. As will hereafter be seen, a similar restriction was approved by the Tilden commission in 1877. The restriction probably caused the defeat of its many excellent suggestions.

The convention voted to report that general laws should be passed for the organization of cities; that members of common councils should hold no other office in cities, and that no city officer should hold a seat in the legislature. Beyond this, it contented itself with a section, drafted by Henry C. Murphy, the purport of which was that the mayor should be chosen by the electors of every city as the chief executive officer; that he should have power to investigate the acts of the various city officers and the right to examine them and their subordinates on oath; that he should have power also to suspend or remove such officers, whether they were elected or appointed, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal, but that no removal should be made without reasonable notice to the officer complained of and opportunity to be heard in his defence.

The financial article (article VIII) remained substantially as in the constitution of 1846. A new section (15)

was proposed—providing that real and personal property should be subject to a uniform rule of assessment and taxation.

Space will not permit complete enumeration of the changes finally adopted by the convention. For a full list the constitution reported by the convention must be examined. The rejection of the proposed constitution did not mean the final defeat of its suggestions. The following provisions which it approved subsequently found their way into the constitution, either in 1874 or upon the ratification of the work of the Convention of 1894, viz.: abrogation of the property qualifications of colored voters, adopted in 1874; registration of citizens as a pre-requisite to voting, adopted in 1894; increase in assembly membership, adopted in 1894; prohibition of the audit by the legislature of private claims against the State, and of the grant of extra compensation to public officers or contractors, adopted in 1874; prohibition of local or special laws in certain cases, adopted in 1874; election of secretary of State, comptroller, treasurer, and attorney general at the same time and for the same term as the governor, adopted in 1894. The Convention of 1867 framed provisions regarding bribery, that were adopted in a modified form in 1894. It proposed also that the question of calling a constitutional convention should be determined by a majority of the votes cast upon that question only. This in a modified form was adopted in 1894. Some of its ideas regarding city government became fruitful in later years. Much of its excellent work finally became part of the organic law of the State, although its incorporation into the constitution was deferred for a longer or shorter period.

Following the example of its predecessors, the convention appointed a select committee to draft an address to the people. This draft, the work of Charles J. Folger, briefly summarized the proposed amendments, commending attention to the stringent provisions it had framed to stop bribery

at elections and to check abuses in the disposition of public money; its proposed restrictions upon the passage of special laws; its proposed abolition of the offices of canal commissioners, and substitution of a single head to the canal system, to be appointed by the governor and senate; its plan for the creation of a constitutional court of claims; and for the organization and government of cities; its proposed changes in the control of State prisons, and its drastic measures to prevent corruption in office and bribery of officials. In language similar to that employed in previous addresses, the convention expressed its belief that if its work should find favor with the people, the government of the State would be safe and beneficent, "and the Commonwealth, with the favor of the Ruler of all events, be borne forward for another generation in increasing happiness and prosperity."

The convention had prolonged its sessions beyond the November election of 1867, notwithstanding the statutory mandate requiring its work to be submitted to the people at the fall election of that year. Its report was not completed until February 28, 1868. On that day its proposed constitution was agreed to by a vote of 84 in favor to 31 against it—Comstock, Amasa J. Parker, Church, Murphy, and Daly being prominent among the dissenters. A resolution was passed to authorize absent members to sign it before its submission to the people and previous to the third of the following November. The question of submission was in fact most perplexing. From the outset it had led to numerous debates and the expression of much diversity of opinion. The first two constitutions had never been submitted to voters for ratification, and one source of controversy between the legislature which met in the spring of 1820 and the council of revision was whether provision should not be made for the submission of different articles separately. The Convention of 1821 decided to submit its work for approval or disapproval in its entirety, and a like course was pursued in 1846, except as to two special mat-

ters. Chapter 194, Laws of 1867, left it to the discretion of the convention to determine whether its amendments should be submitted as a whole or separately. Whether it had power to fix a different date of submission from that named in the law provoked differing opinions, some arguing that it had such power, others that it had not. Differences arose as to whether the people should be asked to vote upon the constitution at the regular election or at a special election, when the public mind would not be preoccupied with other issues. The separate submission of different questions was urged by some and opposed by others; Comstock, for instance, declaring that if the convention decided to submit all its proposals as an entirety, he would not sign its report. The wording of the various questions to be presented to the people aroused much debate. This was particularly so as to the property qualification for negro suffrage. The question, it was said, should be put in such clear and concise language that voters would know to a certainty the exact point upon which their opinion was asked. A vote to submit the proposed constitution at a special election in June, 1868, was lost in the convention, 40 to 65; and a vote to submit it at the general election in November, 1868, carried, 61 to 31.

On February 28, 1868, the convention adjourned *sine die*. The assembly thereupon passed a bill for submission at the general election of that year, which the senate would not approve. By Chapter 538, Laws of 1868, the legislature ratified the continuance of the convention's sessions after the first Tuesday of November, 1867, and authorized the payment of all its expenses down to the date of its close. But the act specially provided that nothing therein contained should be "held or construed to affirm or ratify any form or mode of submission to the people of the constitution by said convention proposed." This prevented submission that year. On April 24, 1869, by Chapter 318, Laws of 1869, the legislature specifically authorized submission

at the general election of that year. Four ballot boxes were provided in order to give voters opportunity to express their opinion upon the constitution as a whole, upon the judiciary article, upon the proper method of assessing and taxing real and personal property and upon the wisdom of retaining property qualifications for colored men. As was noted in chapter X, the proposed constitution (section 17, article VI) provided for the submission of two questions at the general election in the year 1873—one with respect to the election or appointment of the chief judge and associate judges of the court of appeals and of justices of the supreme court, the other with respect to the appointment of the judges mentioned in sections 12 and 15 of article VI. The results of this last vote have heretofore been given.[6] The proposed constitution, with the exception of the judiciary article, was on November 2, 1869, voted down, the vote against it being 290,456 to 223,935 in its favor. The convention's proposal to abolish property qualifications for colored voters and its proposal to subject real and personal property to a uniform rule of taxation were defeated.

[6] See page 201.

CHAPTER XII

GOVERNOR HOFFMAN PROPOSES A CONSTITUTIONAL COMMISSION IN LIEU OF A NEW CONVENTION—HIS SUGGESTIONS FOR CONSTITUTIONAL REFORM—CHAPTER 884, LAWS OF 1872, AUTHORIZING THE GOVERNOR TO APPOINT A COMMISSION—PERSONNEL OF THE COMMISSION—RESEMBLANCES BETWEEN ITS SUGGESTIONS AND THE CONSTITUTION DRAFTED IN 1867—ENLARGEMENT OF THE SPHERE OF INELIGIBILITY TO THE LEGISLATURE—PROHIBITION OF LOCAL AND SPECIAL LEGISLATION—THE NATURE OF PRIVATE AND LOCAL LAWS TO BE FAIRLY SPECIFIED IN TITLES—PROHIBITION AGAINST AUDIT OR ALLOWANCE OF PRIVATE CLAIMS AGAINST THE STATE—INCREASE OF LEGISLATIVE POWERS OF BOARDS OF SUPERVISORS—SUGGESTION AS TO PRIVATE BILLS NOT APPROVED BY THE LEGISLATURE—HISTORY OF PRIVATE LEGISLATION IN GREAT BRITAIN—PROPOSED RE-CREATION OF A COUNCIL OF REVISION—ENLARGEMENT OF GOVERNOR'S VETO POWER—THIRTY-DAY BILLS—PROPOSED INCREASE OF GOVERNOR'S TERM—PROPOSED APPOINTMENT OF STATE OFFICERS—SALE OF NON-PAYING LATERAL CANALS—PROVISIONS AS TO CHARTERS OF SAVINGS BANKS—CONSTITUTIONAL LIMITATIONS UPON POWER OF CITIES AND COUNTIES TO INCUR INDEBTEDNESS—ENORMOUS EXTENT OF SUCH INDEBTEDNESS IN 1872—PROHIBITION OF CITY OR COUNTY INDEBTEDNESS IN AID OF PRIVATE ENTERPRISE—COMMISSION PROPOSES TWO NEW ARTICLES—THE BRIBERY ARTICLE—DIFFERENCE BETWEEN THE PLAN OF THE COMMISSION AND THAT OF THE CONVENTION OF 1867—THE MUNICIPAL ARTICLE—LATER RE-

STRAINTS UPON LOCAL EXPENDITURE—ADOPTION OF MANY SUGGESTIONS OF THE COMMISSION BY THE LEGISLATURE AND THE PEOPLE—COMMISSION AN INNOVATION IN THE STATE'S HISTORY.

The constitution which had been formulated with such care and intelligence by the Convention of 1867 was, with the exception of its judiciary article, defeated at the polls in 1869 by an adverse vote of more than 66,000. Yet this disapproval so emphatically registered was, by one of those reversions so common in politics, to be followed in 1874 by a measurable degree of approval; for in that year the people by majorities ranging from 120,000 to 360,000 ratified many of the convention's proposals, either in the form in which they had been framed by it or as they had been revised in the constitutional commission of 1872. The people seem unable to pass upon many questions simultaneously. The white heat of 1868 and 1869 had cooled in five years, and the electorate was then ready to consider the work of the convention upon its merits. Constitutional reform profoundly interested Governor Hoffman who, whatever history may say regarding his association with the Tweed ring, rose toward the close of his term as governor to the height of statesmanship.

Hoffman had begun his career as recorder of New York City; he had been mayor, and afterward an unsuccessful candidate for his party's nomination for the governorship in 1866, and became governor in 1868, in a campaign in which false registration and fraudulent voting were believed to have been practised upon a colossal scale. His opportunities for the study of State and city government had been exceptional and had been wisely improved. He was among the first to advocate the legislation that culminated in the Tilden taxpayers' acts. His message to the legislature, January 2, 1872, reads like an essay upon constitutional reform, and is replete with excellent suggestions.

The governor seems to have carefully studied the deliberations of the Convention of 1867. After allusion to its work and its rejection by the people—with the exception of the judiciary article—he pronounced the existing constitution defective "as a framework of efficient republican government." He would not, he said, recommend another convention, for popular attention would be engrossed during the year by a presidential canvass; but he proposed instead the appointment of a commission of thirty-two eminent citizens to be selected equally from each of the two leading political parties. Such a commission might have "all the benefit of the debate incident to a larger body through intelligent discussions in the press and the voluntary suggestions of thoughtful citizens," and its report could not be expected until after the presidential election, when the public mind would be able to examine it calmly. In his opinion a constitution from such a source, when approved by the legislature, and also by the people, would be as duly established as if the suggestions of the commission had, in the first instance, emanated from the legislature itself.

In analyzing defects in the organic law, the governor showed an interesting coincidence of view with the majority opinion of the Convention of 1867. The secretary of state and the attorney general should, he argued, be appointed by the governor and hold office during his pleasure. The comptroller, the superintendent of canals, and the superintendent of prisons might be appointed by the governor either with or without the senate's consent, and should hold office during the same term as the governor and be removable by him at any time for cause. The State treasurer, as actual custodian of public moneys, and, perhaps, also the superintendent of public instruction, should be appointed by joint ballot of the two houses. Additional safeguards against local and special legislation were urgently necessary. The number of laws passed for a score of years had exceeded upon the average five hundred a year and for the

previous six years had surpassed eight hundred a year. Special legislation was the chief cause of this great volume of statutes. There was no profit in limiting the legislative session to one hundred days, as this had not lessened the volume of legislation, but induced haste and carelessness in its passage. The governor urged that power should be reposed in the chief executive of the State to prorogue the legislature after it had been in session for one hundred days.

His views regarding the composition of the senate and the assembly bore close resemblance to those advocated in the Convention of 1867. The senate should consist of representatives versed in public affairs; its very name imported that it should be a council of men of long experience and every inducement should be offered to invite a high order of minds to service in it. "A long term and a large constituency would greatly enhance the dignity of office of senator, and make it attractive to our most distinguished citizens. If the senatorial term were made four or five years and the State were divided into a small number of senatorial districts, so as to throw the choice of senator upon a large constituency, and the compensation made a fair one, the ablest and most experienced of our public men would be found ready to apply themselves in the senate to the important duty of securing good laws for the people." Hoffman favored also the restoration of county representation in the assembly. Doubtful of the wisdom of attempting to frame a universal charter for the cities of the State, a skepticism still shared by many, he advocated "more specific constitutional restraints upon legislative power to grant special charters for corporations, upon special legislation generally, upon legislative awards of extra compensation to claimants under contracts and otherwise." The veto power also should be made more effectual.

Hoffman's home-rule doctrines were sound. True decentralization would consist in giving to the people of every county and of the other political subdivisions of the State

autonomous control of their own local affairs. They should not possess the power of selecting State officers whose duties were exclusively connected with general affairs of the State and the enforcement of State laws. It is interesting to hear from a Democratic governor the confession that "the framers of the constitution of 1846, eager for decentralization of power, made the mistake of supposing that this was to be effected by breaking apart and disconnecting the machinery whereby the State government is to be carried on and by multiplying the number of elective officers."

In accordance with the governor's recommendation, the legislature passed an act,[1] which he approved, authorizing him to nominate, and with the advice and consent of the senate to appoint, a commission of thirty-two persons, four from each judicial district of the State, to propose to the legislature at its next session such amendments to the constitution (exclusive of the recently adopted judiciary article) as the commission might deem proper. The act provided also the mode of filling vacancies in the commission, the place of its meeting, compensation of its members, and other incidental matters. Pursuant to this enactment, Governor Hoffman nominated and the senate confirmed thirty-two commissioners, six of whom had been delegates to the Convention of 1867, and to whose presence in the commission the close correspondence in the work of these two bodies may partially be ascribed. These men were George Opdyke, who had succeeded Fernando Wood as mayor of New York City in 1861; Augustus Schell; Erastus Brooks, editor of the New York *Evening Express;* David Rumsey, who had represented his district in Congress; William Cassidy, the accomplished editor of the Albany *Argus,* who was destined not to live to the close of his term as commissioner; and Francis Kernan, a leading lawyer, who in 1874 was

[1] Chapter 884, Laws of 1872.

elected to represent the State in the United States Senate. George B. Bradley, who subsequently occupied a place upon the bench of the court of appeals, second division, and Lucius Robinson, successor of Samuel Tilden in the governorship, were also members of the commission.[2] It assembled in the council chamber of the city of Albany, December 4, 1872. Robert H. Pruyn was chosen permanent chairman. Its sessions continued until March 15, 1873, when it adjourned *sine die*. On March 24 it reported to the assembly, and on March 25 to the senate, numerous amendments to the constitution, and two new articles, one relating to municipal government, the other to the crime of bribery.

The commission gave little heed to memorials for the enfranchisement of women, or to arguments of the "Committee of Seventy" of New York City for minority or proportional representation in municipal charters and county government. Impressed alike by the danger incident to the growing use of money in elections and by the repugnance of legislatures to the exercise of the power bestowed by the existing constitution to pass statutes against bribery, it proposed to embody in the organic law drastic provisions excluding bribers and the recipients of bribes from the exercise of the elective franchise, substantially approving the

[2] The names of the members were: John D. Van Buren, George Opdyke, Augustus Schell, John J. Townsend, Erastus Brooks, Odle Close, John J. Armstrong, Benjamin D. Silliman, William Cassidy, Robert H. Pruyn, George C. Burdett, Cornelius L. Tracy, Artemas B. Waldo, James M. Dudley, Samuel W. Jackson, Edward W. Foster, Daniel Pratt, Ralph McIntosh, Francis Kernan, Elias W. Leavenworth, Lucius Robinson, John F. Hubbard, Jr., Jonas M. Preston, and Barna R. Johnson, appointed in place of Francis M. Finch, who had been appointed in place of Orlo W. Chapman, both of whom resigned before the first meeting of the Commission. George B. Bradley, Van Rensselaer Richmond, Horace V. Howland, David Rumsey. Mr. Rumsey resigned in January, 1873; Guy H. McMaster was appointed to succeed him, but declined, and the place was filled by the appointment of Lysander Farrar. Sherman S. Rogers, Cyrus E. Davis, Benjamin Pringle, and Lorenzo Morris. Opdyke, Schell, Brooks, Cassidy, Rumsey and Kernan had sat in the Convention of 1867.

amendment drafted by the Convention of 1867 to check this evil. This amendment after its adoption by two successive legislatures was ratified by the people in the fall of 1874.[3] But the commission declined to recommend an amendment approved in the convention requiring registration to be uniform in all cities.

The commission proposed to increase the term of senators to four years, and to divide the State into eight senate districts, each of which should choose four senators, one every year—a slight departure from the plan urged in the Convention of 1867 (but voted down upon the floor of that body), to elect one-half of the senate every two years. One object which the commission sought to effectuate was the creation in that chamber of a reviewing power free from mere local influence, to some extent analogous to that lodged in the chief executive. It was thus hoped to stop the passage of much "special and ill-digested" legislation, which in existing conditions could be nullified only by unsparing use of the governor's veto power. There was a physical limit to a governor's use of the veto, for adequate review of all bills transmitted to him was impossible in the short time at command. The senate should act as a check upon unnecessary laws. For this purpose it should be a dignified body free from too narrow local influences. To obtain such a senate the constituency of senators should be enlarged, the districts made fewer and the term be lengthened. The senatorial office, said the commission, "should be one which the ablest and most experienced men in the district should compete for and accept," and the annual renewal of one-fourth of the senate should "insure the continual presence of a large number of experienced members." But its proposed reconstitution of the senate failed of legislative acceptance, and was never submitted to popular vote. It differed from the convention and from Governor Hoffman in

[3] See Section 2 of Article II.

not favoring return to county representation in the assembly.

In 1819 Roger Skinner was simultaneously federal judge, State senator and member of the council of appointment. The constitution of 1822 therefore forbade any person who was a member of Congress or held a judicial or military office under the United States from holding a seat in the State legislature. In 1870 Tweed while State senator held also the lucrative and influential commissionership of public works in New York City. The commission of 1872 proposed to enlarge the sphere of legislative ineligibility so that no future Tweed could hold a city and State office at the same time. It favored such a change in the constitution as would provide that no person should be chosen to either house who, within one hundred days prior to his election, had been a member of Congress, a civil or military officer of the United States, or an officer under any city government; and that if any person after his election to the legislature should be elected to Congress or appointed to any civil or military office under the United States or under any city government, his acceptance thereof should vacate his seat. This amendment met with due legislative approval and was ratified by the people at the November election in 1874.

In its discussion of the subject of special legislation, the commission declared that three-fourths of all statutes were in reality special acts. Had the constitution forbidden special laws where general laws were feasible the volume of legislation would have been reduced one-half, and the legislature would have had more time to devote to the general interests of the State. Following the example of the Convention of 1867, it reported the prohibition of private, special, or local laws in a number of cases, but enlarged the list fixed by that body. Two legislatures accepted a number of its suggestions, and the inhibition upon special legislation, thus modified, was ratified by the people in 1874. The com-

mission added two sections to article III—one declaring that no private, special, or local law should embrace more than one subject, which should be named in its title, and that any such law embracing more than one subject should be void, and the other declaring that no act should be passed which should provide that any existing law or any part thereof should be made or deemed a part of said act, or which should enact that any existing law or any part thereof should be applicable, except by inserting it in such act. It added a section, similar to one favored in 1867, forbidding the legislature to audit or allow any private claim or account against the State, although it was permitted to appropriate money to pay claims audited and allowed according to law. All these amendments received due approval and became part of the organic law.

The commission proposed to alter the existing constitution so as to require the legislature by general laws to confer upon boards of supervisors of counties such further powers of local legislation and administration as the legislature might from time to time deem expedient, which was adopted. It proposed to deprive the legislature and the common council of any city and any board of supervisors, of power to grant extra compensation to any public officer, servant, agent or contractor, which also was adopted.

Some suggestions of the commission upon the subject of legislation were not approved by the legislature, and therefore were not submitted to the people for ratification. Of this class was its proposal that every bill introduced into the legislature should be considered and read twice, section by section, in the senate and assembly; that every bill should have three readings, no two on the same day; that every bill and all amendments to it should be printed and distributed among the members of each house at least one day before the vote upon its final passage; that the question on the final passage should be taken immediately upon the last reading, section by section, and by yeas and nays to be

entered upon the journals; and that the assent of a majority of the members elected to each house should be requisite to the passage of every bill. In effect, this was incorporated in the constitution in 1894.

Section 18, as reported by the commission of 1872, is as follows:

"No private, special or local bill shall be introduced in any regular session after sixty days from the commencement thereof, without, in each case, the recorded consent by yeas and nays of three-fourths of all the members elected to the house in which such bill is offered; and no such bill shall be passed unless public notice of the intention to apply therefor and of the general objects of the bill shall have previously been given. The legislature, at the next session after the adoption of this section, and from time to time thereafter, shall prescribe the time and mode of giving such notice, the evidence thereof and how such evidence shall be preserved."

The main purpose of this provision—which unfortunately was not approved by the legislature and therefore never submitted to the people—was to inform the public as to all private bills introduced into the senate or assembly, and thereby to secure to those most interested in defeating their passage ample opportunity to register opposition. This was the first attempt in the State of New York to adopt the principle of the parliamentary standing orders which have proved an invaluable safeguard in Great Britain against the passage of improper private or local bills. In the matter of private legislation the example of Great Britain is worthy of emulation. The passage of special legislation through parliament is in the nature of a judicial proceeding. All private or special bills must be filed sixty days before parliament convenes, and all whose interests such bills may affect adversely must be given ample notice to file objections. The promoters of a bill are required to deposit sufficient sums to meet the expenses of the proceedings. If they fail to give the requisite notice or otherwise fail to comply with the standing orders of parliament the

proceeding is dropped. If the requirements of the standing orders have been observed, the bill is referred to a special parliamentary committee, and if its objects are approved, it must be made to harmonize with existing legislation before becoming law.[4] The attempt to pass a section of this tenor was renewed in the legislature in January, 1896, but it failed to secure the needed votes.

Erastus Brooks proposed to create a council of revision to consist of two senators, the chief judge or one of the associate judges of the court of appeals, the attorney general and the governor, the governor to designate every year the senators and judge who should form part of the council, but the committee to which the project was referred, in declining to recommend its adoption, declared that a similar experiment had been tried and had signally failed in the early history of the State. The reasons given in the Convention of 1821 for abolishing the council of revision and which are valid to-day against a revisory council in which judges sit were that it mingled judicial and legislative functions that ought to be kept separate, gave the judges potent influence in shaping legislation, and tended to make them politicians. A senate with a longer term, elected from

[4] "With but very rare exceptions," says Mr. Simon Sterne, "the House of Commons regards the findings of a committee on a private or local bill as final. This method of ascertaining the merits of a measure is so complete, the examination of witnesses and experts is so thorough, every element that can enlighten the mind of the legislator has been brought to bear with so much accuracy and forensic skill that the margin of human error, after such a trial, is very small." Governor Roosevelt, in his message of 1899, directed attention "to the custom of the British Parliament, which puts upon the would-be beneficiary the cost of all private and special legislation, and wisely makes it difficult to obtain at all, and impossible to obtain without full advertisement and discussion. No special law," he added, "should be passed where a general law would serve the purpose." For a full account of Private Bill Legislation in England, see Chapter XX, of the "Government of England," by A. Lawrence Lowell, President of Harvard University.

fewer and larger districts, would be a far more salutary check upon improper and incoherent laws.[5]

The commission terminated the controversy which had perplexed the conventions of 1821, 1846, and 1867 as to the number of members of each house necessary to pass a bill over the governor's veto. The provision which it reported made the consent of two-thirds of the members elected to each house essential to the passage of a vetoed bill. It further reported that no bill should become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after adjournment. These proposals, the first of which had been favored by the Convention of 1867, and both of which had been advocated by Governor Hoffman, were adopted by two legislatures and by the people and form part of the constitution.

Another and much-needed amendment reported by the commission, which also found its way into the constitution, empowers the governor to veto one or more items of an appropriation bill, while approving its other features. In this particular the constitution of New York is more flexible than the Federal constitution. The State has not suffered more from improper riders upon appropriation bills than has the general government. But this pernicious practice on the part of Congress, which was temporarily checked by President Hayes' resolute action in 1879, cannot perhaps be effectually suppressed without an amendment to the Federal constitution.

The commission proposed also that the governor's and the lieutenant governor's term be increased to three years. This amendment was ratified and went into effect on January 1, 1875, too late, however, to have influence upon Gov-

[5] Nevertheless, an advisory council of revision properly organized would be an invaluable instrumentality in the formulation of legislation. A commission organized under Chapter 1025, Laws of 1895, reported to the legislature of 1896 a scheme to govern the introduction of private bills and the method of procedure after their introduction, but its suggestions never bore practical fruit in legislation.

ernor Tilden's term; but his successors—Robinson, Cornell, Cleveland, Hill, and Flower—each served for three years. On January 1, 1895, the term of the chief magistrate was reduced to two years. It would have been far better had the Convention of 1894 made the governor's term and the term of senators four years. The commission also reported amendments providing that the comptroller be elected at the same time with the governor and for a like term, and that the secretary of state, attorney general and State engineer and surveyor be appointed by the governor with the consent of the senate, and hold their offices until the end of the term of the governor by whom they should be nominated and until their successors were appointed. These amendments were not approved by the legislature and were therefore not voted upon by the people.[6]

The commission proposed the creation of two new State officers, a superintendent of public works to take the place of the canal commissioner, and a superintendent of State prisons to take the place of the former prison inspectors—the superintendent of State prisons to be appointed by the governor with the consent of the senate for five years, the superintendent of public works to be appointed in like manner and hold office until the end of the term of the governor by whom he was nominated. These changes, after adoption by two legislatures, met with popular approval and were incorporated in the constitution. The commission proposed that the treasurer should be chosen by the senate and assembly in joint ballot and hold office for three years. This proposal was not acceptable to the legislature and the treasurer, as also the secretary of State, comptroller and attorney-general continued to be elected as before and to hold their office for two years. Under the first constitution the treasurer was selected by the two houses upon nomina-

[6] The short-ballot advocates of to-day would give the governor power to appoint all State officers, without confirmation by the senate, and to remove them at his pleasure.

tion by the assembly, and under the constitution of 1822 by both houses upon joint ballot, if the two chambers should not agree in their nomination. That constitution had provided for the election of the secretary of State, comptroller, surveyor general, and attorney general in like manner with the treasurer. The plan of the constitutional commission was a return to the plan of 1822 in the election of State treasurer. The office of district attorney, an outgrowth in 1801 of the office of assistant attorney general, was by the constitution of 1822 placed within the appointive power conferred upon the county courts and in 1846 district attorneys were made elective. In the constitutional commission, as in the Convention of 1867, a disposition was manifested to treat this official as a sort of deputy attorney general and to give his appointment to the governor—an idea urged by Governor Hoffman; but the plan did not prevail.[7]

The commission decided that most of the lateral canals had outlived their usefulness and would continue in the future, as they had proved in the past, a burden to the State. It declared that the time had arrived to relieve the canal system from the odium due to non-paying laterals. It therefore recommended a modification of section 6, article VII, restricting the prohibition upon the sale, lease, or other disposition of the canals of the State, to the Erie, Champlain, Oswego, Cayuga and Seneca. This modification was found acceptable to the legislature and was approved by the people, but a few years afterward it was decided to include the Black river canal among the non-disposable canals. Although the revenues from the laterals had never

[7] According to Hammond, Governor De Witt Clinton in his first message (1818) "recommended several important improvements in our municipal laws, among which was the abolition of the division of the State into districts, for the purpose of criminal prosecutions, and the appointment of an attorney for the people in each district; and he advised, in lieu of this system, the appointment of an attorney for the people in each county." "Political History of New York," I, 449, 450.

equalled the cost of their maintenance, they had served the purpose of opening communication with fertile lands in the interior of the State, to which their discontinuance caused a temporary disadvantage, as these sections thereafter became exclusively dependent upon railway transportation.[8] In the interval between 1874 and 1882 attempts had unsuccessfully been made to sell the Chemung, Crooked lake, Genesee valley, and Black river canals. Because of the failure of these efforts the legislature decided to retain the Black river canal as a valuable feeder to the Erie. An amendment made in 1882 added it to the list of inalienable canals.

To section 3 of article VII the commission proposed to add, "no extra compensation shall be made to any contractor, but if from any unforeseen cause the terms of any contract shall prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel such contract." And it proposed to take from the legislature, the canal board, the canal appraisers, and their agents, power to audit, allow, or pay any claim "which, as between citizens of the State, would be barred by lapse of time." These two amendments became part of the constitution on January 1, 1875.

The commission proposed also to amend section 4, article VIII, by requiring that the legislature should by general law conform all charters of savings banks or institutions for savings to a uniformity of powers, rights and liabilities, and that all charters thereafter granted for such corporations should be made to conform to such general law and to amendment thereto. No such corporation was to be permitted to have capital stock, nor were the trustees to possess any interest, direct or indirect, in the profits of the corporation nor to be interested in any loan or use of its money or other property. This amendment was ratified and

[8] Whitford's "History of the Canals," 781, 785. Hill, Waterways and Canal Construction, N. Y., 194. Report of Commission of 1872.

is now in the constitution. The amendment eradicated an evil which had sprung from the creation of savings banks with stock, under special charters, without proper restrictions upon the investment of their funds. Actuated by the desire to make large profits and declare handsome dividends, some savings banks had taken risks entirely inconsistent with the nature of their business, to the great injury of depositors; and the temptation to such risks was increased by their having capital stock of which the directors or trustees could be holders. In his annual message, January 4, 1870, Governor Hoffman informed the legislature that 128 savings banks had theretofore been organized in this State with an aggregate of assets exceeding $180,000,000. The magnitude and importance of the savings bank interest seemed, he thought, to demand more intimate guardianship and more careful supervision. In his message in January, 1872, he declared that careless legislation regarding savings bank and other moneyed incorporations had become an evil so great as to constrain him to refuse his signature to 68 bills for the incorporation or increase of the powers of this class of institutions.

In 1846 a ban had wisely been placed upon State aid to private enterprise. The experience of intervening years convinced the commission that a like prohibition should be applied to cities and other local subdivisions of the commonwealth. The report of its committee on city, town, and county indebtedness contained striking proofs of reckless abuse of power in the creation of local obligations for future generations to pay. In aid of railroads there had been issued by towns, cities, and villages bonds then remaining unpaid amounting to $26,946,662.09.[9] For the erection of public buildings obligations amounting to more than $10,000,000 had been incurred. The debt for roads, boulevards, streets, avenues and bridges was $36,000,000; for water-

[9] See Report of Special Committee to the commission February 28, 1873.

works and fire apparatus, $29,000,000; and for parks and various other local improvements, $84,000,000. Counties, cities, towns, and villages of the State were staggering under the enormous indebtedness of $214,344,676.58, which was more than ten per cent. of the assessed valuation of real and personal property within the State. The commission's conclusion was that in order to avoid disastrous financial results restraint should be put upon the power of municipalities to incur debt. It therefore recommended the addition of two new sections to article VIII. It added a new section (10) which declares that neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking, but that the section shall not prevent the legislature from making provision for the education and support of the blind, the deaf and dumb and juvenile delinquents, nor apply to any fund or property held or to be hereafter held by the State for educational purposes. Section 10 received adequate legislative approval, was approved by the people and became part of the constitution.

As proposed by the commission section 11 forbade every city, town or village not only from lending its money or credit to any private enterprise but from incurring indebtedness exceeding ten per cent. of the value of the taxable property within its limits. No county was to be allowed to incur any indebtedness save for county or municipal purposes. Section 11 was modified by the legislature and as changed by it was approved by the people. In its changed form it prohibited every city, county, town or village from thereafter giving any money or property or loaning its money or credit in aid of any individual, association or corporation or from becoming directly or indirectly the owner of stock in or bonds of any association or corporation and it prohibited every county, city, town or village from incurring any indebtedness except for county, city, town or village purposes—the prohibition, however, not to

preclude provision for aid or support of the poor. These amendments had become eminently necessary because of the latitudinary construction which the courts (particularly those of the United States) had given to the powers of municipalities and towns in the loan of their money and credit to railroads and other private enterprises. Similar constitutional restrictions were adopted about the same time in many other States. A new section (9) was also added to article X, providing that no officer whose salary is fixed by the constitution should receive any additional compensation; that the compensation of other State officers named in the constitution should be fixed by law, and be neither increased nor diminished during their terms; and that no State officer should receive to his use any fees or perquisites of office or other compensation. Article III, relating to the oath of office, was also amended. Despite the stringent oath now required from legislators and the severe penalties enforced against all found guilty of bribery at elections, the offence continues to be common.

All these amendments were subsequently approved by two legislatures and ratified by the people.

The commission proposed two additional articles to the constitution: Articles XV and XVI. Article XV related to municipal reforms and will be analyzed in the next chapter. Article XVI related to bribery. This article was adopted and is article XIII of the present constitution. The article makes it a felony for any person holding office under the laws of this State to receive any money except his legal salary, or any fees or perquisites or anything of value or of personal advantage or any promise of either, for the performance or non-performance of any official act or upon the express or implied understanding that his official action is to be influenced thereby. The article further provides that any person who shall offer or promise a bribe, if it shall be received, shall be deemed guilty of a felony and liable to punishment. The briber

shall not be privileged from testifying upon any prosecution of the officer for receiving such bribe; but he shall not be liable to civil or criminal prosecution for offering the bribe if he shall testify to offering or giving it. Offering a bribe which shall be refused is made a felony. The article also permits either the briber or the bribed to testify in his own behalf in any civil or criminal prosecution for the bribery. Any district attorney failing to prosecute a person amenable under this article shall be removed from office by the governor, after due notice and an opportunity to be heard in his defence. Expenses incurred in any county in investigating and prosecuting any charge of bribery or attempt at bribery within such county are made a charge against the State, and their payment by the State must be provided for by law.

The Convention of 1867 proposed that if a person should offer a bribe, and it be accepted, he should not be liable to civil or criminal prosecution therefor. The feeling in the convention was that convictions for bribery would never take place under existing laws; it therefore concluded that the briber must be absolutely immune if the bribee was to be reached and punished. The commission of 1872 was unwilling to go as far in leniency toward the briber, but it relieved him from liability if he would testify to the giving of the bribe, whereas no such immunity was offered to the recipient of the bribe. It seems remarkable that to offer a bribe which is refused is more dangerous than to offer one which is accepted! This article was approved by two legislatures and ratified in 1874.[10] It is in section 3, article XIII, of the constitution of 1894.

[10] According to the Committee on Official Corruption in the Convention of 1867, corruption of legislators was common but extremely difficult to prove, owing to the immunity extended by the constitution to both the giver and the recipient of the bribe. While legislative corruption was the evil to be eradicated, a corrupt legislature could not be expected to furnish the remedy; hence the people must supply it in the organic law. In weighing the turpitude of the giver

Section 11 of article VIII was destined to further alteration in the direction of restraint upon local expenditure. As has been seen, the legislature of 1874 did not accept all the suggestions of the commission of 1872 upon this subject, and agitation for more effective restriction continued. In 1881 the legislature recommended an amendment to section 11 of article VIII—the section proposed by the commission of 1872 and ratified by the people in 1874. The amendment proposed in 1881 forbade any county containing a city of over 100,000 inhabitants or any such city from contracting any indebtedness which with its existing indebtedness should exceed ten per cent. of the assessed valuation of the real estate of such county or city subject to taxation.

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and the taker of the bribe, the latter might justly be considered the worse offender, for he violated both his official oath and his trust. Since it was obvious that no conviction could be had under the act of 1853 (Chapter 539, Laws of 1853), which treated both classes of offenders alike, the constitution would have to exculpate the successful briber, if the recipient of the bribe were to be punished. There was force in the cogent dissent of Martin I. Townsend who regarded the act of 1853 as adequate, and thought that legislation of this nature did not belong in the organic law. The discrimination which permitted the briber to practice his nefarious trade he regarded as pernicious. Much evidence suggestive of bribery had been taken by the Committee under authority previously given it by the convention. Townsend declared that it had not been the policy of the State to punish the seduced and let the seducer go free. As he said later in debate: "Suppose the owner of several great railroads were the sort of man to bribe the legislature and should use the funds of his road to prevent just legislation adverse to its interests, would it be safe and right to provide in the constitution that he should incur no risk? Would it not be dangerous to say in the organic law that the professional lobbyist who should be adroit enough to carry out his objects should be guilty of no crime whatsoever?" Comstock, in supporting the article, said that only one of the two could be found guilty, and which one is guilty depends upon the question whether the offence is consummated by the acceptance of the bribe. If it is, then the person receiving the bribe is the guilty party, and if it is not, he is not; but if the offence is not consummated, then he who offered the bribe is the guilty person and can be convicted.

After an experience of forty years with this provision, bribery has not been stopped, but, it is feared, has alarmingly increased.

This amendment, having received the necessary legislative approval, was submitted for popular ratification in November, 1884, and became part of the constitution on January 1, 1885. But curtailment of local power over local moneys was not yet at end. Section 11 was amended by the Constitutional Convention of 1894, which also changed the number of the section, making it number 10. The amendment of 1885 was limited to a county containing a city of upward of 100,000 inhabitants, or to a city of like dimensions The amendment of 1894 was more general: it forbade every county and city from incurring indebtedness exceeding ten per cent. of the assessed valuation of its real estate subject to taxation. Amendments since made to this section relate especially to the debts to be eliminated in the computation of the ten per cent. indebtedness. As they chiefly affect cities and particularly the City of New York, explanation of them will be reserved for a later chapter. The creation of assessment districts and sewer districts covering several cities, towns or villages, with power to issue bonds to pay for proposed improvements, in effect burdens each of the cities, towns or villages within the larger area with indebtedness in excess of the ten per cent. limit. To this extent constitutional prohibitions are frustrated.

Thus, through the agency of the constitutional commission acting as an aid to the legislature, many of the excellent suggestions of the Convention of 1867 ultimately entered the organic law of the State. This beneficent result was largely due to Governor Hoffman, originator of the plan for a constitutional commission. The antipathy of his party to the work of the late convention had been emphatically declared in the platform of the Democratic State Convention in 1869, which resolved that "the amended constitution, with its various schedules for submission to the electors, did not commend itself to the favor of the Democrats of the State, either by the motives in which it was conceived or by the manner in which it was presented, or by

its intrinsic worth"; but the governor rose superior to party considerations in his treatment of the subject, and thus rescued much of the splendid work of the convention from utter defeat.

The commission of 1872 was an innovation in constitutional evolution in this State. The experiment of an intermediate body summoned into being to advise and report to the legislature upon constitutional reform had never before been tried in its history. The device proved so successful that it was again employed in 1890. Commissions of this nature are likely to contain men of higher talent, wider learning, and greater constitutional knowledge than the ordinary legislator or delegate has. As their number is small, their deliberations may be conducted with more order and advantage than attend the proceedings of a large convention. Judge Jameson has questioned the constitutionality of amendments originating in commissions not expressly authorized by the organic law; but there does not seem to be any valid objection to the creation of such bodies, because their work is futile if not accepted by the legislature. Whenever accepted, it becomes in effect the work of the legislature as completely as though initiated by it. Such commissions merely report to the legislature; they exercise no coercive power over it. The argument carried to an extreme would preclude any suggestion to the legislature from an outside source respecting the propriety of an amendment. A commission exercises no more coercion over a legislature than the public sentiment to which all commissions and legislatures are or should be alike sensitive and alike amenable.

CHAPTER XIII

NEW YORK AND ALBANY ONLY CITIES MENTIONED IN CONSTITUTION OF 1777—FREEDOM OF THE CITY—CITIES OF THE STATE FEW IN NUMBER IN 1846—HOME RULE INSTINCT AS OLD AS CIVILIZATION—EARLY AMERICAN CITIES LIKE ENGLISH PROTOTYPES—NEW YORK CITY CHARTERS, DUTCH AND ENGLISH—DONGAN CHARTER—CITY CHARTER OF 1830 AND ITS DEFECTS—CHARTER OF 1849—LEGISLATIVE USURPATION OF CITY GOVERNMENT IN 1857, REASON THEREFOR, AND RESULTS—TWEED CHARTER OF 1870—CHARTER OF 1873—ATTENTION FIRST FOCUSED ON CITY MAL-ADMINISTRATION AFTER CIVIL WAR—TREATMENT OF CITY PROBLEMS BY CONVENTION OF 1867, AND COMMISSION OF 1872.

The only cities mentioned in the constitution of 1777 are New York City and Albany, and this reference was necessary to prevent a denial to freemen of either city of the right to vote for assemblymen. During the colonial period, only the freemen of a borough or city could practice any art, trade, or occupation within its limits; in New York City and Albany, freemen alone were allowed to be merchants, traders, or shopkeepers. Freemen equally with property holders were allowed to vote, and were qualified to hold corporate office. When the Convention of 1821 sat, cities were few in number, and such as then existed enjoyed special charters. In the Convention of 1846 the subject of municipal government received scant attention; the meagre outcome of its brief discussion in the final days of its sessions was embodied in the provision (Sec. 1, Art. VIII)

that corporations might be formed under general laws, but should not be created by special act except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation could not be attained under general laws. Only nine cities had been incorporated in this State down to 1846; the number since has been greatly multiplied. In this State the problem of the city may fairly be said to have arisen since the close of that convention.

Cities are as old as civilization. In ancient Greece, nearly every city was an independent sovereignty. In ancient Rome, cities possessed more or less completely the right of self-government, and while under the empire they were more essentially parts of the vast political organism, as to local affairs they were treated like autonomous communities. In some instances their privileges survived the decadence of the empire, and when feudalism spread throughout Europe they became recipients of special charters exempting them from customary feudal obligations. These charters, says Chancellor Kent, were cherished by their inhabitants as "invaluable barriers against the insecurities and oppression of the feudal system." In England the first municipal charter appears to have been granted to the city of Kingston-upon-Hull, in 1429. The rights which cities came to enjoy were, according to Bishop Stubbs,[1] "free election of magistrates, independent exercise of jurisdiction in their own courts, and by their own customs and the direct negotiation of their taxation with the officers of the exchequer." The character of these grants is somewhat nebulous, but such privileges as were conferred were defended with vigor against the sovereign and the noble. The love of home rule, the instinct for self-government, seems to be as old as civilization.

According to Cooley, the first American municipalities

[1] "Constitutional History of England," vol. I, 628.

"were formed in the likeness of their British archetype." Like the English municipal corporation, the early American city was mainly an organization for the satisfaction of purely local needs, which were then few and simple; executive and judicial functions were usually merged in the same set of officers, and it was seldom that the city had the power to levy taxes for local purposes.[2]

[2] Even in colonial days, the legislature was reluctant to give the city power to levy local taxes. In Dutch times the city of New Amsterdam had its own revenues, which often rendered resort to direct taxation unnecessary. Improvements were paid for by special assessments. The method of special assessment seems to have been introduced in 1657 for the pavement of what now constitutes Stone street, the first street in New Amsterdam to be paved. Under early English rule the city's revenues were frequently adequate to pay the charges imposed upon the public, and to render unnecessary any direct property tax. After the provincial assembly was established in 1691, taxes for municipal purposes were levied only by its special permission, and up to about 1750 such legislation was rarely necessary, as the city revenues usually sufficed to meet its annual bills. Its income came from its ferries, its dock, tavern licenses, special license charges to merchants and handicraftsmen, and other miscellaneous sources; its expenditures for salaries, repairs of public buildings and property, and repair of the common sewer, were made out of its income. The lighting and cleaning of the streets had to be done by the citizens themselves, and improvements were defrayed by special assessments. After the Revolution, the State legislature followed the precedent set by the colonial assembly in granting authority to levy taxes for local purposes year by year as the city needed the power, and in 1813 the same power to levy taxes for local purposes was conferred upon it as was bestowed upon supervisors of counties. The machinery of assessment for taxation and of taxation is provided by Chapter 86 of the session laws of that year. By Chapter 262, Laws of 1823, the supervisors of the different counties were required to meet on the first Tuesday of October in every year and examine the several assessment rolls of the several towns within the county, and the mayor, recorder and aldermen of the city of New York were required to perform all the duties enjoined upon supervisors of counties, which included the power of levying taxes. Chapter 83, Laws of 1825, provided that the mayor, recorder, and aldermen of the city of New York should be supervisors of the city, and as such annually meet on the third Tuesday of August at the City Hall to examine the assessment rolls, equalize and correct valuations, and thereafter levy taxes. From about this time down to and including 1852, the legislature seems annually to have authorized the city authorities acting as county officials to raise

The first charter of New Amsterdam came from the Dutch government February 2, 1654. It partakes of the nature of the liberal charters theretofore granted to cities in the Netherlands. Upon the surrender of the fort to the English, August 27, 1664 (O. S.), Colonel Nicoll gave its inhabitants under the corporate name of the mayor, aldermen, and sheriff a new charter, which recognized their former privileges. The Dongan charter, in which New York is described as "an ancient city," in turn confirmed all the rights which the city had enjoyed under its Dutch name of Schout, Burgomasters, and Schepens of New Amsterdam, as well as all more recent grants under British rule, conferred upon it ownership of all waste, vacant, unpatented and unappropriated lands within the city and upon Manhattan Island—sale of which lands was to become a source of revenue to the city—extended its jurisdiction to low-water mark upon both the Long Island and the New Jersey shore; authorized a government by a mayor, recorder, town clerk, six aldermen, and six assistants under the name of the mayor, aldermen and commonalty of the city, in whom was vested power from time to time to make, amend, and alter laws and ordinances so long as they should not be repugnant to the laws of England or of the provincial assembly, which laws were to be binding for the space of three months and no longer, unless confirmed by the governor and council. The mayor and also the recorder were annually to be appointed by the lieutenant governor, and the aldermen and their assistants chosen by a majority of

by tax a sum not in excess of an amount fixed in the act, in order to defray the various expenses legally chargeable to the city and county. In 1853 the legislature began to supervise appropriations with far more minuteness. Chapter 232 of that year provided that the board of supervisors should be empowered to order and cause to be raised by tax and to be collected according to law "a sum not exceeding $2,354,925, for the objects and purposes following, to wit"—which was followed by a long detailed specification of the items of appropriation. Legislative appropriations and authorizations of tax levies continued until about 1873.

the votes of the inhabitants of each ward qualified to vote. This charter, which bestowed a large measure of self-government upon the city, was confirmed by the Montgomerie charter of 1730; both charters were confirmed by an act of the colonial assembly in 1732; and the first constitution of the State expressly saved from abrogation all charters to bodies politic made by authority of George III. or his predecessors.

For a considerable period after the adoption of the first constitution changes in the charter of New York City were made upon the initiative of the qualified voters of the city, through the medium of charter conventions, the members of which were elected by city voters. Few statutes affecting only the affairs of the City of New York passed by the legislature in that interval took effect until they had been approved by popular referendum. Thus, in 1829, delegates to a convention to amend the city charter were chosen by voters of the city from its fourteen wards. This convention, which included in its membership John Hone, John Duer, Philip Hone, Gulian C. Verplanck, and Peter A. Jay, assembled on June 23, 1829, and produced a charter which was submitted to the people of the city at a special election and approved by them. This municipal organic law passed the legislature unchanged.[3] When it is contrasted with modern city charters, its brevity is striking; it contains only twenty-six sections, many of which are short. It vested the "legislative power" in a bicameral council—the board of aldermen and the board of assistant aldermen—fixed the date for the election of charter officers as the second Tuesday of April, and the date of their entry into office as the second Tuesday of May, 1830; and provided that the executive business of the corporation should be performed by departments organized and appointed by the common council. It retained intact all parts of the time-honored colonial

[3] Chapter 122 of the Laws of 1830.

charters not inconsistent with its express provisions. Its legislature of two houses was quite naturally modeled after the Federal Congress, and the State senate and assembly, and the mayor's qualified veto was similar to the veto given the governor under the constitution of 1821. The convention favored an amendment to the constitution under which the mayor should be elected by the voters of the city instead of by the common council, as the constitution then required, but his election by citizens was not brought about until the constitutional amendment of 1834 took effect.

The charter of 1830 failed to realize the expectations of its framers. Its chief defect was that it clothed the common council with executive power—a power which in its ability to select heads of departments it continued to enjoy even after the mayor came to be elected by the people, in 1834. This was effected through the provision that the executive business of the city should be performed by distinct departments to be organized and appointed by the council. Thus, aldermen and assistants were able through their committees and departments to control even the minutiæ of administration, the "very name of 'executive committees,' which these officials retained, showing how little they confined themselves to legislative functions." [4] The executive had only a shadow of authority; he could recommend, but do little more; nearly all substantial power was centered in the council. After nineteen years this evil was remedied, but unhappily there followed others born of over-confidence in the wisdom of the sovereign people. The right of citizens to frame their own charter through delegates of their own selection was, however, again expressly recognized. Pursuant to an act of the legislature of 1846 [5] an election was held in the city on the first Monday of June of that year, at which were chosen delegates to a county convention em-

[4] "History of New York City Finances," by Edward Dana Durand, page 60.

[5] Chapter 172, Laws of 1846.

powered to frame a new charter or amend the existing one. The delegates were required to meet on the first Monday of July, and to complete their business in time to allow the submission to the electors of the city and county of New York at the succeeding November election, of any charter or amendments formulated by them. Delegates were accordingly chosen, and the city convention assembled in the city almost simultaneously with the meeting of the State constitutional convention at the capital. The new charter was not approved by the local electorate, partly because of absorbing interest in the Mexican War, and partly because of public pre-occupation with the work of the State constitutional convention; but in 1849 the legislature amended the charter along lines proposed by the city Convention of 1846. The Democratic sentiment of the time insisted upon the election by manhood suffrage not only of the mayor and the common council, but also of the heads of the various executive departments, which under the charter of 1830 had been controlled by committees of the common council. The most revolutionary feature of the legislation of 1849 was the creation of executive departments, the heads of which were to be elected for short terms. The act provided that the new charter should be submitted for approval to the electors of the city and county of New York at an election to be held on the second Tuesday of April, 1849, and that in case of its approval by a majority of the electors it should go into effect on June first of that year. By a popular vote the new charter was approved.

The charter of 1849 was almost as succinct as that of 1830. It vested all executive power in the mayor and heads of departments, and forbade the common council and its committees from exercising executive functions. The executive departments were single-headed, with the exception of the Croton Aqueduct Board, which was established on May 2, 1834, as a State board to secure a supply of water for the city from the Croton region. Contracts

for work and supplies were to be let by department heads under regulations to be prescribed by the common council. The charter of 1830 was expressly repealed.

The change in city government effected in 1849, which was approved by a popular vote of 19,339 in favor and of only 1,478 against it, was seemingly not inspired by party motives. The charter of 1849 was amended in 1853, but not without popular approval, for the act containing the proposed amendments required the submission to the electorate of the question whether these should be incorporated in the city's organic law. The alterations made in 1853 grew out of public revolt against corruption in the grant of city railway franchises, the most important reform of this year requiring all franchises, as well as all leases of ferries, docks, slips and piers, to be offered at public auction to the highest bidder giving adequate security.

But an extraordinary revolution in legislative treatment of the city was to be witnessed inside of four years. The slavery question had assumed portentous prominence, and the conflict which Seward in 1858 declared to be irrepressible was felt to be impending. The Republican party, which controlled the State government, was ardently opposed to the extension of the South's peculiar system into the new territories of the nation; while New York City, which was Democratic by a large majority, contained many sympathizers with extreme pro-slavery views. Both parties were deeply interested in success in the coming State and national elections; the city's officials did not command the confidence of its better citizenship, and, in the tenseness of feeling and prejudice, Republicans were naturally eager to seize any tactical advantage, when apparently sound reasons existed for curbing the power of a Democratic administration. So unsatisfactory and even corrupt had been the management of the city's affairs, so insecure property and even life within its borders, that the Republican State government felt impelled to intervene. Hope of party advan-

tage may have prompted its action, but its legislation had strong backing in public sentiment. Nevertheless, this legislation was not carried into effect without tumult and bloodshed, nor without intelligent opposition, for it involved nearly complete subversion of the principle of home rule, until then almost unbrokenly acknowledged. The city charter was radically altered; the election of all department heads except the corporation counsel and the comptroller was taken from the people and their appointment given to the mayor, upon confirmation by the common council; the city government was separated from the county government and a board of supervisors created to levy local taxes, canvass the vote, and perform other county duties.[6] For the ward, the old unit of an aldermanic election, was substituted an arbitrary district so gerrymandered as to increase the strength of the Republicans in the board of aldermen. Councilmen were to be elected from senatorial districts. Charter elections were to take place on the first Tuesday in December. Control of the police system was withdrawn from the city; a metropolitan police district, in imitation of the London system, was established, and there was created a police board, appointments to which were made at Albany. Later, the government of the new Central Park was vested in a State commission, and a metropolitan fire district and a health district also were formed. These changes in the charter in effect removed the administration of the city's affairs from the City Hall to the Capitol, but the transfer of power was not accomplished without controversy in the courts, and the case of the People v. Draper et al. (15 N. Y., 532) became a notable landmark in the centralization of city government at the capital.

In order to sustain the constitutionality of the law, the court of appeals in the Draper case was obliged to hold that the legislature might constitutionally establish new civil

[6] See Chapters 446, 569, 590, Laws of 1857.

divisions of the State embracing the whole or parts of different counties, cities, villages, or towns for general purposes, permanent or temporary, of civil government, provided the divisions recognized by the constitution were not abolished nor their capacity impaired to subserve the purposes and arrangements to which they were made instrumental by the constitution. Chief Judge Denio, author of the prevailing opinion, admitted that the legislature could not abolish counties, cities or towns, since these were indispensable subdivisions of the State government, but nothing in the constitution, he declared, required that these local divisions should always possess the same measure of administrative power. Justice Brown, who had been a member of the State Constitutional Convention of 1846, cogently argued for the minority that these civil divisions of the commonwealth were "coeval with the government" and that they were as much beyond the pale of legislative abrogation as though their destruction had expressly been prohibited.

The Albany legislature ruled the city with an iron hand for a number of years after 1857. It not only levied taxes within the city, but fixed all details of the city budget, and made minute appropriations of the city's money. Reaction set in with the election to the governorship of John T. Hoffman, who, in his first message to the legislature in 1869, denounced the system of government of the city by legislative commissions, and recommended its repeal. The plain spirit of the constitution, he contended, had been violated in the creation by the legislature of geographical divisions not recognized in the organic law, and, while by a bare majority the highest judicial tribunal had upheld the legislation, he charged it "to have been a partisan contrivance for power, and, if not an open violation, at least an evasion of the constitution," whose effect was "to give to the political minority in these districts the power of governing the majority."

The city charter of 1870, commonly known as the Tweed charter, was fundamentally sound in rescuing the city from government at the State capital, although the powers restored to the people were abused by the officials to whom they were entrusted.[7] In this year the Democrats had a majority in the legislature and a governor of their own faith at Albany. By the charter, aldermen were to be elected upon a general ticket through the city at large, and

[7] It is no condemnation of the home-rule theory that this charter, quite generally approved by the press of the time, should have been followed by the scandals of the Tweed ring. It was not the charter, but other legislation secured by the ring, which enabled it to enrich its members beyond the dreams of avarice, and increased the city debt in a few years to $50,000,000. Coincidently with the procurement of the charter, the ring obtained the passage of legislation abolishing the county board of supervisors established in 1857, and transferring to the mayor, recorder and aldermen the powers of that odious bi-partisan board. Legislation was obtained authorizing the mayor, comptroller, and president of the board of supervisors (a position occupied by Tweed) to audit the county liabilities and issue revenue bonds for their payment—a process by which $6,413,737 of county liabilities, in large measure fictitious, was audited by a board which never met; and new bonds were accordingly issued. There was procured also legislation for the consolidation of the city and county debt, and the refunding of this debt by the issue of thirty-year stock, and further legislation by which the money spenders were placed in the new board of estimate and apportionment; also laws changing the grade of Ninth avenue; establishing a board of street openings; and authorizing the widening of Broadway, Sixth avenue, Seventh avenue, St. Nicholas avenue, and the repaving of numerous streets. By some of this legislation unprecedented powers were conferred upon the commissioner of public works. Improvements in the water-supply system received legislative sanction, and unnecessary mains were ordered to be laid. The gigantic operations of the ring were not the fruit of the new charter, but the direct consequences of the evil habit, begun in 1857, of constant legislative intervention in city affairs. It was the numerous, complicated and sometimes overlapping measures passed in 1870 and 1871, which enabled the ring to acquire apparently absolute control of the city government and its finances; and all this legislation, by which the ring attained the height of its power, was, as was clearly revealed in testimony at the time, the result of legislative corruption. The Tweed régime, therefore, is to be attributed to the policy of legislative interference with the city, and not to the evils of the Tweed charter.

assistant aldermen were to be chosen in assembly districts; all heads of departments other than finance and law were to be appointed by the mayor, and confirmation by the common council was dispensed with; the December city elections were abandoned, and all city elections thereafter directed to be held in November. The county board of supervisors was abolished, important tax legislation enacted, and an entirely new board called the Board of Estimate and Apportionment [8] created, to which the department heads were required to submit their annual estimates and which was charged with the duty of making up the city budget; while to meet appropriations thus authorized the common council was permitted to levy taxes. Thus there was restored to the city the power of levying taxes which it originally enjoyed in a limited degree, and of which for three generations it had been deprived; and the ability of the legislature to delegate this authority was subsequently upheld in the courts.[9]

The evils of ring misrule led in 1872 to the draft by the Committee of Seventy of a charter which was passed by the legislature, but was vetoed by Governor Hoffman mainly upon the ground that the principle of minority representation which the charter proposed to employ in the election of certain city officers was unconstitutional. A cardinal defect in the charter, as the governor said, was its creation of a mayor without real executive responsibility; it lodged the power of appointment in the common council. In the succeeding year (1873) there was passed a new charter—a species of compromise between the Tweed charter of 1870 and the charter drafted by the Committee of Seventy [10]—

[8] This board has since played a most important part in city government; its powers have from time to time been enlarged, and it may ultimately become the vehicle for the evolution from the mayoral system into the commission system of government.

[9] Townsend v. Mayor, etc., of N. Y., 16 Hun. 362.

[10] Chapter 335, Laws of 1873.

which with few changes remained in operation until the creation of Greater New York in 1897.

In the period following the Civil War, attention became concentrated upon the evils of city government, and public feeling in New York City rose to fever height after the disclosures of 1871. The long era of misgovernment had culminated in the criminal peculations of the Tweed ring, but misgovernment was not confined to the metropolis alone. The speculative spirit engendered during the Rebellion, and the lowered moral standards usually consequent upon a period of war, had led to general corruption in the affairs of cities, while the concentration of public attention upon national questions had secured municipal wrongdoers a certain degree of immunity. The dangers to city government from the naturalization and admission to citizenship of hordes of ignorant immigrants from Europe, and the advantage that such numbers would give to corrupt leadership, were dimly appreciated as far back as 1846. In the State convention of that year, Henry C. Murphy earnestly advocated the passage of a constitutional requirement for the incorporation of cities under general laws. Murphy's views met with little favor in the convention. In the Convention of 1867 city misgovernment and its causes and remedies aroused warm debate. The legislation placing the police under State control was bitterly attacked and strongly defended. Martin I. Townsend with much justice declared that but for the efficiency of the metropolitan police the draft riot of July, 1863, might have resulted in revolution. The Democrats of the convention urged the abrogation of all legislative commissions, but failed to carry a majority of the convention with them. The committee on cities was divided in sentiment; while nearly all favored the passage of general legislation for the incorporation of cities, a minority under the leadership of ex-Mayor Opdyke urged as a remedy some restriction upon the suffrage in the selection of officials having charge of the expenditure of

city moneys. The convention decided to report amendments to article VII of the constitution, one of these amendments delimiting the powers of boards of supervisors, another defining the powers of mayors, and a third prohibiting the enactment of special laws for the organization and government of municipalities, save where the object to be attained could not in the judgment of the legislature be effected by general legislation.

The constitutional commission of 1872, which was a much smaller body than the Convention of 1867, but made up equally from the two political parties, approved a constitutional amendment in the shape of a municipal article containing five sections. Section 1 provided for the choice by the electors of every city in this State of a mayor as the chief executive officer, charged with power to nominate, and with the consent of the board of aldermen to appoint, the heads of executive departments, and with power to investigate their acts and all books and documents in their offices, and to examine them and their subordinates under oath. He was empowered also to suspend or remove the heads of departments for misconduct in office or neglect of duty, but was obliged to specify the misconduct or neglect in the order of suspension or removal. He was given a power of veto over acts of boards of aldermen like that possessed by the governor over acts of the legislature; and boards of aldermen were invested with power of reconsideration and enactment, after a mayor's veto, analogous to that possessed by the legislature over bills vetoed by the governor. Section 2 provided that heads of departments might appoint and remove their subordinate officers.

Section 3 is as follows:

"The local government of every incorporated city shall be vested in a mayor and a board of aldermen. Aldermen shall be chosen by districts or wards, not more than three from each district or ward; and the whole number of aldermen shall not be less than one to every fifty thousand of population. There shall also be a board of audit of not less than five nor more than eleven members. They shall be elec-

tors of the city, and shall be chosen by general ticket, by such electors thereof as shall have paid, individually, in the year previous to the election, a tax on property officially assessed for taxation at not less than two hundred and fifty dollars. The assent of such board of audit, by the vote of a majority of all members elected thereto, shall be necessary to every resolution, ordinance or other proceeding of the board of aldermen involving the auditing of claims and accounts, the expenditure of money, the contracting of debts or the levying of taxes and assessments; and the board of audit shall be clothed with no other power."

Section 4 is as follows:

"The government of every city shall have, within its own boundary, exclusive legislative power in all matters relating to taxation and expenditure for local purposes, the care, regulation and improvement of its streets, avenues, public grounds and public buildings, of its supply and distribution of water, of its almshouse and its other charitable and benevolent institutions, and may exercise such further powers as shall be conferred by law."

Section 5 required the legislature at its first session after the adoption of the new article to enact a general law for the government of cities in harmony with its terms.

The municipal article framed by the commission of 1872 was not accepted by the legislature to which it was submitted, nor did it obtain the approval of any subsequent legislature; hence the people were never called upon for their opinion of its merits or unwisdom.

Under a general law for the creation of cities, the legislature might escape "the swarms of local bills forced upon its attention at every session," and the constant alteration of city charters might cease, with gain to home rule; yet despite these advantages, a stage in which a satisfactory general law for cities of the first class might be framed had not then been reached. The conservatism shown in legislative disinclination to adopt this article was wise. It would have been a mistake for the legislature and the people to have accepted it, even had it been rid of the somewhat undemocratic provision urged by Opdyke both in 1867 and 1872, and subsequently indorsed by the Tilden commission of 1875,—that city officers charged with the spending of

city moneys should be chosen only by owners of property. The minimum valuation suggested by Opdyke in 1867 was $1,000; in 1872 he reduced it to $250.

The municipal article drafted by Opdyke, in providing for the choice of a mayor as the chief executive officer of every city of the State, covered the same subject as the constitutional amendment of 1839, and was unnecessary. The idea of fettering the mayor's power of nominating or removing heads of executive departments was erroneous. In several of his annual messages, Governor Hoffman had advanced beyond this now generally discredited theory of limited mayoral responsibility, for he urged that the mayor should have the amplest power of appointment and unrestricted power of removal, and such has been the trend of recent legislation for the cities of the State. In his first message, Hoffman affirmed that good government could not be secured to any great city unless it had one responsible head, vested with all executive power, to whom, as the elected representative of the people, all departments charged with executive duties should be directly and summarily responsible and accountable.[11] In his second message, he said: "I believe this to be the very foundation stone of a good structure of municipal government." In his message of January 2, 1872, he advocated "fixing the responsibility for good administration upon the mayor; and to this end giving him full power of appointment and removal of all heads of departments except the police." The article advocated by the commission of 1872 would have enabled heads of departments to appoint and remove their subordinate officers. Had this been ratified, the Civil Service Law of 1883 in some of its aspects might have been unconstitutional, and reform of the civil service perhaps belated until its incorporation into the constitution of 1895. The scheme to limit the franchise was chimerical, and would alone have insured the defeat of the article.

[11] Messages of Governor Hoffman, pp. 26, 96.

CHAPTER XIV

TILDEN COMMISSION—ITS ADVOCACY OF LIMITED SUFFRAGE IN CITIES—SUMMARY OF ITS PLAN FOR IMPROVING CITY GOVERNMENT—FAILURE IN LEGISLATURE—CONVENTION OF 1894 DIVORCED CITY FROM STATE AND NATIONAL ELECTIONS—ITS NEW MUNICIPAL ARTICLE—GENERAL AND SPECIAL CITY LAWS—RECENT ENACTMENTS ENLARGING POWERS OF CITIES—DUAL FUNCTIONS OF THE CITY—CONCLUDING CONSIDERATIONS—OUTLOOK FOR FUTURE HOPEFUL.

Municipal reform, although a prominent feature of the work of the constitutional commission of 1872, had suffered a seeming failure in the refusal of the legislature to submit the proposed municipal article to the people in 1874; but the subject was soon to be urged by a statesman of large theoretical and practical experience, who had been a member of the constitutional conventions of 1846 and 1867—Samuel J. Tilden. After his election to the chief magistracy of the State, he submitted to the legislature a special message relating to cities. It stated that the Convention of 1846 had accomplished nothing for municipal reform beyond adopting on the last day of its session a provision devolving upon the legislature the duty of enacting laws to protect municipalities against excessive taxation and financial evils similar to those which, prior to 1846, had afflicted the State at large. After alluding to the fact that, far from discharging this constitutional obligation, the legislatures had in reality acted in direct opposition to their duty, and after adverting to the alarming increase in the debts of

some of the leading cities in the State, the governor suggested the appointment of a commission to frame some permanent uniform plan for the government of the cities of the State. The message sought to indicate the true sphere of independent city authority. "In the most completely developed municipality," "it embraced the care of police, health, schools, street cleaning, prevention of fires, supplying water and gas, and similar matters, most conveniently attended to in partnership by persons living together in a dense community, and the expenditure and taxation necessary for those objects. The rights of persons, property, and the judicial systems instituted for their preservation—general legislation—government, in its proper sense; these are vast domains which the functions of municipal corporations and municipal officers do not touch."

The message was presented to the legislature on May 22, 1875. On the same day a concurrent resolution was adopted by the two houses, authorizing the governor to appoint a commission, to consist of not more than twelve persons, "whose duty it should be to consider the subject referred to in said message, to devise a plan for the government of cities, and to report the same to the next legislature." The members of the commission, selected equally from the two great political parties, were William M. Evarts, Samuel Hand, Edwin L. Godkin, Edward Cooper, Martin B. Anderson, John A. Lott, Oswald Ottendorfer, William Allen Butler, Simon Sterne, Joshua M. Van Cott, Henry F. Dimock, and James C. Carter, all of whom save President Anderson of Rochester University accepted the appointment. With the exception of Ottendorfer, Godkin, Cooper, and Dimock, all were publicists and lawyers of eminence, and the high qualifications of Godkin, for years editor of the *Nation,* and of Ottendorfer, editor of the *Staats Zeitung,* were generally recognized. Cooper had been mayor of New York City between 1879 and 1881. The commission organized immediately after its appoint-

ment. At its first meeting, held December 15, 1875, Evarts was elected chairman. The magnitude of its task precluded report to the legislature of 1876, and the legislature of that year therefore authorized the presentation of the report to the session of 1877.

The report submitted by the commission March 6, 1877, is a valuable contribution to the subject of municipal reform. According to Mr. Bryce, it may be said to have become classical. Yet in some respects its views were of questionable wisdom, and few of its suggestions have yet been embodied in the constitution. According to the diagnosis of the commission, the salient features of city misgovernment were the existence of incompetent and unfaithful governing boards and officers, the introduction of State and national politics into municipal affairs, and the assumption by the legislature of direct control of local matters. Concerning the fearful burden of debt that corrupt officials had imposed upon the City of New York and the poverty of return for prodigious expenditures, the commission declared the outlay "sufficient for the construction of all the public works of a great metropolis for a century to come, and to have adorned it besides with the splendors of architecture and art." The cure was to be found in the elimination of these evils. The commission dismissed as inadequate remedies dealing with the symptoms rather than the disease, and asserted that the work of amendment should begin at the very foundation of the structure. As the Evarts report sonorously phrased it, the fundamental question was whether "the general application of universal suffrage in the election of the local guardians and trustees of the financial interests of public corporations was in accordance with sound principle." The commission answered that it was not,—that the assumption was a fallacy, and that "the choice of the local guardians and trustees of the financial concerns of cities should be lodged with the taxpayers."

The reasons for its conclusion, however ably presented,

seem unsatisfactory. They are like an echo from the distant past of the State, when property holders alone were deemed competent to exercise the elective franchise. They sound a note of distrust of democracy, since it fails at the very core of things—in local administration. Because all voters participate in elections for city officers, it had come, said the commission, "to be a common belief that the question of submitting the local government of cities in all respects to the full operation of universal suffrage had, after the fullest consideration of the legislature and people of the State, been deliberately adopted." This was affirmed to be an error, the correction of which was of primary importance. The contrary was declared to be the policy of the State in respect to the financial concerns of its political subdivisions. In the establishment of the governments of villages, the legislature as early as 1847 had determined to entrust to taxpayers alone the control of financial concerns. "The village executive officers, the board of trustees, the local legislature of the village are elected by voters possessing the ordinary qualifications; but the vote of the taxpaying electors is with certain exceptions requisite to confer the authority to raise money by taxation." The general village incorporation act of 1870 reaffirmed and adopted the same principle of discrimination in the exercise of the suffrage, giving the election of officers to electors generally, but committing questions of expenditure, with the exception of small amounts for ordinary purposes, to taxpayers alone. Many cities of the State grew out of village organizations and their charters usually contained the same discrimination. That this policy had not been applied to the larger cities was declared to be "an anomaly," "an accident," not the result of deliberation, as the lodgment of voting power with taxpayers in villages had antedated the constitution of 1846, and in many instances also the year 1826, when property qualifications for State voters were swept away. The commission said:

"The establishment of a representative body, to be chosen by taxpayers, is, therefore, the proper method by which they can control the question of expenditure and taxation in large cities; but the provisions of the constitution, declaring in effect that all elective officers are to be chosen by universal suffrage, stands in the way of such a procedure. The commission created in 1872 for the amendment of the constitution perceived the anomaly we have pointed out and the necessity for the creation in large cities of a board representative of taxpayers under whose guardianship the prime matters of debt and taxation should be placed, and recommended an amendment of the constitution designed to remedy the evil. * * * The measure we recommend is not in opposition to the principle of general suffrage but in support of it—as much so as if the sole duty of this commission had been to consider how that principle could be best preserved and perpetuated. No surer method could be devised to bring the principle of universal suffrage into discredit, and prepare the way for its overthrow, than to pervert it to a use for which it was never intended and subject it to a service which it is incapable of performing."

The practical difficulty of securing a constitutional amendment restricting the suffrage is almost insuperable, for as Kent said in the Convention of 1822, "there is no retrograde movement in the rear of democracy," yet this seems not to have weighed with the Tilden commission. From the standpoint of fairness or even of expediency, such a restriction as it proposed could hardly have been justified. Taxpayers and rent payers are not the only classes entitled to share in government. The people who live in a city, who from choice or necessity make it their home, however infinitesimal seem their contributions to the support of administration, are vitally interested in its concerns, and have the same right as their wealthier neighbors to be consulted about its expenditures. It would be difficult to say who should form the favored class of voters, for taxation is often indirect, and its incidence uncertain. Who do, and who do not, pay taxes is not easy to determine. Mere physical numbers cause higher assessed and rental values in different localities, and those whose presence aids in bringing others within the favored class may not fairly be excluded from it.

The policy in the long run might, as has often been said, prove detrimental to public welfare by checking growth in

civic knowledge and devotion on the part of non-voters, who upon the plan proposed would still constitute the great mass of the citizenship, although without any right to participate in the city government. Mill, who would have taxpayers alone elect the assembly that is to vote the taxes, has glowingly portrayed the great benefit in education of the intelligence and sentiments that the ordinary voter derives from the use of the ballot. Until tax laws are so amended as to make taxation uniform, owners of property not of a taxable nature would be excluded from the franchise equally with those who own none at all; and the application of such a test in the use of the ballot would greatly complicate present cumbrous election machinery. Any limitation of suffrage might result in the exclusion from office of all not possessed of the requisite property to make them voters, whatever their other qualifications. Arguments drawn from the partial exclusion from the suffrage of the non-taxpaying element in villages, with their simpler life, are hardly analogies, for the city touches the welfare of its inhabitants at a thousand points; its mighty industries compel their presence, yet upon the commission's plan of limiting the franchise they would be powerless to better evil conditions from which they would often be the chief sufferers.

The plan of the commission for the improvement of city government may briefly be summarized: In every city there should be a single elective board of aldermen, an elective mayor clothed with the right to appoint department chiefs except the heads of the department of law and of finance, and with a qualified power of removal, reviewable by the governor. A Board of Finance—corresponding in function with the present board of estimate and apportionment in New York City—should be elected by taxpayers and rent payers, certain minima of taxes and rents being established in order to qualify voters in different classes of cities. All estimates for annual expenditures should be made by this board, subject to the mayor's approval, the estimates stat-

ing separately the amount of moneys in the treasury or receivable for city purposes and the amount required by taxation. No debt or liability should be created in the absence of a prior appropriation therefor. Local improvements falling altogether upon the city at large should not be undertaken without the consent of two-thirds of all the members elected to each of the two houses. No improvement charged exclusively upon property owners should be initiated without a two-thirds vote of the board of aldermen, and the approval by a majority in interest of the land owners within the contemplated assessment district. No part of the cost should be paid by the city except with the approval of two-thirds of both houses and the consent of the majority in interest of the property owners within the proposed assessment district. Municipal borrowing power should be restricted and legislative assent to debt-creation required. Sinking funds should be created and ten per cent. amortization instalments raised by annual taxation.[2]

To liberate cities from legislative control, the commission proposed the following provision for the organic law:

"Sec. 8. The Legislature shall itself have no power to pass any law for the opening, making, paving, lighting, or otherwise improving or maintaining streets, avenues, parks or places, docks or wharves, or for any other local work, or improvement in or for a city but all authority necessary for such purposes shall be by law conferred on the city government; nor shall the Legislature impose any charge on any city or civil division of the State containing a city, except by a vote of two-thirds of all the members elected to each house."

The bestowal upon the mayor of exclusive power of appointment and removal would, the commission thought, furnish no corrective for mal-administration. It would be an unprecedented step and would lodge in the hands of a single individual the disposition of a revenue larger than

[2] The suggestions of the commission were embodied in an article known as Article XVII. The article contained eleven sections. It may be found in the Session Laws of 1877, pp. 560-564.

that of some kingdoms. Few men worthy of public confidence would, it said, accept place at the hands of a master who might make or unmake them at pleasure. An autocratic mayor as a remedy for bad government has been declared by Mr. Bryce to be of the "cure or kill" order, for "if voters are apathetic and let a bad man slip in, all may be lost till the next election." Yet the principle of broad mayoral responsibility has within the last decade or two become almost generally accepted. In six of the larger cities in New York State, in Boston, in all cities in Indiana, and in a few other cities, says Professor Fairlie in a recent work, the mayor has been clothed with the sole power of appointing the chief heads of departments, and in the same cities with the addition of the four largest in Pennsylvania he has also the power of removing at any time appointive department heads. "Under this system the executive authority and responsibility is concentrated in the mayor, except for a few officials still elected by popular vote." [3]

Constitutional limitations forbidding city indebtedness in excess of a percentage of assessed values seem to have been viewed with disfavor by the commission, because the limitation might readily be evaded by raising assessed values. Yet such limitations have been widely adopted within recent years and have proved at least partial safeguards against excessive expenditure. Its remedy for the temptation to excessive indebtedness was to require the city to appeal to the legislature for permission to incur the debt, which would simply have forged more tightly the fetters by which the city is held in bondage by the legislature, whereas absolute emancipation from legislative control is what the city requires. The commission's idea of separating city and State elections was excellent. It proposed, however, to hold city elections in March or April, but the constitution of 1894 has improved upon this. Its plan to take away legis-

[3] "Essays on Municipal Administration," 1908, page 22.

lative power in respect of certain matters, like the plan outlined by Opdyke in 1872, was not sufficiently far-reaching.

The suggestions of the Tilden commission were approved by the legislature of 1877, but were not acted upon by the succeeding legislature, and hence were never submitted to the people. It seems extraordinary that the work of such a commission with the endorsement of one legislature, even if it had not also the influence of the governor behind it,[4] could have successfully been "buried" and its submission to the people thus prevented. Few things better illustrate the notable growth of public opinion in the last generation, for politicians today are unable to resist public sentiment.

The movement for a larger degree of municipal autonomy was felt in the convention of 1894, but despite the elaborate report of its committee on cities and prolonged discussion, continuing sixteen days, the outcome was not great. Suggestions to the convention and its committee on cities for improvement of municipal government were numerous and diverse. On July 27 the committee presented to the convention a proposed new article of the constitution "to provide home rule for cities". The legislature was to be required to pass general laws for the incorporation of cities; each city was to have a mayor and a common council of one or more chambers; members of the common council might be chosen by minority representation; city officers were to be chosen at the general election in an odd numbered year; cities were to be divided into two classes, the first to include all municipalities having a population exceeding 50,000, and the second to include all

[4] Governor Robinson, who had been a member of the constitutional commission of 1872, gave only a tepid approval to the work of the Tilden commission in his annual message of 1878. Amendments in accordance with the report had, he said, been approved by the last legislature and would require the approval of the existing legislature before they could be submitted to the people. If, he added, "you see fit to do so they will be referred to the people for action at the next general election"

other cities; special laws relating to cities were, with certain enumerated exceptions, to be prohibited; permissible special laws might be enacted with the consent of the mayor or the mayor and common council of a city after prior notice to the city of the terms of the bill and upon the consent of the city affected. The legislature might also pass such laws on the consent of a majority of city electors expressed at a general or a special election. The legislature was authorized to provide for the consolidation of contiguous cities and the enactment of a new charter for the consolidated city—a prevision of Greater New York.

Divorce of city from State and national elections met with no objection, but the proposal to forbid special legislation elicited discussion, with the result that the article and the amendments suggested during debate were referred to the committee on cities for further consideration. The committee subsequently reported a new municipal article containing provision for city elections in odd numbered years, bi-partisan election boards, appointment and removal of police officers, and minority representation in the choice of mayor and common council. It also reported in favor of general laws for the incorporation of cities and their division into three classes upon the basis of population. This report, together with a minority report favoring an even larger grant of home rule, was discussed in the convention, and on August 30 the convention decided to recommit the entire article to its committee.

The final outcome, which was a compromise, appears in the amended constitution (sections 2, 3, Article XII). Section 2 provides for the classification of cities and creates three separate classes; the first class consisting of cities with a population of 250,000 or more; the second, of cities with a population of 50,000 and less than 250,000; the third, of all other cities. Laws relating to the property, affairs or government of cities may be general or special city laws. General laws relate to all cities of one class or more than

one class; special, to a single city or to fewer than all the cities of any class. No bill for a special city law shall become effective unless after its passage by both houses a certified copy be immediately transmitted to the mayor of the city which it affects, who within fifteen days thereafter shall return it to the house from which it emanated, or if the legislative session have ended, to the governor, with a certificate of the city's acceptance or non-acceptance of the bill. For cities of the first class the mayor acts alone. For every other city the mayor and the city legislature act concurrently. Public notice of a hearing upon a bill is to be given in the city before the city shall act thereon. Where more than one city is affected by the measure, every city concerned must have an opportunity to act upon it. All special city bills returned with the city's acceptance go to the governor for his approval or veto. If a bill be returned during the session without the necessary local approval, or if fifteen days elapse without its return, it may again be passed by both branches of the legislature, and then becomes subject to the governor's action. Wherever a special city law is accepted by any city, the title is to be followed by the words "Accepted by the City", or "Cities", as the case may be. Every such bill passed without city approval must, in the event of its enactment by the legislature, show in the title that it was passed without the acceptance of the city or cities, as the case may be. With the exception of elections to fill vacancies all elections of city officers, including supervisors and judicial officers of inferior local courts elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, are to be held at the regular fall election in an odd numbered year and the term of every such officer is to expire at the end of an odd numbered year. To prevent an interregnum city officers may, in case of vacancies, be elected in even numbered years. The section is inapplicable to any city of the

third class and to elections of all judicial officers except judges and justices of inferior local courts.

This amendment with all other provisions of the proposed constitution was ratified by the people in the fall of 1894. But no clause making it compulsory upon the legislature to pass general laws for the incorporation of cities was adopted. Conditions were so different in different cities that the convention felt it unwise to follow the course pursued in the commission of 1872 and in the Tilden commission in 1877. It therefore abstained from framing a general municipal law. The amendment has aroused a degree of watchfulness on the part of city officials and public-spirited bodies, and has led to the frustration of many evil measures. But the legislature can too easily override local disapproval, as it needs only a majority vote to enable it to ignore local wishes. The benefit attained by the amendment is negative at best; it is preventive in character; it assures no city a chance to initiate constructive legislation. The true remedy is to give each city control of strictly local business through its own local legislature or governing body, subject, however, to the constitution and the general laws of the State.

In the twenty years that have elapsed since the convention of 1894 was held, there has been ample time to decide whether its municipal amendment has produced the benefit hoped for by its framers. It has not remedied the evils of city mal-administration. City debts continue to grow in disproportionate ratio to population. Legislative intervention is hardly, if at all, checked. The percentage of the whole volume of legislation to local legislation seems to have remained fairly constant. In 1898 the percentage of local legislation was thirty-five per cent. In 1904 it was thirty-seven per cent. In 1909 it was thirty-nine per cent. In 1912 it was thirty-five per cent. Several times since 1897 has the legislature proposed to revise the charter of the city of New York. In 1900 it passed a revised charter

over the city's non-acceptance, and the amendments since made to that instrument have run into the thousands. Its mandatory appropriations add heavily to the annual cost of the city government. It has never been willing to allow the city to fix the salaries of all persons whose pay comes exclusively from the city treasury. What is true as to the metropolis is measurably true as to other cities. Through charter defects cities are powerless to do the simplest of municipal acts—acts plainly local in character—without resort to the legislative power at Albany. City business is thus retarded, the cities are rendered less efficient agencies for the satisfaction of purely local needs, local administration is crippled and its expense increased. Moreover, the legislature, whose business is to legislate in the interest of the State as a whole, is diverted from its duty; its time is consumed in passing laws that are little better than ordinances, relating only to local matters of the most elementary sort. The great evil is the constant legislative invasion of the just and undoubted field of city government. No local policy, however wise or necessary, can be put into operation with any certainty that the central legislative authority will not arbitrarily substitute another policy at its own pleasure. As it takes only a bare majority of the legislators present in either house to override city disapproval, the legislature is often able to work its will, despite the remonstrance of city officials.

The local sentiment which would stop legislative tinkering with local government, the home rule sentiment, as it is often termed, has made great advance within a few years. This sentiment compelled the leading political parties in 1912 to put home rule planks in their convention platforms. And within the last two years it has secured the enactment of two measures of local emancipation which may eventually prove of great importance. The main object of the first of these, the so-called Municipal Empowering Act (Chapter 247, Laws of 1913) was to obviate the need for

constant resort by cities to the legislature for authority to do specific things. It involves a reversal of the common point of view of a city charter—that it is to be strictly construed. This is shown in section 19—the general grant of powers—which reads:

"Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power, or to exclude other powers comprehended within this general grant."

The act is not intended to enable a city to frame its own charter. Underlying it there is recognition of the fact that a city, which is an incorporated body of citizens, already has a charter or fixed form of government. The act merely adds to the sum of powers which a city's officers may exercise under its existing charter. It grants a larger measure of powers for the doing of the things which the city has been organized to do but without intent to permit it to revolutionize its existing form of government. The constitutionality of this statute was subsequently assailed, but in several well considered opinions it has been sustained.[5] It was followed by a measure drawn with similar care, known as the Optional City Charter Act (Chapter 444, Laws of 1914). This statute provides six different forms of city charter for cities of the second and the third class—including the commission form, the city manager plan and simplified mayor and council plans, any one of which may be adopted by a city after a referendum vote, for the taking of which the act itself makes seemingly adequate provision.

The Municipal Government Association, under whose auspices these two measures were drafted, presented to the legislature of 1914 a home rule amendment to the constitution which passed the assembly, and narrowly failed of passage in the senate. The proposed amendment would

[5] See for example Hammitt v. Gaynor, 82 Misc. 193.

confer upon each city and each village plenary control over its own property, affairs and government, subject to the constitution and laws of the State. No enumeration of powers contained in any law shall be deemed to limit or restrict the general grant of powers conferred by the constitution. Each city and each village is to have power to adopt and amend local laws not inconsistent with the constitution and general laws of the State in so far as necessary for the exercise of all constitutional and statutory powers within the sphere of its appropriate activity.

The emancipation of the city will never be attained until the prevailing concept of the relation of the city to the State has been radically changed. It has become almost an axiom that a city charter is to be so strictly construed that nothing may pass by inference; that every substantial power must be found in express terms in the grant. Accordingly the city is treated as the creature of the legislature whose charter may be altered, even taken away, at the pleasure of the central authority. There have, at times, been eloquent judicial protests against this doctrine, as in People v. Hurlbut (24 Mich., 44), where Judge Cooley denied that local self-government was "a mere privilege, conceded by the legislature in its discretion" to "be withdrawn at any time at pleasure." To paraphrase the statement of Chancellor Kent nearly one hundred years ago regarding charter powers of New York City—the power of a city should be liberally construed so far as concerns the purposes and objects for which city government is organized. Recent legislation in this State has taken a forward step in securing the home rule law, with its important declaration that no enumeration of powers shall operate to restrict the general grant of power. To make this rule of construction binding upon the courts a constitutional amendment is necessary.

American legislatures are beginning to appreciate the dual character of a city government and to differentiate the

sphere of local action in which the city should be free from all legislative interference and the domain in which it is merely an agent of the State. The right of cities to self-government—a right acknowledged in Great Britain and upon the continent of Europe, a right which may, in a sense, be said to be as old as civilization itself—is now recognized in numerous State constitutions.

In so far as the city is a political or governmental subdivision of the State, an agency of the State to do its work, the legislature is supreme over it, but in so far as it is an aggregation of people choosing to carry on collectively certain local business of a general nature, "matters," as Governor Tilden once said, "most conveniently attended to in partnership by persons living together in a dense community," for obvious reasons it should have unqualified control of this business. In exclusively local concerns the city should be sovereign, although still part of the State and subject to its superior law in matters of general concern. This is the immemorial home rule principle, the imperishable neighborhood and city instinct, that has persisted against all State centralization and will persist until its acceptance has taken the form of a constitutional guaranty.

City dwellers are rousing themselves from their long lethargy to learn that the government of themselves is one of the highest political tasks in modern life. The extent and importance of the public service rendered by private citizens without expectation of reward and their zeal in reform politics, are most hopeful auguries. Knowledge of the effect of city development upon land values and public utilities has stimulated the inclination to preserve collective wealth for the public to which it belongs, and to check its appropriation by private interests, a process which, had it sooner begun, would have reduced municipal taxation almost to its lowest terms and placed an enormous capital balance to the city's credit in its ledger. The absorption of community property by individuals will cease, franchises

deriving their financial importance from city expansion, whether they relate to the surface, to land beneath it, or to avenues through the air, will be neither corruptly obtained nor given away, but will be unwaveringly acknowledged to be municipal property; and yet the sphere of private enterprise will not be unjustly circumscribed.

The city revolutionizes notions of government. It initiates revolt against assent to long accepted principles. It has taught the *laissez faire* doctrine its limitations, and opened new areas to the police power. The concentration of masses in urban life compels many readjustments, if the right to live and to live healthfully is to be recognized. The "more and fuller" life, which is the dream of modern democracy, includes in its comprehensive aspirations successful treatment of the housing, the fire, the water, the sanitary, the transportation problem, better education, ample school accommodations, recreation centres, parks, courts in which real justice is administered to the poor, streets and avenues fitted for the varied business of a city, a comprehensive city plan with opportunities for expansion and beautification, and a genuine civic spirit incompatible with the continuance of ignoble or dishonorable methods in dealing with the city. The test of civilization may, in a sense, be said to lie in its ability to solve the intricate problems of city life. The relations of the city to the future of democracy are momentous. The city may transform its children into grotesque creatures like the comprachicos who were the sport of royalty a few centuries ago, or may prepare them for wise and lofty citizenship. There are signs that commercialism in city politics has reached its flood and is ebbing. The checkered history of municipal government during the last generation rightly interpreted shows signal advance, and justifies the largest measure of hope for the city of the future. The remedies for municipal maladministration may confidently be trusted to the intelligence and judgment of the widening circle of educated citizenship.

CHAPTER XV

EFFECT OF THE CONSTRUCTION OF RAILROADS UPON CANAL REVENUES—FORMATION OF THE NEW YORK CENTRAL SYSTEM—THE ERIE RAILROAD—INCREASE IN TONNAGE CARRIED BY RAIL—INFLUENCE OF THE GRAIN CARRYING TRADE UPON RAILROAD RATES—ASSEMBLY COMMITTEE TO INVESTIGATE RAILROAD ABUSES—ITS REPORT—INJUSTICE OF SECRET AND SPECIAL RATES—RECOMMENDATIONS OF THE COMMITTEE—PASSAGE OF CONSTITUTIONAL AMENDMENTS AFFECTING CANALS—IMPROVEMENT OF CANALS AND INLAND WATERWAYS—GOVERNOR ROOSEVELT'S COMMITTEE ON THE STATE CANAL POLICY AND ITS REPORT—PROVISION FOR THE $101,000,000 BARGE CANAL.

When, after its completion, the Erie canal was found to pour a golden flood of benefits into the State, in the general optimism of feeling that the commerce of the west had become perpetually tributary to the State, the belief prevailed that canals would always bring immense revenues into its treasury.[1] As early as 1818 Governor Clinton

[1] "The revenue from tolls was so large during the decade after the completion of the Erie that extravagant notions were entertained as to their volume in the future. It was predicted that they would amount to a million dollars in 1836 and four million in 1856, and would continue to increase in that proportion for half a century" (Hill, Waterways and Canal Construction in New York State, 152).

The gross tolls in 1876 were only $1,340,000, and in 1877 only $880,000, a lower amount of receipts for tolls than had been known, said Governor Robinson in 1878, for the preceding forty-five years. There was a slight advance in the next year, but the gross tolls for the year ending September, 1882, fell to $818,264.61.

declared that the canals were to be "a prolific source of revenue for the general purposes of government." The Erie canal might have proved a veritable Pactolus flowing on forever, but for the rise of an agency of transportation not foreseen when it was first projected; and this novel and unexpected competitor not only diverted commerce to its rails, but also revolutionized the point of view to be taken of the canal. As Eli Whitney's invention of the cotton gin, with all its profound effects, is after a century seen to have been one of the most influential factors in the political history of the nation, so the modern railway, which has grown from George Stephenson's locomotive, "The Rocket," is, as Charles Francis Adams, Jr. has said, "with perhaps few exceptions the most tremendous and far-reaching engine of social change which has either blessed or cursed mankind."

We are not here concerned with the evolution of the railway system except to show its effect upon the utility of the canals, which reached their period of greatest prosperity between 1868 and 1874, after which canal commerce began to decline.

The genesis of the vast New York Central system was in the charter granted by the State of New York to the Mohawk and Hudson Railroad in the year 1826. In 1827 the legislature of Massachusetts ordered surveys to be made of the most practicable routes for a railway between Boston and the Hudson river at or near Albany. The Erie railway, in which the State invested $6,000,000 of its own money by way of concession to the interests of its southern tier of counties as an equivalent for the Erie canal, was chartered in 1832. Pennsylvania initiated its railway system in 1827; the Baltimore and Ohio road followed in Maryland in the succeeding year. In 1853 the New York Central was formed by the consolidation of eleven separate lines, and in 1869 was amalgamated with other roads into the New York Central and Hudson River Railroad Com-

pany. This road speedily absorbed the Lake Shore and Michigan Southern Railroad Company by obtaining control of a majority of its stock, and about the same time acquired control of the Rock Island and the Chicago and Northwestern. In 1870, by means of a perpetual lease of the United Companies of New Jersey, the Pennsylvania Railroad gained a terminus at New York, and almost simultaneously established connections which brought it into Chicago, Cincinnati and St. Louis. The Erie and the Baltimore and Ohio also expanded to the same points west. An era of railroad enterprise had set in which met a temporary check only in the panic of 1873.

"The great factors in the economic progress of the country between 1867 and 1880 were railroad building with its dependent industries and the expansion of farming." [2] To stimulate the first, both the national government and the States made grants of land to railways upon a colossal scale. Garfield declared that these donations covered an area nine times the size of the State of Ohio. The release, after the Civil War, from army service of a great body of men to return to peaceful pursuits, and the opening of the west by railroads, coincided with a period of large immigration, a movement of native population westward, and depression in the wheat industry abroad. By the opening of the great routes to the seaboard and the reduction of railway charges over long distances, a condition most favorable to large exports was created, with the result that the balance of trade with Europe was turned in favor of this country. "Since 1880 the country as a whole has exported each year from twenty-one to forty-one per cent. of the wheat which it has raised, the average being thirty-two per cent. In these same years the leading surplus wheat producing States of Kansas, Nebraska, Minnesota and the Dakotas have had to find in the south, upon the Atlantic

[2] Hugo Richard Meyer, "Regulation of Railway Rates," 204.

seaboard and in Europe, a market for not less than eighty-five per cent. of their crop." [3]

To accomplish this result, the rates for carrying wheat to the Atlantic seaboard had to be reduced. As late as 1866-68 practically the whole of the grain arriving at New York had come by water, but improvements in railway transportation and the reduction of rates soon led to a vast increase in the tonnage carried by rail. The economies on the canal stood still, while those on the railways forged ahead; by 1872 the amount carried by canal was seventy per cent., and by 1876 it had fallen to fifty-seven per cent. When the Baltimore and Ohio and the Pennsylvania succeeded in reaching Chicago by rail, they competed with the New York roads and canals for the grain carriage, but as ocean freights to Europe were higher from Boston and Philadelphia than from New York, the differential agreement was established by the railroads, which made the rail rates to New York sufficiently higher than to Boston and Philadelphia to compensate, as was claimed, for the higher cost of ocean service from these last ports. To check the loss of canal freights the State reduced canal tolls and ultimately, by the constitutional amendment of 1882, abandoned all toll charges. The competition of rival seaboard cities for the grain carrying trade was a leading factor in further reduction of railway freight rates, and the handicap put upon the port of New York by the differential agreement undoubtedly aided the diversion of a large trade from New York City to other competing cities. It was this sensible decline in the outward commerce of the port, accompanied by a decline in imports, that was the origin of the movement for an enlarged canal.

As early as March, 1879, the legislature of New York had been impelled by public sentiment to appoint a commission to investigate abuses alleged to exist in the man-

[3] Meyer, "Regulation of Railway Rates," 210, 211.

agement of railroads chartered within the State. The report of this committee, of which A. Barton Hepburn was chairman, made on January 27, 1880, created a profound impression, for it showed the abuses perpetrated by the railways to the detriment of commerce that would naturally find an outlet through the commonwealth. It was originally supposed, said the report, that passengers only and not freight, except in the most limited degree, could be carried by rail.

The report continued:

"Restrictions were accordingly thrown around the passenger traffic, and it has been at all times and is today carefully guarded and regulated by positive statutes. The roads were forbidden to carry freight in opposition to the canals; and later, when they—the railroads now forming the New York Central—were found carrying freight, they were required to pay to the canal fund a sum equal to the tolls exacted for a similar carriage by canal. This restriction was soon removed, and the railroads left to their own management, practically unrestricted and uncontrolled as to carriage of freight, and remain so today. True, April 14, 1855, a law was passed creating a board of railroad commissioners. But this was found an inconvenient interference with railroad plans, and so the roads paid the commissioners the full amount of their salaries for the term for which they were created ($25,000), to silence their opposition, and then procured the repeal of the law creating the commission, in April, 1857.

"In discharging the duty it owed to commerce and the public, the State either had to construct railroads on its own account, or authorize corporations or associations to do so, clothing them with the prerogatives of the State for that purpose. In view of our costly experience in State management of various institutions, and the extent to which the managers and attaches of those institutions became factors in our politics, there is no doubt the State acted wisely in committing the construction of railroads to associations of citizens. There is no doubt of the wisdom of lending State aid to encourage railroad building during its incipient and experimental period. It grew, however, into an abuse."

The report dealt also with fast freight lines, watered stock, railroad consolidation and terminal facilities. From its insular position the city of New York enjoyed peculiar advantages in receiving and forwarding freight by water, but what was to its advantage in this respect was to its

disadvantage as a railroad terminus. In contrast with cities to the south, its disadvantage was that the roads had not immediate access to the water-front, and that lighterage expenses had to be incurred in transporting freight from railroad termini to warehouses and points of shipment. This lighterage charge, which brought no profit to the railroads, nevertheless constituted a tax upon transportation and a burden upon the commerce of New York, threatening a diversion of commerce from the city until vessel and car could be brought together.

The agreements entered into in 1877 between the New York Central and Hudson River Railroad Company, the Erie, the Pennsylvania Railroad and the Baltimore and Ohio Company made the charges on east bound freight less to Baltimore than to Philadelphia, and less to Philadelphia than to New York. Of the west bound business of the port, other than California business, thirty-three per cent. was apportioned to the New York Central and the Erie each, twenty-five per cent. to the Pennsylvania and nine per cent. to the Baltimore and Ohio, while all California business was divided equally. Ocean rates from Philadelphia averaged slightly higher per year than rates from New York; the rates from Baltimore were slightly higher per year than rates from Philadelphia, yet the difference by no means equalled the difference in rail rates conceded to the more southern cities. Boston was given the same railroad rate as New York. The ocean rates from New York and Boston averaged the same.

The report disclosed for the first time the arrangements between the railroads and the Standard Oil Company, by which the roads had placed in the absolute control of this company the handling of all oil carried by them to New York. The preferential rates given to that company had enabled it to grow to colossal proportions. The report dealt with the inducements to mismanagement by the sale of proxies of the real owners of stock to the officers of a

company for the time being, which enabled such officers to perpetuate themselves in power. (This led to a change in the law respecting proxies.) It showed also the failure of statutory requirements to secure an accurate history of the yearly transactions of the railroads, for full compliance with the law did not disclose their actual condition. The railroads of the State discriminated against citizens of the State in favor of western and foreign producers, and numerous special contracts existed with the New York Central and Hudson River Railroad, estimated by railroad men at six thousand (the number was much less with the Erie), whereby secret special rates were given upon time contracts, and under which the open rate varied to the advantage of the party obtaining the special rate, thus favoring certain localities, and even individuals in localities, as against other individuals in the same region. There was no unit of volume at which one man might ship as cheaply as another. He who went into a railroad office and bartered for a low rate obtained it, while his competitor, relying on equitable treatment or unaware that secret special rates might be had, paid a higher rate. Competition among railroads as a regulator of freight tariff was found to be a failure. No community could support parallel railroads. But the competition of waterways served as a general regulator of rail rates. The report said also:

"The political influence of these corporations should be understood. Not less than thirty thousand voters are in the direct employ of the railroads of this State—a number sufficient to have turned the scale at any election in recent years. These employees are doubtless divided in political sentiments, yet in times like the past and present, the question of remunerative employment is of paramount importance to the individual employed, as compared with the success of either party. The political sentiments of corporations have been aptly and truly described by a prominent railroad man who testified: 'In a Republican district I was Republican, in a Democratic district I was a Democrat, in a doubtful district I was doubtful, but I was always Erie.' The possible exercise of this vast political power, direct and indirect, not to discuss its exercise in the past, seems to your committee an unanswerable argu-

ment in favor of instituting governmental supervision of railroads and holding them in their management to a strict accountability."

The report recognized that the questions involved often transcended the limits of State jurisdiction. It denounced the granting of unequal or preferential rates, the making of secret rates and the giving of drawbacks and rebates. It advocated the fixing of a proper unit of shipment, and the prohibition of a greater charge for a short haul than for a long haul. It advocated publication of a full history of the transactions of each road during each year, both financial and business, it proposed amendments to the law which permitted the roads upon consolidation to fix their capital stock at any amount; and it recommended the creation of a commission to be composed of three individuals with ample powers of investigation and recommendation, one commissioner to be an expert in railroad business, another to be a representative of the commercial interests of the city of New York and the third to represent the interests of the interior of the State, one of the three to be a lawyer. Two of the members dissented from the recommendation for the appointment of a commission.[4]

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[4] The Railroad Commission as organized by Chapter 353, Laws of 1882, consisted of three persons to be appointed by the governor with the advice and consent of the senate, one to hold office three, one four, and one five years. One member was to be selected from the party which should cast at the general election for governor succeeding the year 1882 the largest number of votes; one was to be a person experienced in railroad business; and the third was to be selected upon the recommendation of the Chamber of Commerce, the New York Board of Trade and Transportation and the National Anti-Monopoly League of New York, or any two of such organizations. Jurisdiction was given to the commission over accidents, fatalities and injuries upon railroads and also over freight rates. Its expenses were to be paid by the railroads. By Chapter 728, Laws of 1905, its membership was enlarged. This commission was eventually superseded by the two public service commissions, one for Greater New York, the other for the residue of the State (Chapter 429, Laws of 1907). Each commission was to consist of five members to be nominated by the governor and confirmed by the senate. This last statute abolished not only

The committee proposed also certain amendments to the general railroad law, which were submitted as an appendix to its report, one, authorizing the formation of railroad corporations and regulating the same; another, forbidding the issue by a railroad company formed by the consolidation of two or more such companies of capital stock in excess of the aggregate of the capital stock of the companies so consolidated, at par, and forbidding the issue of bonds or other evidences of debt as a consideration for or in connection with such consolidation; the third, to regulate voting by stockholders and bondholders, the fourth, to regulate the transportation of freight, the fifth, creating a board of railroad commissioners and defining and regulating their powers and duties, and the sixth, requiring a verified report to be annually filed setting forth specifically the matters referred to in the proposed enactment. Many of these suggestions were embodied in legislation, but as the major evils of which the report complained affected interstate commerce, the subject transcended the powers of the State and could be dealt with adequately only by Congress, which in 1887 created the Interstate Commerce Commission.

The announcement by the Hepburn Committee of the principle that the competition of waterways, whether artificial or natural, would serve as a general regulator of

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the Railroad Commission, but also the Gas and Electricity Commission, the Rapid Transit Commission of New York and the office of gas inspector, and transferred their respective jurisdiction, powers and duties to the new commissions. In 1910 the jurisdiction of the Public Service Commissions was extended to include telegraph and telephone companies.

The Board organized under the act of 1855 was maintained by the different corporations it was appointed to supervise, in this respect following the principle adopted for the Banking Department; and the same course was pursued when the Commission of 1882 was appointed. The salaries of the Public Service Commissioners are paid by the State at large, while certain expenses in the first district are borne by the City of New York.

railway rates, undoubtedly aided the movement for the abolition of canal tolls. The freedom of the canals was favored by some of the ablest of New York statesmen—Conkling, Evarts and Seymour—and its wisdom approved by Judge Cooley, who, as chairman of the Interstate Commerce Commission, officially declared in its first report that the Erie canal influenced the rates to New York more than any other one cause, and that through its effect upon these rates it indirectly influenced those to all other seaboard cities. It was recognized that the commercial supremacy of the State was in jeopardy, that the freedom of the canals was necessary to save it—if, in fact, it could be preserved. The movement for abolition of canal tolls culminated in the presentation to the assembly by Honorable Isaac I. Hayes of a resolution proposing an amendment to the constitution abolishing tolls and providing for the payment of canal expenses and the liquidation of the canal debt. This amendment was approved by the legislatures of 1881 and 1882, and ratified by the people at the general election in the fall of 1882 by the decisive popular vote of 486,105 in its favor to 163,151 against it, and became operative January 1, 1883. By it tolls were abolished for the future, and the legislature was required annually to provide for the expenses of the superintendence and repairs of the canals, and for the payment of the principal and interest of the canal debt by equitable taxes.

Abolition of the tolls, however wise, could not stop the operation of the causes which had necessitated it. Western grain areas kept constantly expanding. The competition for their harvests increased and necessitated railway and canal improvements to the seaboard. A slight gain in canal tonnage temporarily followed the passage of the amendment, which was not, however, able for any great length of time to arrest decline. The impression prevailed that the canals should be enlarged and improved, and the necessity for an amendment to render this practicable was

urged in the convention of 1894. In the convention the chief advocates of this policy were Senator Henry W. Hill, Judge Chester B. McLaughlin and Judge Daniel S. Cady. Hill argued that it would be unwise to dig a ship canal between Lake Erie and the Hudson, as its cost would exceed the financial ability of the State, and lake transportation and canal transportation could never profitably be assimilated. He quoted figures from the State auditor's report to show what vast revenues had accrued to the State from its canals. The State had received from canal tolls and water privileges upwards of $133,000,000; the boatmen upon the canals had received for freights more than $225,000,000. According to reliable estimates there had been contributed by canals to merchants, warehousemen and forwarders in commissions and storage, upwards of $110,000,000. The aggregate revenues from the canals, he declared, had exceeded $468,000,000, and had been obtained at an expense to the taxpayers of only $60,000,000. The canals were an advantage because they tended to regulate railway charges, as had frequently been acknowledged. They had enabled the State to control the carrying trade of the northwestern States and Territories. Reliance upon national aid for canal improvement was useless, for Congress would require as a condition precedent the transfer of the canals to the government. Without canals the cost of transporting western grain to the seaboard, according to the best authorities, would be increased at least two cents a bushel. Every reason favored the removal of the constitutional prohibition upon the creation of canal indebtedness and provision for immediate canal improvement. The proposed amendments provided that the canals might be improved in such manner as the legislature should direct by law, and that the cost of improvement be defrayed by appropriations from the State treasury or by equitable taxes.

These amendments were submitted separately from the

body of the new constitution, were ratified by the people, and took effect January 1, 1895. The vote in their favor was 442,998; against, 327,645. In 1895 the legislature passed a law authorizing, with the approval of the people, an issue of bonds not exceeding $9,000,000 in amount, for the improvement of the Erie, Champlain, and Oswego canals, and directing the submission of the question of improvement to popular vote at the general election in the fall of that year. The act provided that if the popular vote was favorable the Erie and Oswego canals should be deepened to a depth of not less than nine feet, and the Champlain canal to seven feet. The plan of improvement, commonly known as the Seymour plan, was approved by a decisive vote.

It soon became evident that the contemplated expenditure would never accomplish adequate results. The contracts which had been let were closed, and settlements were made with the contractors. Charges of fraud and misappropriation of funds grew out of these adjustments, which led to the appointment of an investigating commission, and eventually to the designation by Governor Roosevelt of special counsel to assist the attorney-general in the institution and prosecution of such criminal proceedings as should be warranted by the testimony taken by the commission. Governor Roosevelt reported to the legislature of 1900 that the able counsel assigned by him deemed criminal prosecutions inadvisable and impracticable. There had been numerous instances of apparently unjustifiable favoritism to contractors and of improvident agreements—not, however, of a criminal character, although they subjected the State to large pecuniary loss. As the Governor said: "The delinquency shown justified public indignation, but it did not afford ground for criminal prosecution."

The national government had meanwhile deepened the lake channel from Chicago to Buffalo to twenty feet, and the Hudson river to twelve feet. The Canadian govern-

ment had designed an enlargement of its canal system between Chicago and Montreal from twelve to twenty feet. The project of a canal from Georgian Bay direct to Montreal, and from the river St. Lawrence to the Atlantic Ocean, was also under discussion in Canada and Great Britain. These things made action by the State imperative. At the suggestion of Governor Black the legislature of 1898 appointed a special commission which reported January 25, 1900, that the leading cause of the decline of the commerce of New York was the differential rate on all east bound traffic. As a contributing factor the report mentioned excessive terminal charges. The commission advocated the abandonment of canal improvement upon the nine million dollar plan as utterly inadequate.[5]

On March 8, 1899, Governor Roosevelt appointed a committee to consider the whole canal question and report upon the proper policy to be pursued by the State. The report of this committee (January 15, 1900) assumed at the outset that unless freight could be carried by canal at lower figures than those at which railroads could profitably transport it the canals, whatever had been their past value, might well be abandoned. It then proceeded to argue that the canals would be able to carry freight at minimum rates. Water transportation, declared the committee, is inherently cheaper than rail transportation. Such is the experience of different countries; on the continent of Europe, canals, far from being decadent, have been constantly enlarged and improved. New York State possesses exceptional topographical advantages which it would be folly not to utilize, but

[5] "To offset all the advantages enjoyed by New York City by an inland discriminating rate against New York, is an arbitrary imposition of a burden upon all the export products of the territory tributary to New York, in the competition to which they are subjected in the markets of the world. Such an imposition is not only indefensible from any standpoint of legitimate competition; it is not only an injury to the Harbor and to the State; it is a crime against the commerce of the nation" (Report of Governor Black's Commission, 2).

she has, nevertheless, to encounter competition for the western grain trade from ports on the Gulf of Mexico and from Canada, as well as from shorter all-rail routes to the Atlantic seaboard. Besides the carrying of grain and lumber, which, when the Erie canal was first dug, was expected to be its chief function, recent developments in the iron trade, due to the discovery of an almost inexhaustible body of iron ore in the upper lake region, justified belief that with an adequate waterway between Lake Erie and the Hudson river and the prevailing cheap rates upon the lakes, the iron industry might be centralized within this State; and with the utilization of electric power from Niagara, western New York should become a manufacturing district of the first importance.

According to the committee the alternative seemed to be either to leave the canals as they were, which was virtually to abandon them—a thing forbidden by the constitution—or to enlarge them sufficiently. It warmly advocated the latter policy. The State, it said, ought not to ignore its wonderful natural advantages and cut off its chance of keeping within itself the route that would produce the minimum freight rate. The ship canal project was pronounced impracticable and prohibitive in expense. The committee estimated that by an expenditure of sixty-two million dollars, a one thousand ton barge canal could be built, and this project it favored.

The committee declared that although some lateral canals had proven unprofitable, the reverse was true as to the Erie, which had "paid into the State more money by many millions of dollars than had been spent upon it in the aggregate for any and all purposes whatsoever." The revenues collected from this canal down to the date of the stoppage of tolls were alleged to have exceeded all sums paid out upon it for any purpose whatsoever by the sum of $42,599,718. The canal debt attained its maximum in 1844, being then 3.8 per cent. of assessed valuation in the

State; a corresponding percentage in 1900 would amount to nearly one hundred and ninety million dollars, or double the expenditure which the committee would propose. The ability of the State to cope with the new undertaking was undoubted; it would require the imposition of a small State tax, sixty per cent. of which would fall upon the city of New York. The committee therefore recommended the construction of a barge canal from Lake Erie to the Hudson, from Lake Ontario to the Erie canal, and from Champlain to the Hudson river, with a prism generally twelve feet in depth, and a width of seventy-five feet at the bottom; and proposed that the route of the Erie canal be along the Mohawk river through Oneida Lake and through Seneca and Clyde rivers.

This report was submitted to the legislature by the Governor with a special message on January 25, 1900. It proposed a policy entailing "very heavy expenditure, which could only be justified by success, and which there would be no warrant in adopting save for the weightiest and most unanswerable reasons." The Governor declared the reasoning unanswerable and the policy "not merely wise and proper, but indispensable, if the future development of the State were to in any way correspond with its past." Acting upon the committee's recommendations and the Governor's message, the legislature appropriated the sum of $200,000 for surveys and estimates of the cost of enlargement or improvement. The report of the State engineer and surveyor giving the results of these surveys and estimates was submitted to the legislature by Governor Odell with a special message in March, 1901.

Governor Odell wisely commended the counting of the cost. He called attention to the fact that the loss of canal traffic was not ascribable altogether to inadequate canal facilities, that terminal charges and dock facilities were not so favorable at the port of New York as at other ports, and he concluded by recommending that "the question

of improving the canals along the line of the act of 1895 be submitted to the people at the following election." In his message in 1902 he again called attention to the subject. The canals, he then reminded the legislature, were absolutely closed for at least five months of the year, during which time manufactories were dependent upon railroads. Were it not for the fact that imports followed to a great extent the line of exports, canal improvement would, he declared, deserve little consideration.

In his annual message in 1903, Governor Odell entered upon an extensive consideration of the subject. "Neither the lowering nor the abolition of tolls upon the canals brought, as was hoped, an increase of traffic." Railroad transportation was more costly, yet shippers were willing to pay the increased cost. "Is it because of greater facilities and more prompt shipment at other outports that this decline in canal traffic is due, and will an enlarged canal win back the commerce which we have lost?" He briefly reviewed the history of the recent movements for canal extension, and strongly urged upon the legislature the necessity for "immediate attention to this important problem."

The legislature of that year provided for the construction of a one thousand ton barge canal at a maximum cost of $101,000,000, and directed that the act be submitted to the people at the general election in November, 1903. The popular vote was overwhelmingly favorable, being 673,010 for, to 427,698 opposed.[6] The belief, particularly in New York City and in Buffalo, was widespread that nothing but a deep and broad waterway from lake to ocean could save the commercial prestige of the State and prevent her from lapsing into a secondary position. In 1903 the legislature voted favorably upon a resolution to amend the constitution by extending from eighteen to fifty

[6] In 16 counties there was a majority in favor. The favorable majority in New York county was 223,729, in Kings county, 142,377.

years the period during which bonds issued for State purposes might run, and after approval by the legislature of 1905 this amendment was ratified by the people at the general election in the latter year.

CHAPTER XVI

TAXATION—ITS PURPOSES—CHARACTER OF TAXES—PROVISIONS OF STATE CONSTITUTIONS REFERRING TO TAXATION—LOTTERIES FORBIDDEN BY FIRST CONSTITUTION—EARLY METHODS OF TAXATION—THE GENERAL PROPERTY TAX—ESCAPE OF PERSONALTY FROM ASSESSMENT—TENDENCIES IN MODERN TAXATION—INEFFICACY OF THE PERSONAL TAX—INDIRECT TAXATION SUPERSEDING DIRECT TAXATION FOR STATE PURPOSES—DIFFERENTIATION BETWEEN SOURCES OF STATE AND LOCAL REVENUE—STATE TAXES ON CORPORATIONS—TRANSFER TAXES—LIQUOR TAX—STOCK TRANSFER TAX—TAXATION OF SPECIAL FRANCHISES—SECURED DEBTS TAX—STING OF TAXATION IS WASTEFULNESS—EARLY STATE TAXES—STATE DEBTS—FEDERAL DIRECT TAX OF 1861—RECENT CONSTITUTIONAL AMENDMENTS REGARDING DEBTS—HIGHWAY IMPROVEMENTS.

Ruskin speaks of the preacher as having in his Sunday sermon "thirty minutes to raise the dead in." Almost as ambitious and as equally hopeless may be the effort to convey in a brief chapter any intelligible idea about taxation. "The right to tax," it has been well said, "is not granted by the constitution, but of necessity underlies it, because government could not exist or perform its functions without it." [1] Taxes are levied for the revenue necessary for the maintenance of government. They cannot properly be imposed to benefit one part of the community at the expense of another, or to promote private enterprises.

[1] People ex rel. Hatch v. Reardon, 184 N. Y., 431.

What constitutes the public purposes which justify a tax is often, however, a debatable proposition. Taxes are commonly divided into direct and indirect. The poll, or capitation tax, which led to the insurrection under Wat Tyler, is an illustration of a direct tax, whereas the tariff levied upon imported goods by the United States government, which, although paid by the importer, ultimately falls upon the consumer, is a clear type of indirect taxation. The incidence of taxation has an important bearing upon the question whether a tax is direct or indirect. The literature of taxation is filled with subtle and curious analyses regarding the shifting and incidence of taxation. What is a direct tax, was a question asked by Mr. Rufus King in the convention of 1787, but not answered. Under the power assumed to have been possessed by it Congress on August 15, 1894, levied a tax upon the income of real and personal property, and in the spring of 1895, in the well known income tax cases, the Supreme Court of the United States, by a divided vote, held the tax unconstitutional. According to majority opinion a tax on the rents or income of real estate was a direct tax and was unconstitutional because not laid upon the principle of uniformity. Upon a re-hearing, the Court, by a vote of 5 to 4, besides reaffirming its position that taxes upon real estate were direct taxes and inhibited by the constitution, decided that the tax on personal property or its income was a direct tax, and unconstitutional, as it had not been apportioned among the several States according to the population.

In July, 1909, Congress, by a two-thirds vote in each house, approved an amendment to the constitution reading as follows:

"The 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."

This amendment has been ratified by all the States except Connecticut, Florida, Pennsylvania, Rhode Island, Utah and Virginia. It is the sixteenth amendment to the constitution and was declared in force on February 25, 1913.[2] As Hamilton declared in *The Federalist,* no part of the administration of government requires such extensive information or thorough knowledge of the principles of political economy as the business of taxation. After a century of unsuccessful effort to compel personal property to bear its statutory share of taxation, the tendency to rely for local revenue upon the real estate tax alone is now plain. There has also for a quarter of a century or more been a clear trend toward the separation of the sources of State and local revenue.

The constitution of 1777 put no limitation upon the taxing power of the newly formed State of New York. There is no reference to taxation in that instrument except in the preamble setting forth the Declaration of Independence. The constitution of 1822 contained a negative provision (section 11, Article VII) which declared that no lottery should thereafter be authorized; that the legislature should pass laws to prevent the sale of lottery tickets within the State except in lotteries theretofore provided by law. Private lotteries had been illegal from colonial days, but public lotteries had often been sanctioned by State legislatures and by the Congress of the United States.[3] Two

[2] The discussion as to the advisability of the sixteenth amendment to the national constitution led to the publication of many pamphlets and addresses. Several of these are mentioned by Professor Seligman in his work "The Income Tax," page 590.

[3] There were hundreds of lotteries for the building of schools, the erection of bridges and docks, the repair of churches and roads, the establishment of foundries and glass works (McMaster's "History of the United States," vol. II, p. 23). A long list of purposes for which lotteries were organized is given in McMaster, vol. I, 588, note. Lincoln, in his "Constitutional History," gives a list of lotteries authorized by this State, vol. III, pp. 35-38. See also Wells' "Theory and Practice of Taxation," p. 605. "Lotteries were formerly often relied

opposing and irreconcilable principles had prevailed in this State—one putting a ban upon private, the other permitting public lotteries. In the convention of 1821 the wisdom of the proposed constitutional prohibition was thoroughly discussed and the debate developed divergent opinions. Upon the final vote both Chancellor Kent and Chief Justice Spencer opposed the constitutional prohibition. Spencer declared that it was not appropriate matter for a constitution; Colonel Young, on the other hand, would have included a prohibition against horse racing, thus anticipating the constitution of 1894.

The first methods of taxation in the State were merely an evolution of the Dutch and English colonial systems. The Dutch established the system of special assessments for public improvements. In 1683 the first regular system of taxation was adopted by law. The frequent wars in which the colony was involved in consequence of the conflicts of Great Britain with other nations of Europe, especially the French, plunged it into great indebtedness. These wars cost the colony nearly a million pounds.[4] The general property tax was in vogue at the Revolution, not only in New York but in sister colonies. The first general tax statute was passed in this State in 1796. It was superseded by the Act of 1801, and this by the Act of 1813, establishing a system for the assessment of real and personal estate for taxation, dividing towns and wards into assessment districts, and empowering the county supervisors to equalize

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upon to defray a portion of the State and local expenditures in this country, and are still used for that purpose in two of our States." Ely, "Taxation in American States and Cities," p. 41. The Continental Congress in 1777 established lotteries to raise funds for carrying on the war, and sent agents into all the States to sell tickets (Id., 113). The lotteries authorized by Congress in the District of Columbia led to the famous case of Cohens v. Virginia, 6 Wheaton, 257. It is an interesting fact that several of our leading universities, Columbia and Harvard in particular, have benefited by lotteries.

[4] See note to vol. II, Laws of 1813, 523, 524.

valuations, levy taxes and deliver warrants to collectors. The Act of 1813 was superseded by the Act of 1823, and that in turn by the provisions of the Revised Statutes. The general characteristics of taxation in the earlier epoch were similar in all the States: specific objects, rather than all property, were usually selected for taxation, and upon tangible property was imposed all or nearly all the burden.

Personalty has never borne its fair proportion of taxation. In 1851 Governor Washington Hunt declared in his annual message that a large share of personal property escaped assessment altogether, and that in many portions of the State real estate was estimated by assessors at less than half its actual value. The discrimination in favor of personal property by which it avoided its equitable share of local and State taxes, was pointed out by Governor Fenton in 1866 and 1868; also by Governor Dix in 1873, and Governor Cleveland in 1884. Assessments of real estate in the various counties were so disproportionate that Governor Bouck in 1843 recommended the adoption of some method for equalizing valuations among the several counties. But nothing was done until 1859, when a direct tax had to be imposed to meet the expenses of canal enlargement. The legislature of that year fixed the tax at five-eighths of a mill upon all real and personal property subject to taxation within the State, and at the suggestion of Governor Morgan created a State board of equalization to equalize assessments and taxes among the different counties. The result has not been a success. Comptroller Roberts, in 1898, called attention to the discrepant assessments in various counties, although the same rule of assessment applied throughout the State. Real estate in one county was assessed at fifty per cent. of its real value; in two at fifty-one per cent.; in three at fifty-five per cent.; in two at fifty-eight per cent.; in five at sixty per cent.; in one at sixty-two per cent.; in two at sixty-three per cent.; in one at sixty-five per cent.; in one at sixty-six per cent.; in one at sixty-

seven per cent.; in one at sixty-eight per cent.; in three at sixty-nine per cent.; in twelve at seventy per cent.; in four at seventy-one per cent.; in three at seventy-two per cent.; in four at seventy-five per cent.; in one at seventy-eight per cent.; in one at seventy-nine per cent.; in one at eighty per cent.; in one at eighty-two per cent.; in one at eighty-three per cent.; in one at eighty-four per cent.; in one at eighty-five per cent.; in one at ninety-two per cent.[5] Yet despite the inevitable imperfections of this crude system, the State still clings to it, as it clings to the general property tax, which year by year is becoming almost exclusively a real estate tax.

Land should not be taxed for State revenue, and personal property should be the subject of neither State nor local taxation. The modern tendency is to confine the local tax to real estate—not only because of the difficulty of taxing personalty, but also because fiscal science recognizes the importance of discriminating between the sources of State and local revenue. In the popular mind confusion often exists as to State and local taxation, yet these are as distinct from each other as either is from Federal taxation. All attempts to value and assess personal property have proved unsatisfactory, and with the exception of the States of the Federal Union, almost all civilized communities long ago abandoned the notion of levying taxes upon personalty as inexpedient and impracticable. Because of the difficulty of discovering and assessing this kind of property, the amount subject to assessment is, in comparison with the assessment of real estate, rapidly becoming

[5] "The sixty counties of the State had twenty-five different percentages of its value, at which they assessed real estate, while the same provision of law requiring that real estate should be assessed at its full market value was the sworn obligation of every assessor in the State. * * * It is not possible for any man or body of men to equalize values of property extending over so wide a stretch of territory, with myriads of facts and conditions to be taken into consideration in getting the true valuation."

negligible. It is only a question of time when the percentage of personal assessments will be so small that such assessments will cease, and the tax fall exclusively upon real estate.

"Delaware, Pennsylvania and Vermont levy no State tax on real estate, while Wisconsin and other States, following her method of taxing railroads, either exempt real estate from taxation for State purposes, or contemplate such action in the near future." [6] In his report of 1898 Comptroller Roberts advocated the abolition of a State tax upon real and personal estate, and the raising of the State's revenue "from what we have come to call indirect sources, i. e., from sources other than the general property tax." Mr. Horace White, a recognized authority, in an introduction to a translation of Cossa's famous work upon taxation says: "There is a movement going on to drop real estate from the list of State taxables, and remit it wholly to the lesser political subdivisions, the cities, towns and counties." The tendency, says Professor Seligman, is to confine the local tax to real estate. In some countries, "as in England and Australia, this is now the fact by law; in some places, like the more developed industrial centers of the United States, it is now virtually a fact by custom." This tendency "throughout the world toward reliance for local revenues upon the real estate tax is not alone indisputable, but also in complete harmony with the newer theories of finance." [7]

Rome, says M. Savigny, at the epoch of her great conquests, levied a capitation tax in her subject provinces, but by degrees various persons and classes were exempted from this tax. One edict exempted painters. In Syria, all under twelve or fourteen, or over sixty-five, were ex-

[6] Wells' "Theory and Practice of Taxation," 629.

[7] The Progress of Taxation during the Past Twenty-five Years and Present Tendencies—paper read at 22nd Annual Meeting of the American Economic Association. See also the chapter upon this subject in his Essays on Taxation, as revised and reprinted in 1913.

empted; at a later period all under twenty and all unmarried females; still later, all under twenty-five, widows, nuns, soldiers, veterans and clerics; afterward towns and whole dioceses. Such a tax was more sensible and more humane than our personal property tax, for the Roman removed the burden from the widow and the child, but that is precisely where the operation of our peculiar laws imposes the heaviest load. Intangible personal property can never be discovered by the tax collector, unless the tortures of antiquity are to be revived, or the rack and the thumb screw again brought into requisition. Nothing less cruel than the methods of a Claverhouse would enable an assessor to find it. Under an income tax law enacted in England in 1691, Romanists were taxed at rates double those imposed upon Protestants. But, shocking as was such injustice, it was hardly worse than are laws which, in practice, exempt dishonesty and tax truthfulness, and lay heavy hands on the widow and orphan.

Again and again during the last thirty years the inequality, immorality and stupidity of the personal property tax have been proved. It has been styled a tax upon ignorance and honesty; no one, it has been said, need pay, unless deterred from evasion by a scrupulous sense of honor; its defects and oppressions have been denounced as too glaring to be longer tolerated. The statutes have been described as "old and rickety," "passed in a bygone generation"; the system as a "farce and a humbug," a "reproach to the State," "a dismal failure," "an outrage upon the people, a disgrace to the civilization of the nineteenth century, and worthy only of an age of mental and moral darkness and degradation, 'when the only equal rights were those of the equal robber.'" Hon. George H. Andrews, once commissioner of taxes in the city of New York, in a letter published years ago, asserted that honestly to assess personal property it would be necessary to do four things; first, to amend the constitution of the State; second, to

amend the constitution of the United States; third, to amend the constitution of human nature; and fourth, to amend the constitution of things. Despite all that has been so forcibly said against the assessment of personal property, and despite the abandonment of this sort of tax by all the rest of the civilized world, we still adhere to it, and every few years, by the enactment of severe penalties, some State makes a ridiculous effort to discover what personal property its citizens own, but of course fails. The system of "guessing" adopted by local assessors in this State, unjust and illogical as it is, is more sensible and practically more successful in reaching property, than the absurd and intolerable method of "listing bills," or "dooming" the reluctant citizen to pay upon a certain assessment and depriving him of all right of appeal. Outside of a few persons as to whom the guess of New York assessors is so low that they think it politic not to complain, and of the few with a nice sense of honor, the tax upon personal property in this State is paid, as a New Jersey commission some years ago reported to be the case in that State, by the estates of decedents, widows, orphans, idiots and lunatics.[8]

Although in the city of New York, since consolidation,

[8] "The personal property tax is a farce. It falls inequitably upon the comparatively few who are caught. The burden it imposes upon production is out of all proportion to the revenue it produces. Year after year state and local assessing boards have denounced it as impracticable in its workings and unjust in its results.

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"But it is not a farce to those who are fully assessed. These are chiefly the widows and orphans who are caught when their property is listed in the probate court, retail merchants and others, incorporated or unincorporated, with stocks of goods, and the small investors who are not skillful enough to make non-taxable investments. The tax of 1½ per cent. is equivalent to an income tax of 25 per cent. on a 6 per cent. investment. A general income tax of 10 per cent. would create a revolution—yet we take a quarter of their income or more from the most helpless class in the community." Report of Fassett Investigating Committee. See also Seligman, "Essays on Taxation," 61, 62.

the assessed valuation of real estate has increased year by year, the total of assessable personalty keeps contantly decreasing.[9] Nor must it be assumed that as strenuous effort is not made in the metropolis to assess personal estate as in other cities. The president of the department of taxes and assessments in New York City in a report to the mayor, July 1, 1909, declared that although the assessment of personalty was the more difficult the larger the city, personal property assessed in the metropolis formed a larger proportion of the total assessment than in other large cities of the State. In New York City, he said, personal property constituted 8.2 per cent. of the whole; in Buffalo 8.1 per cent.; in Rochester 5.22 per cent.; in Syracuse 5.22 per cent.

The State comptroller's reports prove the inability to reach personalty for assessment outside of cities. The valuation of real estate increased between the years 1859 and 1904 more than six times: whereas, allowing for all dif-

[9] The aggregate assessments of personalty and of real estate within the city of New York, year by year, since the formation of the greater city are as follows:

Year	Personalty	Real Estate
1898	$510,757,570	$1,856,567,923
1899	545,906,565	2,932,445,464
1900	485,575,598	3,168,557,700
1901	550,192,612	3,237,778,261
1902	526,400,139	3,332,647,579
1903	680,866,092	4,751,550,826
1904	625,078,878	5,015,463,779
1905	690,561,926	5,221,582,301
1906	567,306,940	5,738,487,245
1907	554,889,871	6,240,480,602
1908	435,774,611	6,722,415,789
1909	443,320,855	6,807,179,704
1910	372,644,825	7,044,192,674
1911	357,923,123	7,858,840,164
1912	342,963,540	7,861,898,890
1913	325,421,340	8,006,647,861
1914	340,295,560	8,049,859,912

These figures are taken from the Report of the Commissioners of Taxes and Assessments of the City of New York for the year ending March 31, 1914.

ferences in regard to the property treated as personalty in 1859 and 1904, the personalty assessment in 1859 was little less than half of that of 1904. While there is an increase in the real estate valuations year after year, there is an actual decrease in personalty assessments, and a uniform decrease relatively. The total amount of real estate assessed throughout the State in 1913 was upwards of $10,960,000,000; of personalty, only $555,000,000. The futility of the effort to tax personalty is evident. The local tax should be limited to real estate, and the general property tax discontinued.

Until recently indirect taxation for State purposes had, in fact, virtually superseded the direct tax. The desirability of separating State from local revenues was pointed out some years ago by Professor Seligman, in his "Essays upon Taxation," in the following language:

> "If we can raise the entire State revenue from some other sources than the general property tax, we shall accomplish three great results: In the first place, the unseemly quarrels between the counties (as to equalizing assessments) will cease. In the second place, since the burdens of the farmer will be diminished by the suppression of the State tax on property, he will no longer feel that he is paying the city man's share, and he will listen with greater readiness to a proposition to divide the purely local burdens more equitably. Third, if we raise the State revenues entirely through the so-called 'indirect' taxes on personalty in the shape of corporation taxes, inheritance taxes and taxes on other forms of securities, it will be a far simpler task to bring about an adjustment of local revenues on the basis, not of a general property tax, but of a tax on real estate, together with a few specific taxes on the elements of taxable ability neglected by the State law."

While, as will be seen, the State has not been able to raise all revenue from indirect taxation, without resort to the direct tax, it has initiated such a policy, and has established a corporation tax, a transfer tax, an excise tax, a mortgage tax, a stock transfer tax, and a secured debts tax.

The policy of differentiating the sources of local and State revenues began in the year 1880, when New York

passed its first law imposing a license or franchise tax upon corporations for State purposes only. This was soon followed by a law requiring each corporation organized under the statutes of the State to pay to the State treasurer an organization tax of one-eighth of one per cent. upon its capital stock,—a tax subsequently reduced to one twentieth of one per cent. A few years later a license tax was imposed upon foreign corporations for the privilege of doing business within the State. The system of franchise taxes upon corporations has been amended and re-amended, so that to-day practically all classes of corporations, both domestic and foreign, pay an annual tax based upon the amount of their capital stock employed within this State.[10] Corporations and associations engaged in transportation or transmission pay an annual excise tax or license fee predicated upon gross earnings within the State, exclusive of earnings from interstate business.

Elevated and surface railroads not operated by steam are taxed one per cent. upon gross earnings, and three per cent. upon dividends in excess of four per cent. upon the actual amount of paid up capital. Waterworks corporations, gas companies, electric, steam-heating, lighting and power companies, pay an annual tax of one-half of one per cent. upon gross earnings within the State, and three per cent. upon dividends declared in excess of four per cent. upon their paid up capital. Insurance corporations pay an annual tax of one per cent. on the gross amount of premiums received in any one year; trust companies, an annual tax of one per cent. on capital stock, surplus and undivided profits; savings banks, one per cent. on surplus and undivided earnings; and foreign bankers, five per cent. on the amount of interest or compensation of any kind earned and collected on money loaned, used or employed within the State. All such corporations are exempted from local

[10] The tax upon foreign companies is called a license, upon domestic corporations, a franchise, tax.

taxation for State purposes on personal property. Franchise taxes upon corporations, although at first obstinately resisted, have been declared valid by the Supreme Court of the United States. The expense of collection is relatively small. But the system needs some clarification. The law has been declared "extremely and needlessly complicated. Few business men understand it and lawyers are frequently puzzled by its provisions. A tax of this kind paid by thousands of business corporations, many of them small, ought to be so simple that any officer of the corporation could make out the report and know exactly from its books what the tax ought to be and will be."

In 1885 the State initiated a system of inheritance or transfer taxes upon property passing by bequest, devise or by reason of intestacy. This system has become a source of considerable annual revenue. No community allows a property owner to devise or bequeath his property untrammeled by State regulation. In Anglo-Saxon law the full right to make a will dates back only to the time of Henry VIII. Transfer taxes are levied upon the privilege of transmitting or receiving property and not upon the property itself, and are analogous to license or franchise taxes, which are taxes upon privileges, not upon property. Legislation imposing a tax upon mortuary transfers of property which has long been in vogue in England, and was adopted in Pennsylvania in 1826 and in Louisiana in 1828, has become quite general throughout the United States. Adam Smith, who classes such taxes among the few that may properly be levied upon capital, traces them back to the days of Augustus Cæsar. The imposition of such taxes, especially when they fall upon transfers to strangers or collateral relatives, is not resented.[11]

[11] "The inheritance tax in one form or another has come to stay, and new States are being added every year to the list of those which have adopted it. Five years ago it was found in only nine States of the Union—Pennsylvania, Maryland, Delaware, New York, West Vir-

The inheritance tax imposed by Congress at the outbreak of the Spanish-American War in 1898 was a progressive tax upon the principle of Sir William Harcourt's graduated death duties, which became law in England in 1894. Its constitutionality was sustained by the Supreme Court of the United States (Knowlton v. Moore, 178 U. S., 41).

In 1898 Comptroller Roberts advocated a progressive inheritance tax in this State. It was favored in 1891 by Governor Hill, who pronounced it "fair and just, especially in view of the fact that personal property under existing methods almost entirely escapes taxation during the life of its owner." At an extra session in June, 1910, the legislature of this State, at the instance of Governor Hughes, passed such a law. But this measure was too drastic, and the graduated rates too heavy, as was quickly evinced by the efforts of large property owners to escape the effects of the law through change of residence. In the year 1911 the rates of 1910 were cut almost in half. The tax was mitigated but the progressive principle of taxation was not abandoned.

Progressive taxation brings emphatically into the foreground of discussion the question of the power of the State over individual or private property.[12] There is perhaps

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ginia, Connecticut, Massachusetts, Tennessee, and New Jersey. During the first half of 1893 Ohio, Maine, California, and Michigan were added to the list, though the Michigan law was afterwards annulled because of an unusual provision in the State constitution which was not complied with. In 1894 Louisiana revived her former tax on foreign heirs; Minnesota adopted a constitutional amendment permitting a progressive inheritance tax which has not yet been given effect by the legislature; and Ohio added to her collateral inheritance tax a progressive tax on direct successions. In 1895 progressive inheritance taxes were adopted in Illinois and Missouri, and an old proportional tax was revived in Virginia; and last year Iowa adopted in part the inheritance tax recommendation of her revenue commission." Wells, "Theory and Practice of Taxation," 621, 622, quoting Max West, in *North American Review*, May, 1897, 625.

[12] Mill claims that the right of bequest is an attribute of property, yet admits that it may be restricted as, in fact, it often has been,

no point at which the right of the commonwealth to tax property passing at death may be denied, once the power of taxation is conceded. John Stuart Mill, although an opponent of graduated income taxes as taxes upon industry and commerce, favored progressive inheritance taxes as just and expedient. As Mr. Justice White said in Knowlton v. Moore, a number of authoritative thinkers and economic writers regard the progressive tax as "more just and equal than a proportional one."

In 1896 the State established a new policy in enacting a law recommended by Governor Morton, embodying "the best features of the liquor law in successful operation in the various States, with a consistent aim towards the reduction of the number of saloons in this State." A State Department of Excise was created and placed under the

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especially by limiting the amount any legatee may acquire. Mill more readily concedes the right of the State to restrict *inheritance,* and its right to limit the *taking,* rather than the *giving* of property by will. Few writers have given scientific definitions of property, although the matter of ownership, acquisition and transmission is the subject of repeated discussion. The institution of property, according to Mill, "when limited to its essential elements, consists in the recognition in each person of a right to the exclusive disposal of what he or she have (sic) produced by their own exertions, or received either by gift or by fair agreement without force or fraud from those who produced it"—a definition needing many limitations. There is a degree of truth in Mirabeau's assertion that private property is goods acquired by virtue of the laws. Property and government are in a sense correlatives. There can be no absolute right of ownership, acquisition or transmission, independent of law.

That the right to inherit and the right to devise are not constitutional and may be taken away, was asserted by Vice-President Marshall in April, 1913. His statement was challenged by some lawyers, while approved by others. See *Bench and Bar,* May, 1913, p. 88. "Vested Rights—a Refutation," by Cyril F. Dos Passos, N. A. R., July, 1913, p. 50, quoting the opinion of Surrogate Fowler, in Matter of Gedney, that "the right to dispose of property after death is a natural and inherent right of mankind which cannot be taken away by the State." Blackstone, on the contrary, declares the power to make a will and the power to inherit to be "creatures of civil or municipal law." There was a time in the Roman law when these so-called rights were not recognized.

supervision of a commissioner appointed by governor and senate. Local boards and commissioners of excise were abolished. All certificates authorizing the sale of intoxicating liquors were to be issued either by the State commissioner or by special deputy commissioners in certain counties, or by county treasurers. One-third of all net revenue from liquor taxes, fines and penalties, was to be paid into the State treasury, and the remaining two-thirds were to go to the city or town in which the business was carried on. These revenues were subsequently apportioned half to the State and half to the locality. The imposition and collection of this tax have greatly enlarged the revenue from the liquor traffic, while centralization of the administration has not proven unsatisfactory. This legislation, as the Governor said, marked the beginning of a new era in the State in the regulation of the liquor traffic. It was a radical departure from the traditional policy, which had considered the regulation and sale of liquor matters of purely local jurisdiction. The law imposed severe penalties for the sale of liquors without payment of a tax, and contained stringent provisions as to the persons by whom and the places in which liquor might be sold. It contained a provision, which the governor described as "new in our legislation, authorizing an injunction to restrain the sale of liquor without a certificate, and making the violation of an order of the court a contempt."

A special committee on taxation composed of members from both the senate and the assembly was appointed by the legislature in 1899. This committee by its report (January 15, 1900) advocated the imposition of a five mill tax upon mortgages, and a tax of one per cent. on the stock of national banks, State banks and trust companies. Appended to its report was a bill designed to carry its recommendations into effect. In 1905 the legislature enacted a mortgage tax law laying an annual tax upon mortgages. In 1906 the law was so amended as to render mortgages

free from taxation after a single payment of a five mill tax called a recording tax. In several of his messages Governor Odell had urged the exemption of all mortgages from taxation. As a concomitant of the new tax, mortgages were exempted from all local taxes. The gross tax collected from this source during the year ended June 30, 1913, was $3,728,544.16.

In the year 1905 a stock transfer tax law was adopted (Chapter 241, Laws of 1905) which was amended (Chapter 414, Laws of 1906; Chapter 324, Laws of 1907). The State tax upon transfers of corporate stock has been held to be a tax not upon property, but its transfer, and therefore constitutional. An amendment made in 1906 imposing a tax of two cents on each share of one hundred dollars of face value or fraction thereof, was declared an unconstitutional discrimination in favor of the owner of a share with a face value of one hundred dollars as against the owner of a share with a smaller face value. A provision of the law subjecting private books to examination was held to violate both the State and Federal constitutions.

By Chapter 802, Laws of 1911, the legislature enacted a tax on secured debts, which in effect is an extension of the recording tax to all bonds and mortgages. "Secured debts" include all mortgages, bonds, debentures and notes forming part of a series that do not come under the mortgage-recording law. The tax is one-half of one per cent. on the face value of such securities. If paid once, it exempts the secured debt from ordinary local assessment as personal property. If the State tax is not paid, the owner is liable to local assessment, and cannot deduct or offset his indebtedness as heretofore.

The State has never exacted any income tax, unless the State tax upon corporations may be said to involve an income tax. Income taxes, however, have for years been employed in Massachusetts, Virginia, North Carolina and Louisiana. The experience of the States which employ this

method of taxation has not been satisfactory. Professor Seligman considers that an income tax is more and more unsuccessful as the basis of the tax becomes narrower. In modern times the income of the taxpayer, and especially of the larger taxpayer, has little to do with the locality in which he happens to live. "Incomes nowadays, through the working out of economic forces, have become national and international in character, and at all events have far transcended State lines." It is therefore hardly possible for any local or State administration successfully to ascertain or adequately to control the income of its resident citizens. "The State income taxes in the United States are largely for that reason the veriest farces, and under present economic conditions can never become anything else. If we are to have an income tax of any kind that is at all in consonance with fiscal principle, it must obviously be a Federal income tax rather than a State income tax." [13]

The recent special franchise tax has added a new source of revenue. In 1891 the Court of Appeals promulgated a decision that revolutionized for a time the practice of assessing the personal property of corporations. In People *ex rel.* Union Trust Company v. Coleman (126 N. Y., 433), the court, through Judge Finch, decided that the capital stock of a company for purposes of taxation meant, not the share stock, which had previously been the basis of taxation, but the capital owned by the corporation; that is, the fund required to be paid in and kept intact as the basis of its business. "The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend earning power, of franchise and good will." The one was declared to be the property

[13] "The Relations of State and Federal Finance," *North American Review*, November, 1909, 621. See also Essays on Taxation, 345.

of the company, the other of its stockholders. Ascertainment of actual capital required deduction of debts; furthermore, the intangible franchises of a corporation rarely were valued upon its books; but into the market value of share stock debts only remotely entered, while its franchises, especially if the corporation were exercising public franchises, were prominent factors in determining that value.

After an experience of eight years of assessments of corporations upon the theory of this decision, public opinion began to appreciate the extent to which corporations enjoying profitable public franchises were escaping taxation. To fasten upon the public franchise a tax not susceptible of evasion became the important thing, and the ingenious device was adopted of treating the franchise as real estate, for debts in New York are not deductible from the assessed value of real estate, although they are deductible in fixing the assessable value of personal property. On March 27, 1899, in a special message to the legislature Governor Roosevelt urged a change in the law to bring such franchises under taxation. He had, he said, no sympathy with the outcry against corporations as such; nevertheless, they enjoyed too frequently a large share of immunity from taxation. This was especially true as to franchises bestowed upon gas companies, street railroads, and the like. Whether these franchises should be taxed as realty or should pay upon their gross earnings, was a question; but in some form they should yield a money return to the government. A bill was introduced in the senate by Senator John Ford (now Mr. Justice Ford) enlarging the definition of real estate to include these franchises, and was passed in the senate by an overwhelming majority. Its consideration was blocked for a time in the assembly, but on April 28, 1899, a vigorous special message from the Governor led to its prompt passage. After important amendments suggested by the Governor, which transferred to the State Board of Tax Commissioners the power of

assessment, it was enacted at a special session of the legislature called for the purpose, and became a law on May 26, 1899.[14]

The court of appeals, and ultimately the highest court in the nation, has sustained its constitutionality. With the increasing number of these public utilities, especially in crowded municipalities, and their use of the street, of the sub-surface, and, perhaps, even of the air, enormous revenue may come from them in the future, to the relief of the ordinary taxpayer. The vitally sound principle underlying this sort of taxation, like that underlying the newer forms of taxation for State purposes, is that special privilege should pay for the advantages accorded. The incidence of taxation may cast the ultimate burden upon the community, but with growing regulation this is tolerable.

As was said by Governor Higgins in 1906:

"The State's revenues are now derived entirely from the liquor tax, corporation and inheritance taxes, taxes on transfers of stock, and the like. The primitive form of land tax has been broken up and personal property, escaping as it does practically all direct taxation, is reached by indirect methods which work little hardship."

It was a wise saying of the historian Hallam that "the sting of taxation is wastefulness, but it is difficult to name a limit beyond which taxes will not be borne without impatience when faithfully applied." A fifth canon might be added to Adam Smith's celebrated four canons upon the subject of taxation—that moneys exacted from the community for public purposes should be devoted strictly and sacredly to the ends for which they have been obtained, with utmost regard to economy. Expenditures for State government, originally simple and small in amount, cover

[14] "Under this ingenious definition of a special franchise," says Professor Seligman, "all public service corporations in New York have now been compelled to bear a far greater share of taxation than was previously the case."

to-day a wide realm—schools, charities, hospitals, prisons, canals, good roads, etc.

In a report made by Mr. Wolcott, Secretary of the Treasury, in 1796 to Congress, upon the subject of taxation in the various States, it was asserted that no direct tax had been levied in New York since 1788, and that no objects of taxation were defined by the laws, nor any principles of valuation prescribed. The credit and funds of the State were ample, and their products sufficient to supersede the necessity of taxation except for county and local purposes. The State tax of 1788 was only $60,000. Hamilton argued in *The Federalist* that all necessary expenses of State governments could not for many years exceed a million dollars annually for all purposes. Until the State embarked upon canal building, its expenditures were moderate indeed—so moderate that direct taxation, to which resort was had about 1800, was discontinued a few years later. It was reimposed in 1814, when a tax of two mills on each dollar of valuation of real and personal property throughout the State was levied. This tax was continued until 1818; then reduced to one mill; in 1824 it fell to half a mill, and in 1827 wholly ceased. Several governors, notably Governor Marcy, impressed with the diminution of the general fund, urged recurrence to direct taxation, but direct taxes were not resumed until 1842, when the celebrated "pay as you go" act was passed. Direct taxation was again discontinued in 1907, but has since been resumed. The enormous State debt that has grown out of canal enlargement and highway improvement has necessitated a return to the direct tax, for the interest on the State debt and the requisite sinking fund charges cannot be supplied from the present indirect sources of revenue.

No constitutional limitation upon debt creation existed until 1846. Once thereafter the State debt exceeded the constitutional limit. In 1859 the auditor of the canal department reported that drafts had been made upon the

canal commissioners for sums far beyond the ability of the treasury. This debt, estimated at upwards of $2,000,000, had grown out of claims against the State for work upon the canals, and for private property appropriated for their use or needed in canal construction. As Governor Morgan said in his annual message of that year, a debt had been created "without the means of payment in the treasury or at the command of those who made it," and he urged the legislature to take prompt measures "to save unimpaired the public faith," for under no circumstances, added the governor, "will the State of New York ever refuse to acknowledge and pay any and all just claims that exist against it, or that may have been contracted by any of her authorized agents." Chapter 271 of the Laws of 1859 authorized, subject to popular approval, a loan to the State of two and a half million dollars to defray these claims, and the imposition of a direct tax upon real and personal property to be collected proportionately in the several counties to meet the loan and interest upon it. The bond issue was accordingly authorized by the people at the election of 1859.

A large debt grew out of the bounties offered for the enlistment of soldiers in the Civil War. Governor Morgan, in the special message of April 15, 1861, evoked by President Lincoln's proclamation calling for a force of 75,000 men, of which the quota assigned to New York was 13,000, offered a State bounty of fifty dollars to each volunteer, and large sums besides were voted in various localities of the State as additional premiums to soldiers enlisting in the service. The burden upon the towns and municipalities was so heavy that it was eventually felt that the State should assume it. Governor Seymour recommended the passage of suitable legislation for this purpose, and accordingly a reimbursing act was passed in 1866 imposing a tax of two per cent. on taxable real and personal property in the State, to raise money to pay these bounties, in case the people by popular vote should approve the procedure.

The act authorized an issue of not exceeding thirty million dollars payable in twelve years. By a vote at the fall election of 1866 the people approved the bond issue, the vote being 393,113 in favor to 218,665 against, and bonds to pay bounties were issued to the extent of $27,644,000. This debt was extinguished at its maturity, although the convention of 1867 had proposed its extension to 1886. Governor Robinson in his message in 1878 congratulated the legislature upon the payment of the debt, which had fallen due on April 7, 1877. The debt, he said, had been a heavy burden upon the taxpayers of the State, the whole amount paid by them during the twelve years which it had run being $43,270,337.47. The extent to which the moneys supplied by the generosity of the commonwealth reached the soldiers, remains matter of uncertainty; as Governor Tilden said in his message of 1876, the bounty debt was an "after war adjustment." It was created, as the comptroller had said in his report of 1875, "nominally to pay bounties to the volunteer soldiers who enlisted in the service of the United States during the Rebellion, but only an inconsiderable part of this sum is believed to have reached the soldiers who were actually engaged in the contest."

Early in the Civil War, Congress imposed a direct tax for war purposes of $20,000,000, to be apportioned among the States, and the act fixed the share of each, that of New York being $2,603,916.67. The law enacted that any State might assess or collect the tax in its own way, through its own officers, provided it paid the same into the national treasury. Governor Morgan recommended that the State assume its quota at once, and the legislature accordingly by concurrent legislation authorized the governor to notify the secretary of the treasury that its share of the tax would be paid on or before June 1, 1862.[15]

After the declaration of war against Spain, the legis-

[15] See also Chapter 192, Laws of 1862.

lature, upon the suggestion of Governor Black, in extra session appropriated $1,000,000 to defray the expenses of the National Guard and Naval Militia of the State, and volunteers furnished by it when called into service for the public defence on the requisition of the president. Payments were to be made only upon the certificate of the governor. The act imposed a tax for the purpose of raising the amount appropriated.

By vote of the people, as was told in the preceding chapter, the power to incur a canal debt of $9,000,000, and afterwards of $101,000,000, was approved at the polls. In 1909 the provision forbidding the submission of any proposal to incur or increase a debt at any general election when any other law or any bill or any amendment to the constitution was to be submitted was eliminated, the constitution now reading upon this point as follows: "No such law shall be submitted to be voted on within three months after its passage, or at any general election when any other law or any bill shall be submitted to be voted for or against." In 1909 there was also added the following amendment: "The legislature may provide for the issue of bonds of the State to run for a period not exceeding fifty years, in lieu of bonds heretofore authorized but not issued, and shall impose and provide for the collection of a direct annual tax for the payment of the same as hereinbefore required. When any sinking fund created under this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund and the legislature shall reduce the tax to an amount equal to the accruing interest on such debt." This last provision should save the State from repeating the unfortunate experience of New York City in regard to sinking funds. The growth of the surplus revenues of the sinking funds of the city had become so enormous by 1903 as to justify a law, almost trenching upon the contract rights of the city's bondholders, diverting into the city's general fund

a large annual sum. Under the State constitution, whenever the sinking fund shall have become equal to the debt, increase in the fund automatically stops by the cessation of the direct tax which is its source of supply. By an amendment approved by the legislatures of 1903 and 1905 the imposition of a direct tax for the payment of the principal and interest of certain State debts ceased to be mandatory, and it was made optional with the legislature to provide for the discharge of the bonded debt either by direct taxation or from indirect sources of revenue.[16] The vote in 1905 in favor of this amendment was 293,552, against 127,364; majority 166,108.

In 1905 there was also added to the seventh article of the constitution a section authorizing a debt for the improvement of highways. Rome had been celebrated for her great state roads, which during the latter days of the republic and the early years of the empire had been extended all over Europe and into Asia Minor; and these avenues of commerce and communication were important agencies in the rapid diffusion of Christianity. The use of the bicycle and later of the automobile focused public attention upon the archaic state of the highways of New York, with the result that an amendment was formulated, passed by two legislatures and adopted by the people, the vote in its favor being 307,768, against it 134,773; majority 172,995. (sec. 12, Art. VII.) The aggregate of the highway debt may not at any time exceed fifty millions of dollars. Annual interest and amortization instalments are to be provided for by general laws, and the legislature may by such laws require a county or town or both to pay to the sinking fund the proportionate part of the cost of any such highway within the boundaries of the county or town, and its proportionate part of the interest, but no county shall at any time, for any highway, be required to pay more than

[16] Comptroller's Report, 1906, XXX. The direct tax has, however, since been resumed.

35-100 of the cost, and no town more than 15-100. No provision of the fourth section of article VII is to apply to debts for the improvement of highways. Scandals have unfortunately arisen in the construction of the work which, far from proving as durable as was expected, has required much replacement and repair. The issue of long term bonds for roads lacking qualities of permanence would appear to be a fiscal error of serious import.

The trebling of annual expenditures inside of twenty years from a little more than fifteen millions in 1899, to fifty millions at the present time, proves the need of a proper yearly budget. And it is indeed time to consider whether the numerous State commissions which have been created within the last few years are necessary or are so wisely and economically administered as to take the sting from taxation.

CHAPTER XVII

CONTRASTS BETWEEN THE EARLIER COURTS OF THE STATE AND PRESENT TRIBUNALS—THE CONSTITUTIONAL COMMISSION OF 1890—TREATMENT OF THE JUDICIARY BY THE CONVENTION OF 1894—THE COURT OF APPEALS—THE APPELLATE DIVISIONS—ABOLITION OF THE SUPERIOR COURTS—SURROGATES' COURTS—JUDICIARY PENSIONS—RECENT CONSTITUTIONAL AMENDMENTS AFFECTING THE JUDICIARY—THE WORK OF THE COURTS—THEIR POWER TO DECLARE LEGISLATION VOID—COURTS AND PUBLIC OPINION—INDEPENDENCE OF COURTS VITAL—FUTILE AND UNWISE ATTEMPTS IN CONGRESS TO BRING FEDERAL JUDICIARY UNDER POPULAR CONTROL.

When the courts of the early State are contrasted with present ones, very marked differences are brought sharply to notice. The highest appellate court in the latter part of the eighteenth and first part of the nineteenth century was a very large tribunal. All of the senators participated in the decisions, although comparatively few wrote opinions. In this respect the court was unlike the House of Lords, the final court of appeal in Great Britain. There the law lords alone really constitute the court. The early Supreme Court, on the other hand, consisted of but three members, who guarded their prerogatives so jealously that they were unwilling to share them with a larger number. Under the second constitution the court of errors and appeals continued unchanged save as to actual numbers, the Supreme Court became a court exclusively of appellate jurisdiction and the circuit judges sat at *nisi prius* and in

oyer and *terminer*. Under the first constitution, equity was administered by the chancellor, under the second, not only by the chancellor but also by the circuit judges and the county courts, subject to the appellate jurisdiction of the chancellor. A halfway step was thus taken towards the union of law and equity courts that was completed in 1847.

It is an interesting fact, illustrative of the instability of the first court of appeals, that in its existence of twenty-three years there sat in it one hundred and twenty different judges, while in the period between July, 1870, and the present time the number of judges in the newly organized court of appeals has been fewer than forty, and since the formation of the federal constitution only sixty-four justices have been members of the highest judicial tribunal of the nation.

The growth of population has necessitated great increase in the number of justices of the Supreme Court. The judges of the original court who were so tenacious of their authority that they would never permit the tribunal to be enlarged could not have foreseen the enormous augmentation in the number of Supreme Court justices to follow in a hundred years. They would perhaps have considered so large a court incompatible with the dignity of the office. It would not have been a court of which they would ever have aspired to be members. Enlargement may have a tendency to cheapen the place; nevertheless judicial business seems to require a great number of judges. The federal tribunals contain in all one hundred and sixteen judges. No other State has anything like the relative number that New York has.

With numerous changes every year in the personnel of the highest court of the State between 1847 and 1870, the marvel is that there was not more uncertainty in the law. The strongly conservative habit of judges kept them faithful to legal precedents. In 1846 the size of the highest tribunal had been reduced to eight, although its membership

unfortunately kept constantly changing. In 1870 a small court was continued, but it was rendered more compact, and all its members were elected at large throughout the State, thus ensuring a stable tribunal and the nomination to it, as a rule, of lawyers of recognized eminence. Although an enlargement of the court of appeals has several times been suggested, sentiment in favor of it has never been sufficiently influential to effect a change, and the members of the court itself have almost uniformly been hostile to it. Probably the convention that is to meet in April will leave the size of the court substantially as it is.

The inability of the old court to keep pace with its business and promptly dispose of the causes before it led the judiciary committee in the convention of 1867 to suggest the organization of a temporary commission of appeals, and when the work of the court again fell into arrears, as it did about 1887, a second division of the court of appeals was organized, the constitution having been amended to permit of its creation.[1] But two co-ordinate courts of appeal could not well co-exist without divergence of opinion and the introduction of a degree of uncertainty into the law. The tendency of the court when not under efficient management being to fall behind with its calendars, it was felt soon after the second division had disbanded that either the court of appeals must be increased or its jurisdiction

[1] In 1887 a proposed constitutional amendment was passed by the legislature authorizing the governor, upon certification by the court of appeals that its calendar had proven too heavy for prompt disposition, to designate seven justices from the Supreme Court to act as a second division of the court of appeals and hear and decide the causes assigned to it by the original court. The proposed amendment having passed the legislature of 1889 also was submitted to and ratified by the people at the fall election of that year. The second division commenced its hearings on March 5, 1891, and closed its work on October 1, 1892. All such schemes as commissions of appeals and second divisions were felt to be mere temporary makeshifts. The aim of the commission of 1890 and afterwards of the convention of 1894 was so to reconstitute the court of appeals as to render it efficient in the despatch of business, while maintaining it as a small and harmonious tribunal.

be circumscribed and the number of appeals reduced. To bring about this last result and to create an intermediate appellate tribunal of sufficient distinction and character to furnish a court of last resort was the chief task of the commission of 1890.

Although the people in 1886, by a decisive vote, favored the call of a constitutional convention, no law for the election of delegates was enacted until 1892, as the Republican legislature and the Democratic governor were unable to agree upon the manner of their choice. But it having become apparent in the interval that the judicial system needed correction, the legislature on April 26, 1890, passed an act authorizing the appointment by the governor, with the advice and consent of the senate, of a commission to propose amendments to the judiciary article of the constitution.[2] The commission was to consist of thirty-eight persons, four from each judicial district except the first district which was to have eight, and the second district which was to have six members.[3] Not more than one-half of the members from each district were to belong to the same political party. The persons selected by the governor were lawyers who had achieved high distinction in the profession. The commission organized at Albany, June 3, 1890, and elected ex-Judge George F. Danforth chairman. Its report was submitted to the senate on March 4, 1891.

Briefly stated, the report of the commission favored a single court of appeals unchanged in number, general terms of enlarged jurisdiction, the abolition of the Superior Court of the City of New York on December 31, 1894, and the continuance of the Court of Common Pleas for the City and County of New York, the City Court of Brooklyn and the Superior Court of Buffalo, but without appel-

[2] Chapter 189, Laws of 1890.

[3] At that time there were eight judicial districts in the State. The ninth judicial district was created by a constitutional amendment that took effect January 1, 1906.

late jurisdiction. It proposed that the State be divided into four judicial departments, with one general term of five justices in each department; that the governor should designate the justices to sit at general term; and that general term justices should exercise none of the powers of justices of the Supreme Court other than those pertaining to the general terms of which they were respectively to be members. At first it outlined a theory for the election of twenty general term justices by the State at large, the purpose being to secure for this appellate court men noted for their legal attainments throughout the entire State. But as neither the bar nor the public approved the election of these justices upon a general ticket, this proposal—supported by Mr. Choate, Mr. Carter, Mr. Hornblower and others—was abandoned, and the commissioners finally decided to substitute district election for State-wide election in the choice of the general term justices. The district system was less likely than the general ticket system to secure commanding talent, for a lawyer of mediocre ability may achieve popularity in a district. The judicial departments were to be made alterable every ten years by the legislature. An attempt to reduce the term of Supreme Court justices to eight years was wisely voted down—23 to 10.

The commission was of the opinion that no litigant is ordinarily entitled at the expense of the State to more than one appeal. Under the then existing system the limitation upon appeals was a pecuniary one—no case was appealable to the court of appeals unless it involved at least five hundred dollars. The commission proposed with certain exceptions to forbid appeals to the court of appeals from unanimous affirmances at general term. The chief exception was where the controversy concerned the construction or effect of a provision of the constitution or a statute of this State or of the United States. The theory underlying its proposed limitations of appeals as stated by

one of its members,[4] was that an appellate court possessed two functions: (1) to apply the law as previously laid down by the courts and the legislature to the case at bar and to correct any substantial errors committed by the courts below; (2) to decide new questions of law and to lay down rules for the guidance of the courts in future cases. The first of these functions primarily concerns the individual; the second affects the community at large. The great proportion of litigations should, upon this theory, never be carried beyond the first appellate court—the general term. Its decision in applying the law to the facts should be conclusive unless some doubt should arise as to the underlying principle of law or unless such important questions were involved as to render it desirable in the interests of the State at large that the court of appeals should consider the case. The commission was justly opposed to two co-ordinate courts of appeal and opposed also to a court of fifteen judges—a project widely urged.

The recommendations of the commission were not approved by the legislature of 1891. That body differed seriously with the commission regarding the proper size of the court of appeals. It adopted a resolution for an amendment to the constitution creating a court consisting of a chief judge and fourteen associate judges, the chief judge and associate judges then in office to compose part of the court until the expiration of their respective terms—no elector to vote for more than one-half of the number of judges at any election at which an even number was to be chosen. If an uneven number were to be chosen, no elector was to vote for more than the smallest number sufficient to constitute a majority of the number to be chosen. The principles underlying the work of the commission were unimpeachable and its report possesses enduring value. As in the case of the convention of 1867,

[4] W. B. Hornblower, 5 Columbia Law Times (No. 6), March, 1892.

the labor of the commission was not futile, although its report never received legislative approval. The substance of it in theory if not in form was incorporated in the judiciary article drafted by the convention of 1894 and was accepted by the people with the other provisions of the new constitution.

The controversy between the legislature and the governor respecting the mode of electing delegates to a constitutional convention, which had continued for several years after the popular vote for a convention in 1886, came to an end in 1892, when both the legislature and the governor were Democratic. One of the most important subjects considered by the convention which assembled in the spring of 1894 was the proper manner of amending the judiciary article. The need of improvement in the judicial system had become increasingly evident since the failure of the legislature to permit the work of the commission of 1890 to be submitted for popular consideration.

Upon the judiciary committee of the convention of 1894 were seventeen prominent lawyers from various parts of the State. The committee agreed with the commission of 1890 that no individual suitor was entitled to more than one appeal as matter of right. Its report wisely said:

> "Every State is bound to give its citizens one trial of their controversies and one review of the rulings and results of the trial by a competent and impartial appellate tribunal. When this has been done, the duty of the State to the particular litigants involved in any case is fully performed. There is no consideration of public duty or of the private interests involved in litigation, which requires a second appeal and a second review."

Two methods of relief of the over-burdened court of appeals were proposed in the committee. The first involved either an increase in the membership of the court, or its division into two co-ordinate tribunals, but to each there were obviously grave objections and neither was approved by the judges themselves. The other plan of relief was

to restrict the classes of cases to be appealed, and so reduce the volume of work as to bring it within the control of a court of moderate numbers in which consistency of legal view might be attainable. The judiciary committee decided to continue the court of appeals as previously constituted, but with limitations upon its powers. Upon this subject the report said:

"The court of appeals is to be enlarged to nine, the highest number with which the unity of the court and its consistent declaration and development of the law can in our opinion be maintained. It is to be strictly limited to its proper province of reviewing questions of law (except in capital cases), leaving the judgments of the appellate division final upon all questions of fact."

The plan of the committee was approved by the convention. The jurisdiction of the court was, after December 31, 1895, to be confined, as provided in a new section (9) of the judiciary article, to the review of questions of law, except in capital cases. The money limitation upon appeals was to be abandoned and a section briefly enumerating the subjects of which the court of last resort might take cognizance, was adopted by the convention in lieu of the more cumbersome phraseology used by the commission of 1890. Thus, it was believed, would happily be solved the problem of continuing the court as a unit of workable size and at the same time insuring "consistent declaration and development of the law."

For the general term system, with nine tribunals,[5] coordinate or nearly so, often diverse in views of law, the judiciary committee proposed to substitute a court that should be the ultimate tribunal in the great majority of cases. In the creation of this court it was desirable to

[5] The constitutional amendment of 1882 created an additional department. Thus, with five departments of the supreme court exercising appellate functions and with general terms in the Court of Common Pleas in New York County and in the three superior city courts there were in 1894 nine tribunals of practically coordinate jurisdiction.

cure, so far as practicable, the weakness of the former system, which it was proposed to remedy by the division of the State into four departments, and the formation of four co-ordinate appellate tribunals of such size and strength as to satisfy the bar and the public that each of them would be a worthy court of last resort for the great bulk of suitors. "Its judgments," said the judiciary committee, "were to be made final in a much wider range of questions through limitations upon the jurisdiction of the court of appeals"; it was to be made large enough "to insure full discussion and the correction of individual opinions by the process of reaching a consensus of opinion," and for the attainment of these ends its members were to be relieved from all circuit and special term duties. As the name "general term" was considered meaningless, the title suggested for the new court was that of "appellate division." The appellate division in the first department was to consist of seven justices, no more than five to sit in any case. In each of the remaining three departments it was to consist of five justices. In each department four justices were to constitute a quorum and the concurrence of three was made necessary to a decision. No justice sitting as an appellate justice was to sit in any other capacity.[6] The method of selection of the

[6] Of the foregoing portion of the convention's treatment of the judiciary, Mr. Lincoln well says:

"The Convention of 1894 was fortunate in being held so soon after the judiciary commission of 1890 had submitted its recommendations to the legislature, and whose work was thus fresh in the minds of lawyers; it was also fortunate in having among its delegates two prominent members of that commission,—Mr. Choate and Mr. Marshall,—who were able to speak intelligently of the plans, purposes, and deliberations of the commission. * * * It is a high tribute to that commission, whose work was, apparently, not well received at the time, and which was not considered by the legislature, that in less than four years the chief features of the judiciary system proposed by it were incorporated in the constitution by a convention which apparently could find no better solution of the then troublesome judiciary problem."

Section 2, Article VI was amended in 1905 to allow any appellate division justice when not actually engaged in performing the duties of

appellate division justices involved a partial reversion to the former appointive system. From all justices elected to the Supreme Court the governor was to designate the justices to constitute the appellate division in each department—the presiding justice to continue as such during the term of his office; the other justices to sit for terms of five years, or the unexpired portions of their respective terms of office, if less than five years.

The convention wrought a beneficent work when it proposed the abolition of the superior city courts. There were splendid traditions attached to all of these tribunals, but they had fulfilled their functions. In so far as their jurisdiction was transcended by that of the Supreme Court, positive injury had often been done to litigants. When their jurisdiction grew to be practically commensurate with that of the Supreme Court, all reason for their separate existence ceased. The day, let us hope, will eventually dawn when the probate court will be merged in the Supreme Court, and the serious difficulties regarding its jurisdiction which have often perplexed lawyers and worked injury to estates altogether disappear. Conflicts in which questions of jurisdiction are alone involved should be unnecessary and are often inexcusable. There would seem to be no reason why a will should not be proved in the Supreme Court in every instance, the proceeding being instituted by summons instead of by citation. Such anomalies as the upholding of a will as valid in so far as it disposes of personal estate and the adjudging it to be invalid as a will of real estate (anomalies which have actually occurred) would then cease.[7]

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an appellate division justice in the department to which he was designated, to hold any term of the Supreme Court and exercise any of the powers of a justice thereof in any county or judicial district in any other department.

[7] In the English system of jurisprudence, courts of probate and divorce have been welded with the common law courts. A special committee of distinguished lawyers recently reported to the American Bar

The constitutional commission of 1890 was in favor of abandoning pensions to judges of the court of appeals and justices of the Supreme Court elected after November 1 of that year, but unable to complete their terms of office because of age. It proposed to continue the pension as to all then in office, provided that to receive a pension a judge or justice should have served ten years of the term abridged by the age limit. The judiciary committee in the convention of 1894 and also the convention itself substantially adopted the recommendations of the commission of 1890, the only difference in plan being that the convention resolved that no judge elected after January 1, 1894, should be entitled to receive a pension wherever his term was cut short by the age limitation.

The judiciary system, as the convention of 1894 proposed to reconstruct it, was approved by the people together with the other work of the convention. In the main it has given satisfaction. The constitutional changes made in it in more recent years have increased the number of trial justices in certain districts, notably the first and the second, and created a ninth judicial district within the second department out of the counties of Westchester, Dutchess, Putnam, Orange and Sullivan, formerly included in the second district.

The appellate divisions have in the main been well

Association in favor of a unification of the judicial system, declaring that the whole judicial power of each State, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public.

There is strong opposition in the rural counties of the State to the abolition of either the county court or the surrogate's court. These judicial officers, especially the surrogates, are often able to give advice that dispenses with the necessity of employing lawyers. They are consequently popular and an amendment proposing to abolish these courts would perhaps endanger the ratification of the new constitution.

equipped, the designations of justices have been excellent, and the new courts have made valuable contributions to the jurisprudence of the State. In their rule-making functions they may perhaps exercise too much power over justices sitting at trial and special terms, for these intermediate appellate courts are authorized to designate the parts in which trial judges shall preside during each year. If criticism of the constitution may be ventured, it would seem to have failed in limiting the court of appeals to the review of questions of law. In part this failure may be due to the provisions of sections 190, 191, Code of Civil Procedure. The anomaly frequently occurs of a record with irrefragable evidence of the truth of certain facts, the existence of which the findings distinctly negative, but wherever the affirmance below has been unanimous the record may not be examined to ascertain whether the findings and the evidence conform. The sentiment of the profession seems to favor the prohibition of any appeal to the court of appeals unless the appellate division permits it to be taken, or if permission is refused, the appeal is allowed by the court of appeals or a judge thereof.

There is one tribunal in this State not strictly within the category of a court that might well be made a constitutional body, and that is the Board of Claims. In the State of New York since the year 1870 *quasi*-judicial boards or bodies have existed to which claims against the State have been referred by the legislature. These boards have latterly become political prizes, with the result that at each change of political power at Albany the legislature has abolished the existing board or court of claims, substituting in its stead a new one with identical jurisdiction—for the sole purpose of rewarding its own partisans with seats in the new tribunal. This has become such a scandal that the creation of a board of claims as a constitutional body is now advocated.

Under our present system our courts of justice pass

upon many subjects not distinctively judicial, but largely if not wholly administrative. We might well consider whether the creation of administrative courts to work side by side with the regular judicial tribunals would not be desirable. The creation of a tribunal charged with purely administrative functions, including jurisdiction over claims against the State, would relieve courts of justice from consideration of subjects administrative and not judicial in origin, as for example, controversies about removal of officers and employees of the State or city. Trials of police or other public servants would take place before some branch of this tribunal. Its jurisdiction might well cover cases arising under the election and primary laws; proceedings to enforce orders of departments and bureaus (of the Board of Health, for example, review of which is often sought in the regular courts), and to recover penalties; reviews of assessments for taxation, and perhaps the whole subject of condemnation proceedings. There should be no conflict between such a court and the Supreme Court. It might be made a permanent court of high usefulness and dignity and become of valuable service in facilitating the administration of the fiscal affairs of the State—in fact, it might operate in some measure like the administrative courts upon the continent of Europe which have proven exceptionally efficient and satisfactory. The constitution might well be amended to authorize its establishment. A few words of change would give the legislature necessary power.

As through the praetorian edicts in ancient Rome, the historian gains a vivid idea of the character and habits of its people, so through judicial decisions the life of modern society becomes comprehensible and is invested with intense human interest. The reported cases contain a dramatic history of personal strife, family contentions, commercial and political rivalries, struggles of classes and ideas; they mark also the milestones of constitutional evolution. The

first Supreme Court and the court of errors were the tribunals of a new commonwealth largely agricultural, in which questions of title to land were of primary importance—a commonwealth dominated by great landed interests, but deficient in manufacturing resources and in wealth. The cases of that day were mostly trespass and ejectment, or grew out of claims upon marine policies for losses upon the high seas during the Revolution. Numerous legal complications sprang from the wars in Europe, and later, from the War of 1812 between Great Britain and the United States. In the second period the causes before the courts increased in variety and complexity. There are many "per curiam" or "curia" opinions in the reports of this epoch, and opinions rarely reached the length of the ordinary judicial opinion of the present day.[8] New classes of litigations began to tax the consideration of the judiciary, among them cases of powers and trusts, due to the revision of the statutes in 1828. Later, an even more highly organized society is revealed in the decisions, which include controversies about fire insurance, banking, negotiable in-

[8] It is rare today for a judge to merit praise for terse and compact writing, such praise as was justly given by D. D. Barnard to Chief Judge Spencer. Concerning his brief yet masterly opinion in Griswold v. Haddington, 15 Johnson's Reports, 57, his biographer says: "The opinion is comprised in about four pages of the volume where it is found, and it would be hard to find in the whole range of our judicial records a more clear, comprehensive, condensed, well-reasoned and conclusive opinion. John Marshall, Theophilus Parsons and Ambrose Spencer were, I think, the only judges of their time in this country who delivered such opinions as this." The opinions of the court of appeals at present deal too elaborately with questions of fact. It was expected that recent constitutional changes would relieve the court of the necessity of discussing the facts; the contrary seems to be the result. In many cases differences among the judges, often expressed in long opinions, arise from contradictory interpretations of the facts. A grave evil is the habit of quoting at length from earlier decisions. And an earnest and energetic effort should be made to check the accumulation of printed case reports, and to limit the number of cases to be treated as precedents. The legislature has power to do this; if not, the constitution should give it power.

struments, sales of personal property and other suits denoting the existence of a complex community, and later still come cases arising from the creation and operation of railroads and the development of cities. The law of negligence in its various ramifications is the theme of numerous decisions, the law of eminent domain, of many others, and almost a legion of causes has grown out of the many aspects of corporation law. The cases exhibit what has well been called "the ever growing miscellaneousness of modern society." The bulk of decisions has unfortunately been increased by the passage of the Code of Procedure and the Code of Civil Procedure.

For forty-six years judicial and legislative functions were strangely commingled, judges sitting as legislators in the council of revision, and senators sitting as judges in the court of errors. In the second period the senators still did judicial duty, although the council of revision had passed into oblivion. Sharper lines of demarcation between these two branches of government were drawn in the constitution of 1847, and about that time the judiciary began increasingly to employ its power to decide upon the constitutionality of acts of the law-making body. In few instances under the first constitution did the courts declare acts of the legislature void. The infrequency of such decisions has sometimes been ascribed to the fact that the council of revision was in the habit of vetoing unconstitutional laws. That explanation is not adequate, for of the 6,590 bills which came before the council it vetoed only 83 on constitutional grounds. During the time that the second constitution was in operation few statutes were declared repugnant to it. Such decisions were rare prior to 1847, in fact the date when the courts of this State began freely to use this power might be put far later. While members of the senate sat in the court of errors and appeals that court may have been less likely to condemn statutes in the passage of which its senatorial members had taken part. With

due allowance for all this it is, nevertheless, a patent fact that the disposition of the judiciary to nullify legislation has greatly increased during the last few decades.

Several causes may be assigned: deterioration in the character of legislation in the absence of a council of revision; the greater complexity of the constitution, together with the numerous checks which it puts upon legislative action; the frequency with which the fourteenth amendment to the Constitution of the United States is invoked against State legislation. Whether legislation is more defective than formerly there is no means of ascertaining. Bills are drawn with haste and carelessness, yet there is far keener public scrutiny of important legislative measures. Occasionally legislatures do pass, and governors approve, bills of doubtful constitutionality, leaving it to the courts to apply the corrective; but this does not often happen. The number of instances in which the tribunals of this State have held its statutes violative of the nation's organic law is not large. The greater complexity of the constitution and the great number of checks it has affixed to legislative action partly explain the growing tendency of the courts to declare legislation void. Whatever the causes, the judges have no wish to usurp power, but the responsibility of declaring laws to be unconstitutional belongs to them. If the constitution to-day prescribe a score of checks upon the legislature where but one or two existed sixty years ago, the judges must fulfil their obligations. In an age when criticism of the courts is common, when they are censured by public men and the press for doing what is a simple matter of duty, it should be remembered that the duty is not self-assumed—but a task that is imposed upon them. Nor do courts of their own impulse pass upon legislation, however offensive it may be to constitutional principles; they await the demand of some aggrieved individual who formulates his objection in a suit.

Thus direct collisions among the several departments of government are avoided.[9]

How admirably this system makes for tranquillity and avoids friction between the national and the State government, has often been noted by foreign writers. As Mr. Bryce observes: "The court does not go to meet the question; it waits for the question to come to it. When it acts, it acts at the instance of a party. * * * This method has the merit of not hurrying a question on, but leaving it to arise of itself. * * * A State might be provoked to resistance, if it saw as soon as it had passed a statute, the federal government inviting the Supreme Court to declare that statute invalid." [10]

In his essay upon "Popular Government" Sir Henry Maine says that the process of passing upon legislation by suit "is slower, but it is freer from suspicion of pressure and much less provocative of jealousy than the submission of broad and emergent propositions to a judi-

[9] In the "Power of the Federal Judiciary Over Legislation" (Putnams, 1912) I have aimed to summarize the proof that before the formation of the present union the power of the judiciary to adjudge laws repugnant to the State constitution to be void had several times been exercised and was commonly understood to be an attribute of the judicial function; that the decisions in which laws had for this reason been condemned were known to the delegates when they assembled at the Federal convention in May, 1787; that in the discussions in the convention and also in the debates in the ratifying conventions held in the different States the existence of the power was generally conceded. Among other things, I aimed to show that Judge Walter Clark of North Carolina and Senator Owen were mistaken in asserting that the convention of 1787 four times voted down a proposal to confer such power upon the judiciary and I have, I think, made clear that the proposal defeated upon four separate occasions was a proposal to create a council of revision—similar to the council of revision in New York's first constitution—with a qualified negative upon all laws, whether constitutional or otherwise. One reform advocated in that book has been happily accomplished in the recent change in the Federal law which allows review in the highest court of the nation of decisions of State tribunals holding void State statutes repugnant to the nation's organic law.

[10] American Commonwealth, I, p. 252.

cial body; and this submission is what an European foreigner thinks of when he contemplates a Court of Justice deciding on alleged violations of a constitutional rule or principle." [11]

Had the Constitution of the United States, like the first constitution of the State of New York, authorized a council of revision to interpose its veto, the peace of the country might time and again have been threatened and perhaps overthrown. The serious collisions between the council of revision and the State legislature about bank charters and measures to strengthen the federal government in the War of 1812, and to enlarge the judicial force, and finally, about the convention bill of 1820, caused the downfall of the council. Since 1822 State courts have been discharging purely judicial functions, and the old antipathy between the legislature and the judiciary no longer exists.

At a time when distinguished judges are criticised as "fossilized minds," it may be well to recall the functions of the courts. As was eloquently said by Evarts in the convention of 1867, "the judiciary is the representative of the *justice* of the State and not of its *power*. * * * The judge is not to declare the will of the sovereignty, whether that sovereignty reside in a crowned king, in an aristocracy or in the unnumbered or unnamed mass of the people." The judges declare the law, they do not make it. Necessarily and properly the judiciary is the most conservative branch of government. Recognizing the value of the accumulated experiences of the past and the continuity of legal evolution that runs through history, it is for the courts to say, not what they think the law should be, but what it is; and in a free community capable of altering its jurisprudence by legislation or constitutional change at the need of society it rarely happens that any long divorce will exist between the law and enlightened public sentiment. The judiciary

[11] Popular Government, p. 224.

constitutes a salutary check upon crude public opinion. It is an obstacle wisely set in the way, not of the public will, but of what James Russell Lowell happily styled the public whim. In the discharge of its duty of declaring what the law is, it should be steadfastly kept independent of all influences which might tempt it to fail in its obligations. The need of an independent judiciary was never more imperative in the history of the country. The power of determining when an "act of a delegated authority contrary to the tenor of the commission under which it is exercised is void" must, as Hamilton luminously argued, be lodged in the judiciary, if the constitution is to remain in fact as well as in theory the ultimate governing law.

The rational employment of this far reaching prerogative of the judiciary is essential for the protection of the people, even against themselves, and for the security of private rights. But if the impression should become widespread that it was tyrannically or arbitrarily exercised, the people would undoubtedly abridge the tenure of the judicial office or otherwise bring the bench more directly under the influence of public opinion in making its decisions—which would be an evil of incalculable consequence. The judiciary is not a species of upper legislative chamber with a possible final veto upon every statute which judges may happen to think unwise. In an age when the constitutionality of legislation is assailed at every step in its making—in its passage through the houses, and in its submission to the executive—the courts, while jealously safeguarding all their prerogatives, should remember that the question is not whether had they been the legislature they would have enacted the law under criticism, but simply whether in passing it law-makers have transcended constitutional authority.

The independence of the judiciary rests vitally upon permanency of tenure, and so long as the courts use their vast powers temperately, no measures need be taken to re-

establish the equilibrium between the legislative and the judicial branches of the government; in fact the equilibrium will not be disturbed. As Hamilton well said, judicial independence is the citadel behind which justice sits safe and serene. With an unstable judiciary, how different might have been the decisions of the Federal courts, how altered the history of the country! Attacks have been made upon it, and are even now threatened. The use by the Federal bench under Marshall's leadership of the power to declare acts of Congress void when they conflicted with the Federal Constitution aroused Jefferson's wrath [12] and led to a proposed constitutional amendment introduced in Congress by John Randolph in March, 1805. Had such an amendment been passed, all Federal judges would have been removable by the president upon the joint address of both houses of Congress without cause; the courts would have become responsive to every transitory popular feeling. Defeated in 1805, the amendment was proposed again in substantially the same form in 1806, but without result. In 1807, Senator Tiffin of Ohio moved an amendment that all judges of the United States should hold for a term of years, subject to removal by the president on address by two-thirds of both houses. Senator Tiffin's motion was not an isolated or personal act. The State legislatures were invoked to support the scheme. "Vermont favored the amendment. The house of delegates in Virginia, both branches of the Pennsylvania legislature, the popular branch in Tennessee and various other State governments, in whole or in part, approved its principle and urged it

[12] Jefferson was consistent even to old age in his belief that the federal courts ought to be curbed. Writing to James Pleasants, December 6, 1821, he declared that the best remedy he could devise "would be to give future commissions to judges for six years (the senatorial term) with a reappointability by the President with the approbation of both Houses." The adoption of such a plan would have been destructive of judicial independence.

upon Congress. In the house George W. Campbell moved a similar amendment January 30, and from time to time other senators and members made attempt to bring the subject forward." [13]

In the house, Wright of Maryland in 1811, and in the senate, Nathan Sanford of New York in 1816, urged a similar amendment.

When under the leadership of Marshall and Story the Supreme Court began to declare unconstitutional State legislation that was in violation of the "supreme law," this action of that tribunal was construed by *ultra* State rights men as an affront to the majesty of State independence, and accordingly attempts were made to bridle the courts and curb their jurisdiction. In 1822 Richard M. Johnson of Kentucky offered in the senate an amendment which is: "That in all controversies where the judicial power shall be so construed as to extend to any case in law or equity, arising under the constitution, the laws of the United States, or treaties made or which shall be made under their authority, and to which a State shall be a party, and in all controversies in which a State may desire to become a party, in consequence of having the constitution or laws of such State questioned, the senate of the United States shall have appellate jurisdiction."

This not coming to a vote, proposals were subsequently submitted in the house of representatives to amend the constitution by limiting the term of Federal judges, but all failed of success; and their failure brought an end for years to attacks upon the independence of the Federal courts. Dissatisfaction with Federal judicial action has of late aroused some to advocate election of Federal judges and for short terms. To follow such counsel would be not only to ignore the lessons of history, to cast away our heritage, to destroy the wise separation of governmental

[13] Henry Adams, Hist. of the U. S., IV, 205.

powers, but inevitably to bring the bench into politics, and have law declared at the ballot box, according to popular passion, instead of in the judges' consulting room, in conformity with the principles of jurisprudence.

CHAPTER XVIII

VOTE IN 1886 FOR A CONVENTION—DIFFERENCES BETWEEN LEGISLATURE AND GOVERNOR—LEGISLATION PROVIDING FOR CONVENTION—ELECTION OF DELEGATES IN FALL OF 1893—OUTLINE OF WORK OF THE CONVENTION OTHER THAN UPON THE JUDICIARY ARTICLE, AND IN RELATION TO CANALS—TREATMENT OF ARTICLE XIV—RE-APPORTIONMENT IN SENATE AND ASSEMBLY—CONVENTION'S REPORT—SUBMISSION OF ITS WORK TO THE PEOPLE—LATER CONSTITUTIONAL CHANGES—RELATIVE VALUE OF METHODS OF AMENDMENT.

Section 2 of Article XIII of the constitution, as it stood before the changes made in 1894, prescribed in brief that at the general election in the year 1886 and every twentieth year thereafter, and also at such times as the legislature might by law provide, the electors qualified to vote for members of the legislature should have opportunity to decide whether a convention should be called to revise and amend the constitution, and that if a majority of the qualified electors voting upon the subject should favor a convention, the legislature at its succeeding session should provide for the election of delegates thereto. In 1886 the popular vote for a convention overwhelmingly preponderated over the vote against it, being 574,993 to 30,766; in other words, ninety-five per cent. of those voting upon the subject wished a convention called. Never before in the history of the State had there been such a decisive expression in favor of calling a convention. In 1821 out of a total vote of 144,247 upon the question of a

convention or no convention, 109,346 favored a convention—almost seventy-six per cent. of the total vote. In 1846 the percentage of voters who wished a convention called (213,257 out of 247,117) was so large as to impel Governor Wright, in his message to the legislature, to declare that the people of the State had "with a unanimity almost unknown in the history of our elections" decided to hold a convention. In 1866 the vote for the holding of a convention, 352,854 in favor, to 256,354 against it, was said by Governor Fenton to be "an emphatic expression of the public judgment that some modification of the organic law" was essential.

The demand for a convention in 1886, although supported by a heavily favorable vote, was ignored for several years because of the inability of Governor Hill and the State legislature to agree upon the method of selecting delegates. The conflict between the executive and the legislative department of the government had one beneficent result; it led to the formation and adoption of a provision in the amended constitution which in future cases should render such a deadlock impracticable. The controversy came to an end with the election of Governor Flower and Democratic control of both houses. In his first annual message the governor urged action to make the popular mandate effective, arguing that the disinclination shown by the preceding legislature to approve the revision of the judiciary article proposed by the constitutional commission of 1890 seemed to make the holding of a convention more than ever necessary. The legislature passed a law [1] prescribing that an election should be held on the second Tuesday of February, 1893, for the choice of delegates. The act fixed the number of delegates at 171, of whom 128 were to be chosen by assembly districts, 32 to be elected from the State at large. Provision was made for minority rep-

[1] Chapter 398, Laws of 1892.

resentation, as no elector might vote for more than 16 of the delegates at large. The governor was authorized to appoint eight persons to sit in the convention with all the rights of elected delegates, three of the persons so to be appointed to be representatives of the Prohibition party, and five, representatives of labor organizations. Here for the first time in the history of the State was manifested a disposition to secure class representation in a constitutional convention. The constitutionality of the provision was extremely doubtful. The delegates were directed to convene in the assembly chamber at the capitol on the second Tuesday of May, 1893. The amendments or the revised constitution which might be the outcome of their deliberations were to be submitted to the people for adoption or rejection at the general election in that year. The convention act contained various other provisions; for example, that vacancies in the election of district delegates should be filled at a special election in the same manner as vacancies in the office of a member of assembly, and that vacancies in the office of delegate at large should be filled by the convention. The new constitution was to take effect from and after December 31, 1893, unless the convention should fix a different date; and no amendment receiving less than a majority of all the votes given upon it was to be treated as ratified.

Before the date fixed for the election of delegates, the legislature passed a new convention act which, on January 27, 1893, met with the governor's approval.[2] The radical differences between it and the act of 1892 are worthy of notice. By the act of 1893, delegates were to be chosen not at a special election, as prescribed in the law of 1892, but at the general election in November, 1893, and the number of delegates was fixed at 175 instead of 171. Under the act of 1892, district delegates were to be elected

[2] Chapter 8, Laws of 1893.

from assembly districts; the act of 1893 made the unit the senate district; 160 delegates to be chosen in senate districts, each senate district to elect five. Fifteen delegates were to be elected for the State at large, to be known as delegates at large, and no provision was made for minority representation. The convention act made eligible as a delegate any male or female citizen of this State above the age of twenty-one years. Vacancies among district delegates were to be filled at a special election in the same manner as vacancies in the office of State senator. Any vacancy in the office of delegate at large was to be filled by special election in the same manner as a vacancy in the office of a State officer. The date of opening the convention was fixed as the second Tuesday of May, 1894. The provisions for submission of amendments or of a revised constitution were similar to those contained in the act of 1892, save that all amendments were to be submitted at the general election in November, 1894. If ratified by the people the constitution was to take effect at the end of that year, unless the convention should prescribe a different date. The legislature in 1894 passed a bill for the submission of the work of the convention either at one time or in two separate years, at the option of the convention, but the measure was vetoed by Governor Flower. Mr. Lincoln observes that "the result of the election of delegates to the convention of 1894 would not have been materially different in respect to political representation if the assembly district plan of 1892 had been continued." [3]

Pursuant to the act of 1893, delegates were chosen at the general election in the fall of that year; the convention met in the assembly chamber in the capitol on the second Tuesday of May, 1894, and elected Honorable Joseph H. Choate its president.

The work of the convention upon the judiciary article

[3] "Constitutional History of New York," III, p. 24.

and upon the canals has already been noted; its treatment of the subject of special legislation for cities has also been described. Its remaining work may briefly be outlined. There was no general desire or urgent need for a thorough remodeling of the constitution; the principles incorporated in it had not been devitalized in the evolution of history. As the president of the convention wisely said upon taking the chair, the convention had not been summoned into being to treat the constitution "with any rude or sacrilegious hands." The convention would, he declared, be false to its trust if it should attempt "to tear asunder this structure which for so many years had satisfied in the main the minds of the people of the State of New York." He briefly touched the more important topics likely to come before the convention and concluded with an exhortation to the delegates to subject themselves to the "self-denying ordinance" that forbade "idle talk," since time was precious and many subjects would demand attention.

Apart from its reconstruction of the judiciary system the convention made few radical changes in the constitution. It dealt with the basic law in a spirit of restraint, recognizing that it had no mandate to work a revolution. It placed both the civil service [4] and the cause of education upon a constitutional foundation; framed an altogether new article upon the subject of charities; enlarged the senate from a membership of 32, at which it had re-

[4] In a recent address before the Academy of Political Science in the City of New York upon "The Civil Service Clause in the Constitution," Mr. Samuel H. Ordway, who has since been appointed President of the New York State Civil Service Commission, after an epitome of the history of the civil service movement in this State prior to and since the adoption of the constitutional amendment of 1894, declared that "the present civil service provision of the constitution has worked satisfactorily and well; it is short and simple, and yet elastic; it embodies general principles and avoids details; it has been construed often by the courts, and its construction and meaning are definitely settled. It should be left as it is, and retained in the new constitution without amendment."

mained since 1801, to 50, and the assembly from a membership of 128, established in 1821, to 150, and retained the assembly district as the unit of representation in the lower house. It paid scant consideration to arguments for lengthening the term of the governor, senators and State officers, even reducing the governor's term from three to two years. It made radical alterations in the representative system by providing that no county, however populous it might become, should have more than one-third of all the senators; and that no two counties which adjoin or are separated only by public waters, should have more than one-half of all the senators. By a vote of 98 to 58 the convention refused to favor submission to the people of the question whether women should participate in the suffrage. The startling progress of the movement since 1894 to confer the electoral franchise upon them has elsewhere been noted.

The convention added to Article I—the Bill of Rights—a new section (18) declaring that the right of action to recover damages for injuries resulting in death shall never be abrogated, nor the amount recoverable be subject to any statutory limitations. The wisdom of this amendment was questioned by the president, who asserted it to be "a mere piece of legislation" which ought never to have been placed in the constitution. A new section (6) in Article II, recognizing that the machinery of elections should be under the control of the two principal parties, prescribed that all registration and election boards other than for town meetings or village elections should be bi-partisan in character. The propriety[5] of crystallizing this doctrine in a constitutional provision may be debated. The subject of prison labor perplexed the convention, and while approving the policy which kept convicts from idleness, it forbade the sale of products of convict manufacture for private use in the

[5] For an instructive history of the development of the policy of bi-partisan representation in the conduct of elections, see Lincoln, III, 115, *et seq.*

open market or in any competition with outside industries, but permitted their disposal to the State itself or its political divisions or public institutions owned or controlled by it.[6] It differentiated city elections from State elections, and required State elections to be held in the even numbered years commencing in 1896. This separation of city and State elections has proved invaluable in educating city voters in the belief that city government is a business distinct from national or State government. The benefits of the constitutional provision have proved to be far-reaching. Voting in local elections is now carried on with a freedom from party affiliations that would have seemed well nigh impossible thirty years ago.

The convention initiated the sound policy of protecting the lands of the State known as the forest preserve, forbade their being leased, sold or exchanged or taken by any corporation public or private, and prohibited the sale, destruction or removal of the timber thereon. This was the first constitutional recognition of forestation and its grave bearing upon the water system of the State.[7] The convention left unchanged the provision discriminating between successful and unsuccessful attempts at bribery. It added a new section containing a form of oath or affirmation to be taken by members of the legislature and all officers, execu-

[6] For an admirable summary of the evils of the competition of prison labor with labor in general and of the arguments showing the undesirability of the total abolition of prison labor, see "Hadley's Economics," sections 459-461.

[7] In a paper on "State Policy of Forest and Water Power Conservation," read at the meeting of the Academy of Political Science, November 20, 1914, Mr. John G. Agar urged that it would "be wise to provide in the new constitution for a management of the forests, separate and distinct from the management of the water powers." Any citizen of the State should, he claimed, have the right to bring suit in the Supreme Court to enforce the provisions of the constitution and enjoin their violation. Assuming past grants by the State of water power to be irrevocable, the new constitution should forbid in future absolute alienation of State ownership in water power; and allow no alienation of State property without just compensation.

tive and judicial, of superior rank, called "oath of office." Besides promising to support the Federal and the State constitution and faithfully to discharge the duties of his office, each official was obliged to swear or affirm that he had neither directly nor indirectly paid or contributed nor offered or promised to pay or contribute any money or other valuable consideration or reward for the giving or withholding of a vote at the election at which he was elected to office, and had not made any promise to influence the giving or withholding of any such vote. The convention added a clause designed to prohibit the acceptance by any public officer of any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation for his own use or in conjunction with another. Violation of the prohibition was made a misdemeanor and the office forfeitable at the suit of the attorney-general. The offerer of the pass or privilege could not escape from testifying in relation thereto but was not to be liable to civil or criminal prosecution therefor if he testified to the giving of the same.

In order to prevent a recurrence of such episodes as had delayed until 1894 the meeting of a convention demanded by popular vote in 1886, the convention proposed substantial changes in the clause of Article XIV relating to future conventions.[8] This was accomplished by the for-

[8] This article is a growth. Section 1 first appeared in the constitution of 1822. A constitutional amendment after adoption by a majority of the members elected to each house was "referred to the legislature then next to be chosen." If approved by two-thirds of all the members elected to each house of that legislature it was submitted to the people. When ratified by "a majority of the electors qualified to vote for members of the legislature, voting thereon," it became part of the constitution.

In 1846 the section was altered in two particulars: (1) an amendment after adoption by one legislature was to be "referred to the legislature to be chosen at the next general election of senators"; (2) a majority vote was made sufficient in the second, as in the first, legislature.

mulation of a self-executing clause providing that whenever the question whether a convention should be called to revise and amend the constitution should be favorably answered by a majority of the electors voting thereon, the electors of every senate district of the State as then organized should elect three delegates at the following general election for members of assembly and the electors of the entire State voting at the same election should elect fifteen delegates at large, and that the delegates should convene at the capitol on the first Tuesday of April next ensuing after their election and continue their session until the completion of the business of the convention. A majority of its members was to constitute a quorum. The assent of a majority of the delegates elected at the convention as evinced by the yeas and nays on its journal was made a condition precedent to the submission of any amendment or proposed new constitution, and the convention was empowered to decide in what manner any new constitution or amendment should be submitted—such submission, however, not to occur until at least six weeks after the adjournment of the convention. If ratified by popular vote a new constitution, or constitutional amendments, should go into effect on the first day of January following such ratification. In the case of previous conventions all these matters had been contained in legislative acts. By a vote of 93 to 46, the convention approved the proposed constitution. Like all of its predecessors from 1821 onwards, it drafted a report

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In 1846 section 2 was added. It provided that at the general election in 1866 and in each twentieth year thereafter and at such times as the legislature might by law provide, the question whether a convention should be summoned should be decided by "the electors qualified to vote for members of the legislature." If a majority of the qualified electors voting upon the question voted affirmatively, the legislature at its next session was to provide by law for the election of delegates to the convention.

In 1894 section 2 was radically altered—as shown in the text. The words "electors of the State" were substituted in both sections, for the words previously used to define electors (see page 211).

to the people briefly summarizing its proposed changes. The report declared that the convention had not altered the frame-work or substance of the constitution. It had abstained from venturing upon undue experiments, making such modifications only as experience had shown to be desirable. Of more than four hundred amendments proposed and considered it had adopted thirty-one. The convention, said the report, had renewed the recommendation of the convention of 1867 providing for progress in agriculture by requiring general laws giving the right of drainage across adjoining lands; it had separated municipal from State and national elections in the larger cities of the commonwealth and required the election of municipal officers in the odd numbered years and of State officers in the even numbered years; it had erected various safeguards against abuses in legislative procedure, by requiring that all bills should at least three days before their passage be printed in their final form; prohibited riders on appropriation bills; provided for notice to municipal authorities before special acts relating to the larger cities should become effective; prohibited the issuance of passes or privileges by railroad, telegraph and telephone companies to public officers; enlarged the express constitutional powers of the president of the senate, and changed the date for the annual meeting of the legislature from Tuesday to Wednesday for the better convenience of its members.

"We have also," continued the report, "removed the prohibition against the sale of the Onondaga salt springs which are a source of annual loss to the State," and "the prohibition against the sale of the Hamburg canal in Buffalo, which is about one mile in length and which serves no purpose except to breed pestilence. We have also provided that the public lands in the Forest Preserve shall never be sold or leased, and that the timber thereon shall never be cut. * * * We have extended the prohibition against lotteries, so as to include all pool selling, book-mak-

ing, and other forms of gambling. * * * We have abolished the statutory provision limiting the right of recovery for injuries causing death to five thousand dollars. There is little or no attempt to defend the justness of this limitation. * * * We have sought to throw grave safeguards around the elective franchise by prescribing a period of ninety instead of ten days of citizenship before that right can be exercised, so that naturalization may be taken out of the hands of campaign committees and removed from the period immediately before election. * * * We have modified the language relating to elections, so that if a mechanical device for recording and counting votes is so perfected as to be superior to the present system, the legislature may make trial of it. * * * We have established in the constitution the well tried and satisfactory system of registration of votes * * * and have provided for securing an honest and fair election by requiring that on all election boards, election officers shall equally represent the two principal parties of the State."

In defence of the proposed apportionment and the changes suggested in the size of the senate and assembly, the report urged that the number of senators had first been fixed at 32 in 1801; that with this number the senate districts in 1846 were of convenient size; that only one county in the State (New York) then had more than one senator; that the citizen population in that year was 2,450,778, and in 1892, 5,790,865; that the ratio of population for a senator had consequently grown from 76,586 in 1846 to 180,899 in 1892; that the great increase of population in cities since 1846, carrying with it additional representation in the senate, had required a decrease in representation of the country districts, these having been enlarged and their representation accordingly diminished; that the purpose of the proposed increase was to restrict the country districts to the position which they had in 1846 and to provide for the increased representation of the cities by the increase in

number. The enlargement of the assembly was ascribed to the necessity of maintaining due proportion between the membership of the two houses. The purpose was also "to permit in the apportionment of members a more reasonable recognition of the great difference in population in the smaller counties of the State." In the distribution both of senators and assemblymen absolute fairness had been the aim, and the "distribution had been made in exact accordance with population, so far as the maintenance of county lines would permit." [9]

The new constitution was submitted to the people at the November election in 1894, simultaneously with the submission to the voters of Greater New York of the question whether the larger city should be formed. This was also the final election at which both local and State officers were chosen. The convention deliberated whether or not it would be desirable to present its amendments to the people for separate vote upon each. These were thirty-three in all, and separate submission was decided to be impracticable. There were however three distinct questions presented by the convention (1) relating to the apportionment provisions of the new constitution. While these were considered by some members of the convention to be distinctly partisan in

[9] The Committee on Apportionment, in its report to the convention, said: "When the senatorial districts were but eight in number, the controlling reason for the change made by the Constitutional Convention of 1846, from eight senatorial districts, each electing four Senators, to thirty-two senatorial districts, each electing one Senator, was that the Senators from the eight large districts could have no close relation with all the people of their districts. Our proposed number of fifty Senators will substantially restore to the people approximately the same representation that they had under the Constitution of 1846, the additional eighteen Senators going to the great centers of population. The opportunity for any selfish or corrupt interest to obtain control over a body composed of fifty members will, undoubtedly, be much less than to obtain control over a body of thirty-two members. As we propose, the most popular body, the Assembly, is increased to 150, which is three times as large as the Senate, thus preserving a fair proportion between the number of members of the two bodies."

character, they were approved by popular vote, the vote in their favor being 404,335 to 350,625. (2) The amendment advocating improvement of the canal system was adopted by a vote of 442,998 to 327,645. (3) The other provisions of the revised constitution, which were submitted *en bloc,* were approved by a vote of 410,697 to 327,402.

Several amendments are open to the criticism of being legislative in character—for example, those relating to pool-selling and book-making; bi-partisan local election boards; contract labor in prisons; sectarian appropriations; free passes; damages for injuries causing death. Whether the convention section is in reality self-executing, as was the intention of its framers, is doubtful. The present constitution (sec. 2, Art. XIV) provides elaborate machinery therefor. It perhaps wisely declares that the convention shall be judge of the election, returns and qualifications of its members. The wisdom of requiring the submission of a proposed constitution, or constitutional amendment, to popular vote at least six weeks later than the adjournment of a convention, is debatable. The use of the word "election" to describe the submission is a misnomer. In many particulars the constitution has the attributes of a statute, and is not an organic outline of government.

Since 1894, changes in the constitution, while numerous, with few exceptions have not been vital. Several have grown out of the need of expanding the judicial force and equipping the court of appeals with power more easily to dispose of its enlarging calendar. The purpose of some is to relieve city governments from too narrow limitations in the creation of debts. Others have been inserted at the behest of the labor interests and still others affect the canal policy of the State. Briefly, aside from those increasing the ability of the State to incur debt and authorizing workmen's compensation laws, these amendments are as follows:

In 1899, section 7 of Article VI was amended to au-

thorize the governor, upon the certificate of a majority of the judges of the court of appeals that the court, by reason of the accumulation of causes before it, was unable to hear and dispose of the same with reasonable speed, to designate not more than four justices of the Supreme Court to serve as associate judges of the court of appeals until the number of causes undisposed of upon the calendar should be reduced to 200, when the judges so designated should automatically return to the Supreme Court. Section 1 of this article was amended in 1905 to increase the Supreme Court membership in the various judicial districts, and permit the creation of a ninth district out of the second district.

The judiciary article was further amended in 1899 by the inclusion in section 2 of Article VI of power to the governor to make temporary designations to any Appellate Division, whenever its presiding judge should certify as to the necessity for the service of an additional justice or justices for the speedier disposition of the business of the court. The same section was again amended in 1905 to confer upon Appellate Division justices outside of the department in which they were performing the duties of appellate justices, and while not engaged in such duties, the power to hold terms of the Supreme Court and exercise the functions of justices of that court in any county or judicial district in any other department of the State. The vote for this change was 288,227, against it 125,649; majority 162,578.

In 1899 section 10 of Article VIII was amended to provide that whenever the boundaries of any city are coterminous with those of a county or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted should cease, but the debt of the county theretofore existing should not for the purposes of the section be reckoned as part of the city debt.

In the same year section 26 of Article III was amended

to exempt the counties included in Greater New York from the provisions of the constitution requiring a board of supervisors in each county. Instead a provision was inserted that in a city including an entire county or two or more entire counties, the powers and duties of a board of supervisors might devolve upon the board of aldermen or other legislative body of the city.

In 1905 section 10 of Article VIII respecting city indebtedness was amended so as to permit the city of New York to exempt its water debt from consideration in the computation of the ten per cent. indebtedness which may not be exceeded. The water debt of the city being protected by special sinking funds, there was no valid reason why it should interfere with other needed improvements, as it did, while its amount entered into the ten per cent. limitation. The amendment was approved by a vote of 363,117 to 129,424, or a majority of 233,693.

In 1905 a new clause was added to section 1 of Article XII, which is as follows: "And the legislature may regulate and fix the wages and salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed by the State, or by any county, city, town or village, or other civil division of the State, or by any contractor or sub-contractor performing work, labor or services for the State, or for any county, city, town, village or other civil division thereof." This was approved by a vote of 338,570 to 113,606; majority 204,964.

Several amendments were adopted by the people in 1909, one affecting the compensation of judges of the Supreme Court, another permitting the legislature to alter the rate of interest upon any State debt constitutionally authorized. Other amendments affect the powers of boards of supervisors and judges, the drainage of lands, and timber and trees on the forest preserve. One amendment enlarges the debt creating power of any city by eliminating from the computation of its debt so much as

might be incurred for public improvements owned by the city and run by it at a profit.

Between 1909 and 1913 no amendments were made, but four were ratified at the fall election of the later year. By the first, compensation for taking private property for public use may now be ascertained not only by a jury or by commissioners, as formerly, but by the Supreme Court with or without a jury, but not with a referee. What is known as the "excess condemnation" principle has also been adopted. The legislature may under certain restrictions authorize cities to take more land and property than is immediately necessary for public improvements. The second change is the addition of the workmen's compensation amendment. The third permits the election of additional county judges in the county of Kings. The fourth permits the use of three per cent. of the forest preserve for construction and maintenance of such reservoirs as may be needed for municipal water supply, canals and the regulation of stream flow.

Six constitutional conventions have been held in this State. With the exception of that of 1801, whose chief task was the determination of the true construction of the article of the constitution of 1777 creating the council of appointment, each convention has reported a complete constitution. Of the four constitutions submitted to the people, three have been accepted in their entirety, the constitution drafted by the convention of 1867 being the only one that failed of complete adoption. Down to the constitution of 1847 there was no provision of any kind in the organic law for the call of a convention. The method of amendment by legislative resolution followed by popular ratification (incorporated in the constitution in 1822) has been actively employed ever since 1826, when the first and second amendments to the constitution of 1822 entered into the fabric of the fundamental law. The amendment reducing duties on salt manufacture and permitting the qualified voters of

New York City to elect the mayor became part of the constitution in 1833. The amendment allowing the qualified voters of other cities than New York City to elect their chief magistrate was ratified in 1839. Save for alterations in the canal and the judiciary article, and the provision authorizing soldiers in actual service to vote, the constitution of 1846 stood unchanged until 1874. Some of the amendments adopted by the convention of 1867 and afterward approved by the commission of 1872 were with the permission of two successive legislatures submitted to the people at the general election of 1874. The amendment abolishing canal tolls followed in 1882.

Since the adoption of the constitution of 1894 many amendments have been made upon legislative initiative. Important provisions have through this method found their way into the constitution. Its advantage in earlier days was that one amendment was presented at a time, or at most never more than two arose for consideration at the same election; and each succeeded or fell upon its own merits or demerits. The practice of submitting several amendments at the same election may be said to have started in 1874. While this course was perfectly proper in that year, because the work presented for public approval consisted of amendments originally suggested by the constitutional convention of 1867 and favorably reported by the able commission of 1872, amendments since submitted have often come up for popular consideration without adequate knowledge on the part of voters of the reasons for or against them. This has several times been condemned by the highest officials of the State. "The practice," said Governor Higgins, in 1906, "is not to be commended of submitting numerous, disconnected and complicated constitutional amendments to popular vote, as in case of four of the seven voted on (in 1905) two years after their final approval by the legislature, without the aid of an address to the people explaining their purpose and object. The

provision that a majority of the electors voting thereon shall be sufficient to ratify constitutional amendments, is necessary and salutary,[10] but greater care should be taken to call forth a large and intelligent vote." The same thought was tersely phrased by Governor Hughes when he urged that means be devised to familiarize the voters with proposed constitutional amendments, so that more intelligent action upon them might be secured.

Until recent years amendments originating in the legislature frequently met great public indifference, and the opportunity for burying them in legislative committees often occurred. The danger at present seems rather to be that resort may too often be had to this method of amendment and the organic law changed hastily without adequate reflection or discussion. It is usually easier to summon support for a measure, however unwise the measure may be, than to obtain adequate vote to defeat it. In the history of the State since 1822 rarely has an amendment which had passed the two requisite legislatures been defeated at the polls. A striking instance occurred in the fall of 1896 when it was proposed to amend section 7 of Article VII so as to permit encroachments upon the forest preserve. The proposed change was defeated by an adverse vote of 710,505 to 312,486.

It has never been deemed praticable by any of the constitutional conventions to submit articles to the people section by section, although the law under which each convention since that of 1777 has met has contained provisions for submission of its work in whole or in separate parts at the convention's option. The convention of 1777 never submitted its work to the electorate at all. The convention of 1821, although authorized by the act of 1820 to present its amendments together or in distinct propositions as it

[10] On the contrary it should no longer be permitted that a pitiful minority of the voters of the State shall be able to call a convention, ratify a new constitution or any amendment to the existing one.

might deem expedient, submitted them as a whole, and as a whole they were approved. The act of 1845 gave the convention of 1846 a like option, yet its work was submitted and ratified as an entirety. The act under which delegates to the convention of 1867 were chosen provided that any amendments or the amended constitution should be voted upon as a whole or in separate propositions as the convention should deem practicable, and by resolution declare. The convention reported that its amendments were interdependent; that, in its judgment, they made a complete and harmonious constitution, and that it was not judicious to take any part from the other to be passed upon by the people separately, excepting only those separately submitted. In accordance with this report, the act of 1869 directed that the constitution proposed by the convention should be submitted as a whole, with the exception of the provisions relating to the qualifications of colored voters, to assessment and taxation, and with the exception of the amended judiciary article, which article alone met with popular approval. The convention of 1894, having prepared thirty-three separate amendments to the former constitution, decided that it would be unwise to ask the people to vote upon these singly. The provisions which it submitted separately have heretofore been noted.

Changes in the constitution should not too lightly be permitted, and while the constitutionality of the employment of commissions has been doubted by some constitutional students, notably Judge Jameson, the results in practice have been admirable, for there has been concentration of more intelligent, disciplined, and expert thought upon the proposed amendments than might otherwise have been secured.

CHAPTER XIX

WORKMEN'S COMPENSATION—THE WAINWRIGHT LAW—THE "IVES" CASE—THE WORKMEN'S COMPENSATION AMENDMENT—RECENT IMPORTANT CHANGE IN THE FEDERAL LAW—THE SULZER IMPEACHMENT—IMPEACHMENT TRIAL AND CONSTITUTIONAL QUESTIONS RAISED THEREAT—THE JUDGMENT OF REMOVAL—QUESTIONS FOR THE COMING CONSTITUTIONAL CONVENTION—ACT OF THE LEGISLATURE RECOMMENDING THE CALLING OF A CONVENTION—THE VOTE—TAXPAYER'S ACTION TO ENJOIN ASSEMBLING OF CONVENTION—THE DECISION OF THE COURT OF APPEALS—ELECTION OF DELEGATES.

The doctrine of workmen's compensation found slow acceptance in the United States. As was said by President Roosevelt in a special message to Congress, December 8, 1908, probably in no other respect has legislation in this country kept so far behind that in the rest of the civilized world, as in the matter of liability and compensation for accidents in industry. In 1904 Congress had enacted a compensation law, which was declared unconstitutional because it included commerce over which Congress had no control. A law more strictly limited to interstate commerce was passed by Congress in 1908 and has been upheld by the Federal courts. Underlying the opposition to the earlier statute was the quite general conviction of employers that the compensation principle was in conflict with economic laws and interfered with freedom of labor. The counter feeling had been growing for some years that courts were

becoming agencies to enunciate established and unprogressive economic theories—a sentiment undoubtedly strengthened by the decision of the Supreme Court upon the earlier compensation statute and in the celebrated bake-shop case which had gone to that tribunal from the New York court of appeals. Mr. Justice Holmes from the bench declared that the fourteenth amendment had not enacted Mr. Herbert Spencer's Social Statics, and President Roosevelt from the White House, and later from the hustings, criticised the use of judicial power to resist amelioration in labor conditions.

In 1910, the State of New York, after a well-considered report from a special committee of the legislature, enacted a Workmen's Compensation Law, usually styled the Wainwright law. The committee had not been oblivious of possible criticisms of the measure, for prior to its enactment the sentiment of the legal profession was divided as to its constitutionality. In the case of Ives v. The South Buffalo Railway Company (201 N. Y., 271), the court of appeals unanimously held the act unconstitutional as in violation of the fourteenth amendment to the Constitution of the United States. The court admitted the power of the legislature to abrogate the contributory negligence rule and the fellow-servant principle; it doubted whether assumption of risk could be abolished; it denied that any employer could be held liable for an accident, where in no sense was he at fault.

This decision provoked bitter controversy. It was violently criticised and vigorously defended. Strictly interpreted, it seemed to forbid all compensation legislation until the Constitution of the United States, as well as that of the State, had been amended. Dissatisfaction with the power immemorially exercised by the courts to pronounce legislation void assumed widespread proportions and aroused discussion of the basis of the power all over the country. For a time the decision seemed to add impetus to

the movement for judicial recall, or for recall of judicial decisions by popular vote. While these subjects are still in the polemic stage, the authority of the courts to declare unconstitutional legislation invalid has been completely vindicated. A workmen's compensation amendment to the constitution has been framed and passed.[1] This amendment, after approval by the legislature of 1912 and by the legislature of 1913, was ratified by the voters of the State at the general election of 1913. By Chapter 816, Laws of 1913, the legislature, at the extraordinary session of that

[1] The workmen's compensation amendment (section 19, Art. I) is as follows: "Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

The amendment was made the subject of discussion at the Academy of Political Science, New York, in November, 1914. The phrase authorizing the legislature to pass laws for "the protection of the lives, health, or safety of employees" was considered irrelevant matter. It had been inserted with the idea of encouraging a more liberal attitude on the part of the courts in dealing with labor legislation (Proceedings of the Academy of Political Science, vol. V, No. 2, pp. 101-2, 119). Regarding the other improper matter in the amendment, including provisions authorizing public utility companies to charge the cost of compensation to operating expenses in computing the reasonableness of their rates, see page 102. Two separate drafts of an amendment were submitted in the course of the discussion (see p. 127).

year, passed a Workmen's Compensation Law which was re-enacted and became law March 16, 1914 (Chapter 41, Laws of 1914). Thus, inside of four years after the passage of the Wainwright law, not only was the constitution amended to render such a law possible, but also a new law was enacted and put in force. The discussion ensuing upon the Ives decision and the adoption of the amendment furnish convincing as well as beneficent proof of the adequacy of existing methods of changing the fundamental law. The decision at first aroused a feeling that the power of the courts needed curtailment. Wiser counsels supervened, legal talent throughout the State interested itself in drafting an amendment and although the amendment finally ratified seems unnecessarily comprehensive, the history of the struggle for it justifies confidence in democratic institutions. Laws and constitutions are powerless against public sentiment. In order, however, that a transitory feeling may not be mistaken for it, the constitution wisely interposes checks upon hasty legislation—thus giving the "second, sober thought" time for expression.

The decision in the Ives case, followed by a decision of the Supreme Court of the State of Washington upholding a similar law, emphatically called attention to the desirability of legislation permitting an appeal to the Supreme Court of the United States from State decisions condemning State statutes as repugnant to the Federal Constitution. Such an amendment to the judiciary code of the United States has since the Ives decision been repeatedly urged, and was obtained by act of Congress approved by the President, December 23, 1914. If the benefits of that decision be offset against its seeming injustices it must be acknowledged that they are numerous. Without it the Federal statute might have long remained unaltered. By this change the Supreme Court of the United States becomes the final tribunal to determine whether any statute,

State or Federal, conflicts with the due process clause of the Constitution of the United States.

No impeachment trial has ever surpassed in interest the trial of Warren Hastings, Governor-General of India. In February, 1786, Burke was directed by the House of Commons to present articles of impeachment before the bar of the Lords. In February, 1788, these articles were presented and Hastings was called upon to plead. Not until the spring of 1795 was the memorable decision pronounced and Hastings discharged. This celebrated trial, imperishably associated with the names of Burke, Fox and Sheridan, terminated in failure. Macaulay, whose brilliant pages have made the proceedings and even the hall in which they occurred almost as familiar as every-day incidents, declared that impeachment, though a "fine ceremony and doubtless useful in the seventeenth century," was not a proceeding "from which much good can now be expected." The wisdom of this opinion expressed in 1841, thirty-six years after the impeachment of Lord Melville, the last impeachment in England, was confirmed when by a close vote the senate of the United States exonerated Andrew Johnson. It was Burke's compassion for suffering, his indignation against injustice, his hatred of arbitrary power that gave life to the prosecution of Hastings. Although the impeachment failed, it taught, says Lord Morley, "the great lesson that Asiatics have rights, and that Europeans have obligations." Whether President Johnson had violated the Tenure of Office Act in removing Stanton and appointing General Thomas secretary of war in his stead, was the occasion but not the cause for his impeachment. The trial had its origin in the underlying conflict between a Congress and a president whose policies were diametrically opposed.

The Sulzer impeachment is invested with none of the glamor that surrounds those justly famous trials. It had no great inspiration. Its origin was probably vindictive.

Sulzer was removed from the governorship, but his victorious opponents failed to impose any further punishment than dismissal from office. The vote for him in his subsequent canvass for the governorship, while not a vindication, proves the existence of a strong and, perhaps, justifiable public belief that notwithstanding his serious faults he was marked for punishment because of the fear of his adversaries lest scandals might be unearthed which would result in public prosecutions.

The Sulzer episode is worthy of notice because of the light which it sheds upon the uncertain meaning of clauses of the constitution. It brought into relief the contrast between the Federal and the State constitution as to the meaning and use of the word "impeachment." It awakened public attention to the fact that the organic law of the State failed to define an impeachable offense. It presented some few senators in the inconsistent aspect of advocates of the prosecution and at the same time judges. It showed that the president of the senate, a possible beneficiary in salary and in higher office by Sulzer's conviction, could nevertheless not be debarred from a seat in the court.

The articles of impeachment were adopted at a session of the assembly held pursuant to a proclamation of the governor convening the two houses in extraordinary session for special purposes. The session began June 16, 1913. The articles were presented to the senate on August 13. Instant discussion arose whether impeachment could take place at an extraordinary session, and whether the exhibition of the articles of impeachment required the governor's immediate removal from office. Sulzer having attempted to exercise the governor's power of pardon, and the warden of the penitentiary refusing to acknowledge his act, these questions arose for decision in a *habeas corpus* proceeding in the supreme court. The court, through Mr. Justice Hasbrouck, held that the assembly as an independent body

exercising its judicial power of impeachment, might convene itself for that purpose and that it could prefer articles of impeachment at an extraordinary session of the legislature despite the language of the constitution forbidding the legislature at such a session to act upon any subject not recommended for its consideration by the governor in summoning it.[2] The justice held also that in New York State, "impeachment" was synonymous with the filing of articles of impeachment, and worked instant deposition of the impeached official, pending trial upon the articles.

The impeachment court assembled in the senate chamber at the capitol on September 18, 1913. The chief judge of the court of appeals was made its presiding officer. At the threshold lay the question whether the justices of the supreme court designated to sit as members of the court of appeals in its ordinary judicial functions, could sit as members of the impeachment tribunal. This was ruled affirmatively by the presiding officer.

The first attack made by the respondent was upon the constitution of the court. The organic law ever since 1847 had declared that the court should be composed of "the president of the senate, the senators or a major part of them, and the judges of the court of appeals or the major part of them"; the Constitution of the United States prescribes that "the senate shall have sole power to try all impeachments, and that when the president or the vice-

[2] In a letter to the New York *Sun*, August 15, 1913, under the title "Lawyer," Mr. Francis Woodbridge of the New York bar made a striking distinction between the assembly as a legislative body and as an inquisitorial or impeaching body. As an inquisitor or species of grand jury it was in no way limited by the constitution, save that it must act by a vote of a majority of all the members elected. Its power to meet at any time as an impeaching body was nowhere restricted. A derelict governor could not, therefore, by refusing to convene the legislature, prevent his own impeachment. The view is substantially identical with that afterwards pronounced by Mr. Justice Hasbrouck in the case cited in the text—People *ex rel.* Robin v. Hayes, 82 Misc., 165; affirmed in the Appellate Division and in the Court of Appeals.

president is under impeachment, the chief justice shall preside." The distinction of language in the two cases is marked. Sulzer's counsel objected to the presence in the court of three senators who had been active in promoting the impeachment and who, in a report to the legislature, had, as the challenge ran, "adjudged" the governor guilty upon the charges contained in the articles of impeachment. Objection was aimed at the president of the senate also, who upon Sulzer's conviction would become lieutenant-governor. He was personally interested in the success of the impeachment and would benefit by a decision against the governor. In answer to these objections the precedent of the Johnson case was invoked, where the right of Senator Wade of Ohio to sit was challenged. Wade was not only one of the President's most violent opponents, but in case of his removal would have become his successor in the presidential chair. In support of Wade's claim to a seat, it was argued that there was no power to exclude him. The constitution declared that the court should consist of the *senate* with *two* senators from each State. In reply it was well said by Senator Reverdy Johnson of Maryland, that if Senator Wade sat the judgment would be absolutely void upon general principles.

In the Sulzer case the rejoinder of Sulzer's counsel, through ex-Judge Herrick, was that under the State constitution it was not the senate, but senators or a major part of them, who were members of the court. Hence there was power to exclude. No one, he asserted, should serve upon the court who had a clear interest in the result of the trial. By consent of the court itself the presiding officer was made its mouth-piece to express its decision. His opinion was learned and acute—perhaps sound also from the standpoint of precedent. It is, said he, a question of power, and the question is, have some members of this court power to exclude other members of the court, except for reasons defined by law, either in the constitution or in the statutes.

No one member of the tribunal could exclude another. By this decision, which met no disapproval, a court was constituted of such a nature as Blackstone denied that the omnipotence of parliament could create. Its power, he declared, was limited in this, that it could not make a man a judge in his own case. It shocks the moral sense that senators who might have prejudged the case and a senator whom self-interest might tempt to vote against the governor, could not constitutionally be deprived of seats in the court.[3]

The next objection related to the jurisdiction of the court. In substance it was that the assembly was powerless to frame impeachment articles at the extraordinary session for the reason that neither in the governor's proclamation convening the legislature, nor in any message, communication, or otherwise, was the subject of impeachment, or the consideration of impeachment charges, mentioned. In support of the demurrer to jurisdiction Mr. Marshall, one of respondent's counsel, argued, notwithstanding the decision of Mr. Justice Hasbrouck to the contrary, that an assembly convened in extraordinary session had no power to impeach. The impeachment managers replied that when the assembly impeached the respondent and adopted articles of impeachment, it was lawfully convened for that purpose. Ex-Judge Parker, for the managers, maintained that the assembly, as an impeaching body, could convoke itself. The power to impeach was not legislative in character. The

[3] The challenged senators were at their own request excused from voting upon the question of their right to sit. Apparently the court itself could not have forbidden them had they insisted upon voting, for it could no more decide that they should not vote upon one question than upon another. The reasoning of the chief judge, although sustained by precedents, fails of convincingness. The maxim that the accuser shall not be judge is of universal application. The presence of an accuser upon the bench discredits the court. There was no decision upon this point in the Johnson case because Senator Hendricks, who had first raised the question, withdrew his objection, although unconvinced that it was not sound.

constitution prescribed how the senate and assembly should be summoned for legislative purposes, but was silent as to how the members of assembly might come together as an impeaching body. In this respect they were under no restrictions save that a majority of the elected members must concur in the impeachment. There might, he said, come a time when the necessities of the State would demand that the assembly should convene itself.

The decision of the court of impeachment through its president, while overruling the plea of lack of jurisdiction, denied that the assembly had an inherent right to meet at any time and present articles of impeachment. It was the assembly as such, he held, that was given the right to impeach. It had no power to convoke itself. If the speaker or any other member might convene it, it would have no power to protect itself; it might be convened at one place or another; it would be a scene of anarchy. He held, however, that the assembly had been regularly convened and could lawfully impeach. While the constitution declared that no subject should be acted upon at an extraordinary session save such as the governor might recommend for consideration, that provision related to the legislative power of the houses, not to the impeaching power of the assembly.

The view of ex-Judge Parker, which was that of Mr. Justice Hasbrouck also, seems more convincing. It places no limitations upon the impeaching power not expressly contained in the constitution itself. The dangers conjured by the chief judge appear to be groundless. Each house determines its own rules and is sole judge of the election, returns and qualifications of its own members. It may choose its own officers. These powers are ample to enable the assembly to meet at any time as an impeaching body.

The preliminary objections having been overruled, it was then objected that articles of impeachment 1, 2, 6 related to acts alleged to have been done by the respondent

before his accession to the governorship, and that he could be impeached only for misconduct in office. Upon both sides the arguments were able and disclose great research. Following the practice in civil trials, the chief judge proposed to overrule the objection in the first instance and hear the proofs, reserving decision until the close of the evidence. His suggestion was approved by the court, testimony was offered by the managers and the defense, and the case exhaustively and eloquently summed up. The decision of the court, 39 to 18, was that Sulzer was guilty upon articles 1 and 2—relating to misconduct prior to his accession to office. By a vote of 43 to 14 he was held guilty upon the fourth article, charging mal and corrupt conduct in office in practicing deceit and fraud and using threats and menaces to prevent witnesses from attending before the legislative committee appointed to investigate the subject of contributions by candidates at the last prior election. Upon charges 3, 5, 6, 7, he was held not guilty; and by a vote of 43 to 12 he was held guilty of the charge (No. 8) that he had corruptly used his authority or influence as governor to affect the current prices on the Stock Exchange of securities owned by him.

As to the governor's liability to impeachment for antecedent misconduct there was the sharpest difference of view. Five judges of the court of appeals—Collins, Cuddeback, Hiscock, Hogan and Miller—coinciding with a majority of the senators, held that prior misconduct constituted an impeachable offense; while the minority (Bartlett, Chase, Cullen and Werner) held that it did not. Judge Bartlett's opinion admirably summarizes the views of the minority. Prior to 1846 an officer could be impeached only for misconduct in office. In that year the constitution was changed and made more general by the omission of grounds of impeachment. What was the purpose of this alteration in the fundamental law? Was it tantamount to a declaration that the common law of England regarding impeach-

ments should be the law of the State, or was it a recognition of the provisions then in the Revised Statutes limiting impeachable acts to misconduct in office? That he held to be the correct view. There was no instance on record in this country where an officer had been removed from his office by impeachment for acts done when not in office. Nor could he believe that it was intended by the framers of the constitution of 1846 "to leave the definition of impeachable offenses wholly to the arbitrary discretion of the assembly or of the court for the trial of impeachments—in other words, that the assembly possesses an unlimited power of impeachment for any cause it sees fit, while the court of impeachment may likewise convict and remove for any such cause." For support of this view we must go back more than five hundred years in the history of English jurisprudence. It was inconceivable that our constitution-makers intended to restore in this State a theory of impeachment abolished by statute in England five hundred years ago.

Judge Chase, concurring with Judge Bartlett, said: "If the people hereafter want to give to the assembly power to impeach an officer of the State for any immoral or criminal act committed before his term of office has commenced, they can do it, as they can in all cases when changes are desired in our organic law, by amending its provisions in the manner therein provided."

At somewhat more length Chief Judge Cullen enunciated similar views. "In this State," said he, "the trial of an impeachment is a judicial proceeding, the determination of which must accord with the law." Acts of a public officer committed before he became an officer of the State were not subject to impeachment. "Never before the present case has it been attempted to impeach a public officer for acts committed while he was not an officer of the State." In January, 1849, less than two years after the adoption of a new constitution, the legislature recommended

the Code of Criminal Procedure, which was not enacted, however, until 1881. The Code limited impeachment to cases of "wilful and corrupt misconduct in office." This was law when the constitutional convention of 1894 met and the convention attempted no change. Its theory evidently was that "the existing regulation had properly construed and given effect to the constitutional intention, for constitutions are assumed to be made with recognition of existing statute law."

Mr. Justice Miller cogently presented the obverse view. The change in the constitution in 1846 was "deliberate, not accidental." [4] It was intended to "confer the power to impeach upon the assembly and the power to try upon the court for the trial of impeachments, without restriction or limitation."

The question then arose whether Sulzer should "be disqualified to hold any office of honor or trust or profit under this State." Upon this there were fifty-six noes, the president having been excused from voting. On October 17, 1913, judgment was rendered removing Sulzer from the office of governor.

It will be the business of the forthcoming convention to decide whether the ambiguities of the constitution shall be continued. Is the power of impeachment, if it is to remain in the assembly, to be capable of exercise by it at any time? Shall any judge or senator, however clear his disqualifications to the moral sense of mankind, be permitted to sit in judgment, and must the plea prevail that his associates have no power to remove him from the court? Should a public officer be impeached for acts committed when he was not an officer of the State? Does it rest with the court for the trial of an impeachment to say what are impeachable acts?

[4] No proof of this can be found in the convention's records. (See "Inherent Limitations upon Impeachment," by the author, Yale Law Journal, Nov., 1913.)

Such a court would possess a discretionary power of removal of all officers including elective officers. It would be absolute judge of the extent of its own jurisdiction. As was well said by one of the counsel in the Barnard impeachment trial, it would be "left entirely to the spontaneous guidance of its convictions at the time it is called upon to act." A court invested with plenary authority to determine whether the officer impeached is "fit to continue in office" —for such would be its power—could not only nullify the results of an election, but remove at will. It will be for the coming convention to say whether limitations upon impeachment do not in reality inhere in the framework of government. The constitution has not created a body with imperial powers.

The constitution provides (Art. XIV, sec. 2) that at the general election to be held in the year 1916, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question " 'shall there be a convention to revise the Constitution and amend the same?' shall be decided by the electors of the State." Although the twenty year period had not expired the legislature in December, 1913, invoking the provision which allowed it to submit the question at such other times as it might prescribe, passed a statute (Chapter 819, Laws of 1913) providing for a special election throughout the State on the first Tuesday in April in the year 1914 at which the question whether there should be called a convention should be submitted to the electors of the State for decision. The statute provided that every person might vote upon the question who at that time would be qualified to vote for members of the legislature. The question was to be submitted in the manner provided by law for the submission of constitutional amendments. If as determined by the returns of county boards of canvassers to the State board of canvassers and by its canvass of such returns a majority

of the electors voting upon the question were found to have voted affirmatively, the convention should be deemed duly called and delegates thereto should be elected, in the manner provided in the constitution.

The total vote in favor of calling the convention was found by the returns to be 153,322, the vote against calling it 151,969—a slight plurality of 1,353. The total vote in 1912 for all candidates for governor was 1,611,672. The vote at the special election emphasizes the need of some constitutional provision forbidding the calling of a convention or the ratification of an amendment by petty minorities. The contrast between the relatively small vote in April, 1914, and the percentage of voters voting for or against a convention in preceding years was marked.

In the summer of 1914 a taxpayer brought suit to restrain the various election officials of the State from taking any of the steps preliminary to the nomination or election of delegates to a constitutional convention. The complaint charged the commission of gross frauds in certain election districts in the twelfth and in the fourteenth assembly districts in the city of New York, which, as the special term justice declared in an opinion upholding the right of the taxpayer to sue, "were so widespread as utterly to destroy the probative value of the returns made by the election officials of these districts," and these returns, he ruled, should be disregarded from the statement of the vote throughout the State at large. But at the argument there had been submitted indisputable evidence of a mathematical error in the summation of the votes from a district in Kings County. One thousand votes in favor of the convention were thus added. This destroyed the *prima facie* case for an injunction which arose because of the invalid returns in the twelfth and fourteenth districts, and on this account the court denied the motion for an injunction. The complaint had alleged also that the act under which the special election was held was invalid because no provision had

been made for a ten day prior registration of voters thereat, as required by the constitution in the case of each and every election. The special term justice held that there was a sufficient compliance with the constitution, although the registration had not been completed fully two hundred and forty hours before the opening of the polls on April 7.

At the appellate division, where the absence of registration was made the main cause of attack, several opinions were delivered, the court by a vote of four to one upholding the decision below. Apparently impressed with the fact that fully two hundred and forty hours had not intervened between the closing of the registration and the opening of the polls, two of the justices held that what took place at the so-called special election was not an election, for no officers were voted for, but that it was a submission, as provided for in the constitution itself. And they held that a submission was not an election within the meaning of Article II of the constitution requiring registration of voters before election. The court of appeals [5] by unanimous vote dismissed the action on the ground that there was no inherent power in a court of equity to set aside a statute as unconstitutional except in a controversy between litigants where it is sought to enforce rights, or to enjoin, redress or punish wrongs affecting individual life, liberty or property. "The rights to be affected," said the court, "must be personal as distinguished from the rights in common with the great body of the people. Jurisdiction has never been directly conferred upon the courts to supervise the acts of other departments of government. The jurisdiction to declare an act of the legislature unconstitutional arises because it is the province and duty of the judicial department of government to declare the law in the determination of the individual rights of the parties." The assumption of jurisdiction in any other case would, the court continued,

[5] Schieffelin *v.* Komfort, 212 N. Y., 520, 530, 531, 532.

be an interference by one department of government with another department of government when each is equally independent within the powers conferred upon it by the constitution itself. To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of other departments of government or of the courts of common law. And the court concluded that "the clear weight of authority in this State is against the alleged power and authority of the courts to pass upon the constitutionality of a statute except in an action or proceeding in behalf of a person whose special, peculiar personal rights are affected thereby."

By this decision, which wisely recognizes the just boundaries of the judicial power, the holding of the convention became a certainty. At the general election of 1914 the voters of the State chose fifteen delegates at large and one hundred and fifty-three district delegates. All the delegates at large belong to the Republican party. With the exception of three from Buffalo, all the up-State delegates are Republicans. Only four of the delegates had sat in the convention of 1894—these four were Senator Root, Mr. Louis Marshall, Mr. Delancey Nicoll, all of New York City, and Mr. Charles S. Mereness of Lowville.

In his opening address in the convention of 1894 Mr. Choate reminded the delegates that they had met not as partisans but as citizens and servants of the people, who would not be actuated by any partisan spirit whatever. The delegates to the convention of 1915 will assemble with general public confidence that, forgetful of party, they will coöperate to revise the constitution in the interests of all the people of the State. There has been little, if any, abuse of partisan opportunity in any constitutional convention assembled in its past. The questions which engage attention transcend ordinary politics and are usually approached in something of the spirit of statesmanship.

CHAPTER XX

BRIEF SUMMARY OF CONSTITUTIONAL CHANGES SINCE ORGANIZATION OF STATE—CHECKS UPON LEGISLATIVE ACTION IMPLY NO DISTRUST OF DEMOCRACY—INITIATIVE, REFERENDUM, RECALL; EXTENT OF THEIR EMPLOYMENT IN NEW YORK—NO REAL DANGER OF ENCROACHMENT BY THE NATION UPON THE PROVINCE OF THE STATE—GREATNESS OF THE STATE DEPENDS UPON ITS OWN PEOPLE—UNIVERSAL SUFFRAGE—ITS VALUE IN THE HISTORY OF STATE AND NATION—ASSURED FUTURE OF DEMOCRACY—CONCLUSION.

Almost a complete constitution was established during colonial days. With a clause to indicate change of allegiance, and a few other modifications, the charter of the colony might, as actually happened in the case of Connecticut, have become the first constitution of the State. A generally aristocratic government by a few wealthy families has since been transformed into a representative democracy with manhood suffrage. The three coördinate branches of sovereignty have gradually gained in sharpness of outline notwithstanding that at times one or another has seemed to be dominating.[1] To distrust of the executive has succeeded

[1] In this respect the history of the state is similar to that of the nation. Webster denounced what he styled executive usurpation on Jackson's part; in the reconstruction period Congress seemed to absorb an undue fraction of governmental power; today the complaint with some is that the executive assumes too great authority; with others that the courts overshadow the legislature and have really become an additional legislative body with a veto upon much legislation.

almost undemocratic reliance upon it. To an era when the policy of internal improvements had unbroken sway succeeded a time of jealousy of State enterprise and strict resolve to limit State indebtedness. The State in recent years has embarked upon gigantic expenditures involving it in a debt that may easily reach to a quarter of a billion dollars. The debt has compelled reimposition of the direct tax. In less than a score of years the annual expenses of State government have been trebled. Can it be said that in this interval life, liberty or property has been rendered any more safe or that any glorious governmental gains have been made of which the people of twenty years ago had no conception? The additional expenses cannot be laid exclusively to account of canals and highways, for the annual interest and amortization charges explain only a part of the added cost of government. Taking these into consideration it has been doubled.[2] Government by commissions has become fashionable, and State surveillance over all forms of activity has been greatly increased within a few years. Some of this is inevitable unless the artificial creatures of the State are to constitute a despotism superior to the State and its people. There is, however, much yet to be learned regarding the differentiation of governmental functions. There never was a time when the nature of government, the proper distribution of its powers, and the adjustment of checks and balances needed better to be understood.

In essentials the constitution has undergone slight change save in widening the electoral franchise, curbing legislative power and providing for city government. The legislature remains bicameral, and the courts exercise their

[2] If the system by which taxes are raised is wise, the expense of collection is proportionately excessive to the amounts raised. Last year the State collected from its automobile tax $1,500,000. The cost of collection was more than one-fourth. The total expenses of government last year exceeded $50,000,000. The cost of the State asylum system is one-seventh of the whole amount. The number of State commissions is legion.

old functions, except that law and equity are administered in one set of tribunals. The term of the assembly is still one year, and of the senate two years; the governor's tenure, originally fixed at three years, was, because of the extension of his powers, reduced to two in 1822; it was raised to three in 1875, and reduced to two again in 1895. The popular election idea reached its climax a half century ago; today the feeling is that frequent elections and numerous officeholders are likely to prejudice rather than advance representative government. For almost seventy years judges of the higher courts have not been appointed, nor do they hold during good behavior. From an elective system with short terms of eight years for the superior judges—the outcome of the popular fervor of 1846—the oscillation has been towards life tenure, though the movement stopped with a term of fourteen years.

Although the appointment of judges is commonly deemed the wisest method of selecting them and has stood the test of time and experience, it is doubtful whether it can be re-established in this State. The people are reluctant to surrender power once conferred. As Chancellor Kent said in the constitutional convention of 1821, there is no retrograde march in the rear of democracy. Benjamin Disraeli brilliantly phrased the same thought when he declared that democracy is like the grave; it takes, but never gives. Yet there are times when the people perform acts of renunciation. They need only to be educated to understand when concession should be made. The lengthening of short terms is a surrender of popular power. So is the shortening of the ballot. In 1849 New York City elected all its department heads, but had the wisdom later to recede from this extreme use of the vote. There are many evidences that the people of this State realize that judges have been appointed all along, but by bosses and influences adverse to the people. They have begun to perceive that in their own interests the power of appointment should be

given to some recognized political authority—the governor, for example—whom they may hold responsible for his acts. The power of removal should never degenerate into a recall, but it should be a real and effective means for getting rid of incompetent as well as venal judges. Every judge ought to discharge his functions in wholesome dread of impeachment or removal. The instinct of the American people is sound; it does not admit that any public servant should be above criticism. High character, great attainments, and exalted standards of life ought to be insisted upon in the judiciary. If the bar were a more courageous body, these great ends would readily be attained.

The organic law has reached the limit of mobility consistent with wisdom. The danger is lest the process of amendment be too readily invocable. In some States this is partially overcome by provisions requiring a two-thirds or three-fourths vote in two legislatures before the submission of amendments to the people. The necessity for adequate popular vote as a basis of organic changes is coming more and more to be recognized. It is a mistake to permit a minority of all the voters, although it be a majority of those voting upon a proposal, to possess power to alter the fundamental law.

It is sometimes argued that the checks upon legislation, the adoption of which has practically coincided with the advent of manhood suffrage, imply distrust of popular government. Such was the assertion of Governor John Young in his message to the legislature in 1847 in criticising the constitution of that year. It placed "novel restraints upon the legislature and denied the people the right to vote a single dollar unless by the statute which proposed the expenditure a tax was imposed to pay principal and interest." Was there anything in the history of the State, he inquired, which "should beget this want of reliance in the wisdom and stability of the people"?

Far from signifying the failure of democracy, such

checks indicate a developing sense of the need of limiting ordinary legislative activity. It is not wise to confide to an agent more power than is needed for the office and the time. Assuming, for example, as an abstract proposition, the competence of any legislature to grant perpetual franchises, the wisdom of conferring this measureless power upon men elected for one or two years, thus enabling them for any motive to subject the people for all time to some particular interest, may well be doubted. There have always been checks in constitutions. A second house with a constituency different from the more popular chamber is a check upon legislation; the requirement of a majority or two-thirds vote to pass a bill over the governor's veto constitutes another check upon it. Experience teaches the wisdom of creating agents with special and definite, rather than general and indefinite, powers. Unable to manage their public business directly, the people prefer to delegate as little authority as possible, and to put checks upon one class of agents by the creation of another, as the best means of eliminating abuses or reducing them to a minimum. Thus the ability of local government to incur debt has very properly been curbed and appropriation of public funds for private enterprises wisely interdicted. The constitution restricts the executive and the courts, yet no one has suggested that this implies suspicion of democracy; why, therefore, should limitations upon the legislative branch be deemed proof of its failure? Far from denoting failure of popular government, all such limitations mark a higher political evolution.

The initiative, the referendum and recall have become very popular in some western States. The initiative furnishes voters opportunity to compel action by a legislative body upon a proposed law of their own preparation. The referendum allows them to decide whether a law shall go into effect. The recall enables them to end the term of an elected public officer before its statutory limit in case his

official conduct does not square with his pre-election promises or otherwise fails to meet their approval. It may be well to consider to what extent the principle underlying these is employed in this State, and whether a broader use would be wise.

In New York State the referendum is employed whenever the people vote whether a convention to amend or revise the constitution shall be summoned or register their verdict upon its work. They may revise the constitution by electing two altogether independent legislatures to carry out their wishes and by ratifying its proposed amendments. Frequently they have been asked to approve at the polls a certain policy before it should go into effect. To submit legislation often to popular vote would conflict with the basic idea of representative government. In theory public officers are chosen to enforce a definite legislative or administrative policy. The success of representative democracy rests with the Demos itself. It is the fault of voters if they do not elect good representatives. They should endure the evils of mis-government, until they learn to do their duty at the polls. There must be the expert in the political as in every other field. The business of making laws is the business of experts trained by long and laborious study. Voters should fix policies, but their experts must be trusted to embody these in appropriate legislation.

Every tenure shorter than that of good behavior involves a species of recall. Short terms have been found to operate prejudicially to the public interest, and they have gradually been lengthened, thus proving that one form of the recall may be unwise. What citizenship needs is the faculty of making rational choice of its agents at the outset. The device of the recall is the shift of inefficiency that hopes to repair its initial errors by reserving the power to end the service of the agent at will. This would involve no education in the art of making better selections; there would be danger that even poorer agents would be chosen because of

the facility with which they could be deposed. The best officials might easily be made victims of the system. Use of the recall could work positive mischief of the worst kind in the removal of judges.

A form of initiative prevails under the existing government, but as a rule we legislate too easily under the pressure of popular excitement. With wide enjoyment of the suffrage the people may initiate whatever legislation they will. A higher grade of legislators might be had if terms were longer; and while no one would revive the old council of revision, there might well be a council to bring bills into harmony with the whole content of legislation. Adoption of something analogous to the English private bill system would tend to obviate many evils.

Fear is often expressed that the general government by undue centralization is usurping State functions. The extent of this danger, if in fact there be any, may easily be determined. Upon six different occasions during the course of one hundred and eighteen years, this State through delegates assembled in convention has made and revised its constitution. In changing its organic law it has acted independently of sister States, and of the general government. No provision of its constitution bears marks of extrinsic dictation; no clause has been inserted because of Federal coercion. With few exceptions the State enjoys all elements of sovereignty. It may not declare war, nor maintain ambassadors or consuls in foreign capitals; nor conclude a treaty of peace or an alliance with any foreign power. It has, however, its own militia, which may be summoned to quell disorder; it creates its own government, and may make any constitution whatsoever, provided that the constitution be republican in form.

No one can study the constitution and laws of the State without perceiving the almost illimitable sphere of State activities. The danger is, not that the State cannot do enough, but that it may attempt too much, thus transcending

the limits of government. As Professor Jameson has acutely observed, nearly all the important questions which have agitated England during the last century would, had they arisen in America, have fallen within the domain of State legislation. The fear, old as the Union, that the central power may usurp State functions is unfounded. The lines of State and Federal action are substantially unaltered; even the Civil War never seriously threatened the equilibrium. By the national constitution interstate and foreign commerce are placed in control of Congress, but the marvelous development of commerce and the implications within the grant of power to Congress could not have been foreseen by the framers of that instrument. Nor, on the other hand, could the early patriots have dreamed of the limitless field of State activities. The modern functions of city government alone cover a range of business hard to conceive in its totality and the sphere of city activities keeps steadily enlarging. The city and the State are more likely than the nation to threaten individualism or absorb the enterprises of society.

The chief menace to the State might seem to come from the Federal judiciary. This is more fancied than real. Federal judges not only habitually regard constitutional boundaries in their decisions, but are themselves citizens of the respective States. No State could be oppressed by Congress without the consent of other States. Congress can enact no law infringing State rights without the consent of the States themselves, for it consists of representatives from States. The danger of encroachment is minimized because the people of the States, mediately or immediately, elect the president and the members of both houses of Congress, and appointments of Federal judges may be said to emanate from them. Were the sources of Federal authority foreign or extrinsic, dangerous consequences might be feared, but no outside potentate or sovereignty imposes, enforces or interprets Federal powers. Federal officeholders

come from, and upon retirement return to, the citizenship of the States; in fact, during all their official life they remain citizens of their respective commonwealths. There is no analogy to the prefecture or proconsulate in the relation of the States to the Federal government, and the power of amending the national constitution rests exclusively with the States themselves and the people. The government consists still, as ever, of an indissoluble union of indestructible States. As has eloquently been said by a great historian, the nation, like Milton's angels, "vital in every part, cannot but by annihilating die." [3]

It is for the men of today to give such interpretation to the idea of the State that it shall retain its rightful domain in the field of public life. The mental vision which perceives the almost illimitable horizon of the State has neither jealousy nor fear of national power. Let the citizenship of the State set exalted standards for public servants, State and local; send to the national senate and house neither placemen "all servility and smiles," nor tools of special interests, but representatives of that genuine manhood which still persists if there be any virtue in the commonwealth, and there will be no occasion to fear central usurpation. If the State is ever undermined it will be the fault of its own citizenship. Had membership in important State and local boards, which in the past has too often been determined by petty politics, been decided by large considerations of public interest, history would have been revolutionized. Vast opportunities for distinguished service have been open, but often have been abused. In the laws and constitutions of the State, future historians will find proof that official corruption, betrayal of public trusts, exploitation of the people, are almost inveterate vices, and, paraphrasing the language of Jugurtha, may be tempted to exclaim that everything was venal in New York. We need a

[3] "The Nation," by Alexander Johnston, 2 Lalor's Cyclopædia, 936.

quickened conscience in the selection of officials. They especially need it in the discharge of their duties. With the ancient Romans patriotism was a religion; it ought to be so with us. There is hardly a baser form of turpitude than pillage of the public treasury committed or weakly allowed by an official whom a confiding public has honored with place. Yet looting occurs under Protean forms. It is a species of treason against the State and public opinion may some day demand that it be treated as such.

To emphasize the importance of the State is not scholastic in an age when a new nationalism is inculcated. The State is the home of the individual. Its institutions, laws and customs environ his life and may surround him with an atmosphere of opportunity or discourage all aspiration. It is the originator and controller of the innumerable corporate phases of modern business, so far as business is transacted within the State. It must devise and enforce rules to prevent these artificial creatures from dominating society with an imperial sway hardly enjoyed by past kings and rulers, and from rearing a genuine economic servitude upon conventional political freedom. It must restrain these vast and generally beneficent aggregations from becoming possible enemies or masters of the people. It must revise and re-examine the whole law in relation to grants of privileges and the people must understand, as Burke declared, that there is a public as well as a private aspect to every franchise. The primary, even the sole, object of the State in the creation of a franchise is the promotion, not of the interests of individuals, but of the general public welfare. In the last analysis the power of government to grant special privileges springs not from any right to confer a benefit upon individuals, for it has no such right, but from expectation of advantage to the community. The State has nothing to fear from the nation if it perform its full duty as a distinct governmental entity. The danger of absolutism is chimerical. There is no soil here for the growth

of a Cæsar or a Napoleon. Far more imminent and far more insidious is the peril from accumulated wealth, especially wealth fostered and increased by government favoritism, the peril from widespread corruption, from debasement of the electorate by unrestricted immigration, from the gross materialism and low moral standards of the age, and the effect of irreligion upon natures deficient if not altogether lacking in ethical quality. There is an incalculable menace in the widespread disrespect for law; in fact by this disrespect wealth has too often been attained.

Nothing is clearer than that the future of the State is in the keeping of all its people, and not of a class. That was settled when the States adopted manhood suffrage early in the last century. Their wisdom could readily be justified by *a priori* reasoning; it has abundantly been vindicated by intermediate history. Without manhood suffrage this State would not have attained its acknowledged primacy; without manhood suffrage the nation would have been stunted in its growth; without it slavery extension could not have been arrested. Without it there would have been no logical substructure for Lincoln's appeals to his audiences in the debates with Douglas. His arguments were based upon the proposition that no man has a right to say to another, white or colored, "you earn the bread, but I shall eat it." As Mill has well said, "human beings are only secure from evil at the hands of others in proportion as they have the power of being, and are, *self-protecting*," and this they could not be without the suffrage. Nor would the successful conduct of the Civil War have been possible upon any narrow electoral basis. With the enormous growth of private fortunes in recent years and the creation of vast if not sinister aggregations of capital, manhood suffrage might perhaps not have come at all, or might have been long deferred, had its adoption been postponed. Voting power would, perhaps, have been firmly concentrated in few hands; its holders might have stubbornly resisted any interference with their

privilege of exploiting masses of men for their own benefit. The point to be emphasized is that democracy has the future in its own keeping; what the people desire they will surely obtain. They make and they may unmake constitutions and substitute other instrumentalities of government. Their power is too titanic long to withstand opposition. The great, the abiding need in the interest of genuine progress is that this invincible power shall not be misused.

Fears of the rise of a plutocratic class are frequently expressed; nevertheless, there are cogent reasons for believing that a wealth caste will never flourish in this republic, although at times the belief wavers as a servile and cynical press and almost all grades of officialdom are seen to prostitute themselves before the money power—the only power, as Hudibras says, "that all the world bows down before; money, that like the sword of kings is the last reason of all things." The chief antidote is the organized public opinion, auspiciously on the increase and co-extensive with the republic, that exalts character, intelligence, disinterested public service, nobility of aim and purpose above mere financial acquisition,—an opinion growing vastly more formidable as fortunes accumulate. Democracy has in fact less to fear from plutocracy than from itself,—its own unwisdom, its own low standards, even its own virtuous impatience with evils the extirpation of which requires the exercise of sanity and trained intelligence. There are moods in which one almost despairs of democracy. It seems a dead level of commonplaces; its vulgar contests are uninspiring; its judgment is undiscriminating. It lives in an atmosphere of bustle and hurry; it lacks poise; its manners are plebeian; it can scarcely distinguish a patriot from a demagogue, a Cæsar from a Clodius; it bows down before false gods, and worships false creeds. These are only moods, for the lesson, repeatedly enforced, is that the people may be trusted.

A cardinal error of democracy is its tendency to seek

an instant cure for an ill, sacrificing the ultimate to the immediate good, its action militating against true progress. There is the same recuperative energy in the social as in the physical life of man. Evils tend to disappear or cure themselves, but democracy is restless and unthinking. It needs that proud and unconquerable patience which has somewhere been said to be beloved by the gods. In reckless pursuit of specific remedies, worse ills are often fostered. Government is thus made to consist of a series of reactions.

In a commonwealth of manhood suffrage needed reforms can never long be resisted. Let us first be sure that our remedies are reforms. To the toiling masses life is narrow and in emotional moments they sometimes seem victims rather than beneficiaries of industrial progress. Freedom of contract on the part of the employed often seems the ironic freedom to accept from an employer the terms of a slave. Sympathy resents intolerable evils and injustices long before reason discovers the cure. If, for example, constitutional obstacles apparently blocked the passage of laws to indemnify labor from the almost inevitable casualties of employment, such laws were bound to come; the check could be temporary only. Legislation in the interest of humanity cannot long be resisted, for constitutions will yield sooner than human sentiments.

The constitution assumed substantially its present character under the impulse of the democratic movement culminating in this State in the convention of 1821. The modern industrial State had then hardly begun its life. The steamship was in its infancy, the railroad unknown, the telegraph, the ocean cable, the telephone, the phonograph, the wireless current unimagined. Photography had not been invented; modern chemistry was almost undiscovered. The boundaries of the solar system have since immeasurably widened; Uranus was then the most distant planet of the sisterhood, for not until 1846 did the com-

bined genius of Adams and of Leverrier extend the sun's family to Neptune. The spectroscope, the latest revolutionizer of stellar science, had not been invented. The immense industrial advancement witnessed during the last generation could not have been dreamed of. A tremendous impetus has been given to thought by the scientific, industrial and social evolution of the last sixty or seventy years. It has involved and will continue to involve reconsideration of accepted creeds and ideas. No doctrine based upon traditions however long continued or valued will be safe from mordant analysis. It would be strange indeed if in the general intellectual uprising old theories of political economy and assumed axioms of jurisprudence should escape rough handling. The false and the mistaken will disappear, the true will emerge the stronger from the ordeal.

The questions of the future will probably be economic, rather than political. For their solution the best and most disciplined mental power will be requisite. In meeting new problems study of our constitutional history should be an efficient aid. The crises of the past have been successfully confronted. The crises of the future may be faced with confidence by a genuine democracy with belief in itself and its institutions.

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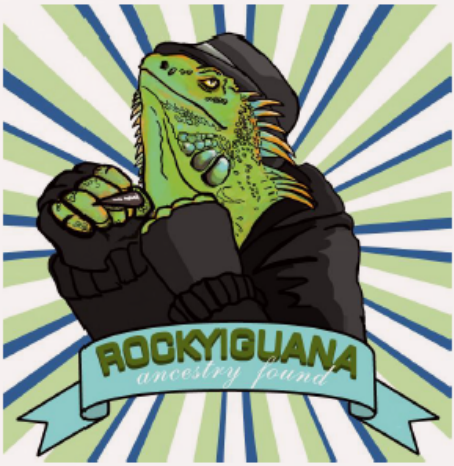

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