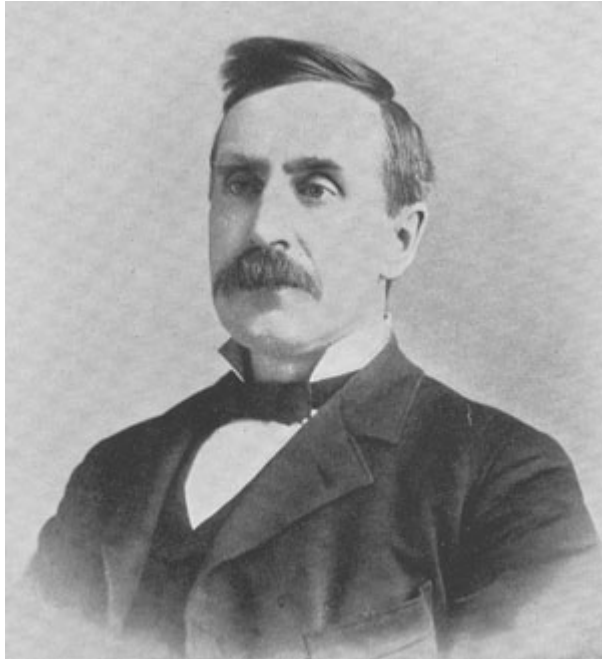


The Constitutional History of New York

Charles Z. Lincoln's five-volume **The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905, Showing the Origin, Development, and Judicial Construction of the Constitution** remains the authoritative history of the evolution of the State Constitution through the 19th century and the forces that shaped the principles it has embraced.

The Historical Society of the Courts of the State of New York has excerpted a number of passages from this compilation which are of particular relevance to the history of the State Courts:

- A profile of the author
- The Colonial Judiciary
- The New York Judiciary, 1777-1845
- The Judiciary Article Under the Third Constitution (1846)
- The First Constitution, 1777
- Amendments to the First Constitution - The Convention of 1801
- Woman Suffrage
- Woman Suffrage Addendum



[photograph and biographical information courtesy of the Convention Manual of the Sixth New York State Constitutional Convention (1894)]

CHARLES Z. LINCOLN

Charles Z. Lincoln was born August 5, 1848, at Grafton, Vermont. An orphan at eight years of age, he resided during his childhood years with various relatives. He was educated in public schools and at Chamberlain Institute, in Randolph, New York. Mr. Lincoln taught school in Cattaraugus and Chautauqua Counties until 1871, when he began the study of law with Joseph R. Jewell, at Little Valley, New York, and with Charles S. Cary, at Olean, New York. He was admitted to the bar in 1874 and thereafter engaged in private practice. He has been President and Attorney of Little Valley, a member of the Board of Education, a State Senator and a Delegate to the New York Constitutional Convention of 1894.

His five-volume work, **The Constitutional History of New York State from the Beginning of the Colonial Period to the Year 1905**, is considered to be the definitive study of the growth of the New York Constitution.

Excerpts from **The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905, Showing the Origin, Development, and Judicial Construction of the Constitution** by Charles Z. Lincoln (Lawyers Co-operative Publishing Company, 1906).

THE COLONIAL JUDICIARY.

It has been said that the judicial system of the state of New York is a growth of the soil. It has been developed from small beginnings, and has a mixed Dutch and English origin. The system, which is the pride of the Empire state to-day, is the result of many struggles, much halting and uncertainty, and numerous compromises. The judicial system of any commonwealth is an index of its character, customs, and civilization. The rude judicial tribunals of the early colonial period were copied from those of European countries, with the modifications required by pioneer conditions and the necessary simplicity of provincial life. The development of those tribunals is an interesting study; and it will be profitable to trace briefly the growth of our judicial system from the earliest Dutch occupation of Manhattan Island * * *

The colony of New Netherland was planted by the great West India Company, a commercial corporation of Holland. "It was exclusively intrusted with the administration of justice in the colonies it should establish, having the right to appoint officers of justice, to maintain order and police, and generally, in the language of the charter, to do all that the service of those countries might require." From the discovery of Manhattan Island by Captain Henry Hudson, in 1609, to 1623 no regular attempt had been made to establish a colony; but in the latter year the colony of New Netherland was formally organized, and a settlement was established at Manhattan, the present site of the city of New York. Whether under the administration of May, the first director, or that of his successor, Verhulst, any provision was made for judicial tribunals cannot now be determined. The number of the colonists was so small, and they were so fully occupied in providing for their immediate wants, that there could be little, if any, occasion for organizing courts.

Minuit came out as Governor in 1626, and "he had, to assist him, a council of five, who, with himself, were invested with all legislative and judicial powers, subject to the supervision and appellate jurisdiction of the Chamber at Amsterdam." There was also attached to the body an officer well known in Holland by the name of the "schout-fiscal." "He was a kind of an attorney general, uniting with the power of a prosecuting officer the executive duties of a sheriff." The administration of justice was left to this body-the governor, the council, and the schout-fiscal-during the six years of Minuit's incumbency and the four of his successor, Van Twiller, -that is, from 1626 to 1637. In what manner judicial proceedings were conducted is unknown. Records were kept under Van Twiller, but they are utterly lost.

William Kieft came out as governor in 1638, and he misgoverned the colony for nine years, ruling with a high hand, and retaining in his own hands the sole administration of justice. He was obliged to have a council, but he reduced it to one member, reserving two votes to himself. The administration of Kieft was so oppressive and tyrannical that he was constantly in trouble with his people, who demanded the establishment of the courts to which they had been accustomed in Holland. This agitation finally resulted in Kieft's recall. He was succeeded in 1647 by Peter Stuyvesant, who immediately established a court of justice with power to decide "all causes whatsoever," subject to appeal to the governor in certain cases.

The desire for popular government had manifested itself very strongly during Kieft's administration; and soon after Stuyvesant's arrival he found the sentiment so vigorous that he was obliged to make some concessions. He provided for the tribunal of the Nine Men to which I have already referred. "These Nine Men were to hold courts of arbitration weekly, and were to give advice to the Director and council in all matters submitted to them." As already stated, "three were taken from the merchants, three from the burghers, and three from the farmers. Thus was preserved and continued the system of municipal organization in the Netherlands." Three of their number attended in rotation upon every court day, to whom civil causes were referred as arbitrators. But there was constant collision between the Governor and the people. His government became insufferably oppressive. The colonists appealed to the home company, and after five years of struggle succeeded in procuring an order for the establishment in the colony of a municipal court of justice, to be composed of one schout, two burgomasters, and five schepens. A burgomaster was a kind of mayor; a schepen was an officer resembling an alderman; and a schout combined the functions of a sheriff and a district attorney. "On the 2d of February, 1653, Governor Stuyvesant issued a proclamation appointing, as burgomasters Arent Van Hatten and Martin Krieger, and as schepens Paulus L. Van der Grist, Maximilian Van Ghèel, Allard Anthony, Peter W. Cowenhoven, and William Beekman; Cornelius Van Tienhoven was schout, and Jacob Kip was clerk." The magistrates met on the 7th and gave notice that the court would meet at the City Hall "every Monday morning at 9 o'clock" for hearing and determining all disputes between parties as far as practicable. The City Hall not being in readiness on the following Monday, the next meeting took place four days afterwards at the fort: when the court was organized for the despatch of business, and the proceedings were opened with prayer. This court was called the "Worshipful Court of the Schout, Burgomasters, and Schepens." Stuyvesant did not like the court. He and the members of it were frequently in collision, and he sometimes contemptuously referred to it as "the little bench of justice;" but it seems to be well established that "the court was composed, in the main, of magistrates who were men of intelligence, independence, and high moral character, evincing an unswerving adherence to established rules and customs, sterling good sense, and a strong love of justice." The procedure in this court was

simple and summary, and strongly resembles, in many respects, the procedure established for the Roman people by the law of the Twelve Tables. The court exercised unlimited civil and criminal jurisdiction, except the infliction of punishment in capital cases. When judgment was given against a defendant for a sum of money, time was given for payment, -usually fourteen days for the discharge of one half, and the remainder in a month. If he did not pay within the time fixed, proceedings were taken to levy on his goods, which were taken by the officer and detained six days subject to redemption; at the end of that time, if not redeemed, the property was sold at auction in a very peculiar manner. "The officer lighted a candle and the bidding went on while it was burning, and he who had offered the most at the extinction of the candle was declared the purchaser."

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The court did a general business, and was also a court of admiralty and court of probate in taking proof of last wills and testaments and in appointing curators to take charge of the estates of widows and orphans. Some of its proceedings in the exercise of this branch of its jurisdiction will serve to illustrate how tenaciously the Dutch clung to old forms or legal ceremonies; as, when a widow, to relieve herself from certain obligations, desired to renounce her husband's estate, it is, in all such cases, recorded that the intestate's estate "has been kicked away by his wife with the foot," and that she had duly "laid the key on the coffin."

It is worthy of note that the origin of a fee bill for regulating, by a fixed and positive provision of law, the costs of attorneys and other public officers is to be traced to Stuyvesant. On the 25th of January, 1658, he issued a proclamation with a preamble reciting the abuses that had arisen, by reason of the conduct of certain officers in demanding excessive fees, and fixing, with detail, the fees thereafter to be charged. "It is then provided that the officers enumerated shall serve the poor gratis for God's sake, but may take from the wealthy the fees specified."

Courts of a similar character were established in other parts of the province. From all these local courts an appeal lay to the appellate court, composed of the Governor and council at New Amsterdam. These constituted the judicial tribunals of New Netherland until the colony passed into the hands of the English, which event occurred on the 6th of September, 1664, N. S. Col. Richard Nicolls, the first English Governor, immediately changed the name of the colony and city to New York, but no change was made in the courts until a later period.

The "Duke's Laws," promulgated March 1, 1665, provided for arbitrators, a court to be held by the constable and overseers, justices of the peace, courts of sessions, courts of oyer and terminer, and a court of assizes with appellate jurisdiction. Justices of the peace were commissioned for the various towns and were clothed with all the powers exercised by such officers in England. A local court was created in each town for the trial of actions of debt or trespass under £5. Six overseers, elected by the people, with a constable, or seven without him, constituted a quorum for the transaction of business; all questions were determined by a vote of the majority, and, if the overseers were evenly divided, the constable had the casting vote. In 1666 the number of overseers was reduced to four, and any two of them, with the constable, held the court; the town clerk was clerk of the court.

The province was divided into three ridings, known as the east, west, and north riding, and in each a court of sessions was established, which was held twice a year; that is, on the first, second, and third Wednesdays in March and the corresponding Wednesdays in June. The court of sessions was held by all

the justices living in the riding. All actions at law, and all criminal cases, were tried before a jury. The jurors were drawn from the overseers, each town electing eight. "Seven jurors were impaneled for the trial of a cause, and the verdict of a majority was sufficient, except in capital cases, when the court might impanel twelve, which was uniformly done, and the twelve were required to be unanimous." This court had both civil and criminal jurisdiction. It was also a court of probate, and exercised the jurisdiction now intrusted to surrogates.

The highest tribunal in the province was the court of assize, or, as it was sometimes called, the general assizes. It was held once a year in the city of New York by the Governor and council and such of the justices of the peace as saw fit to attend it. This court had original jurisdiction, civil, criminal, and equitable, and was the appellate court from the inferior tribunals.

In June, 1665, the court of burgomasters and schepens was abolished in the city of New York and a new court organized called the mayor's court, a title by which it was known for one hundred and forty-six years. The members of the court were the mayor, alderman, and sheriff. The change was more formal than real; "it was merely altering the burgomaster into a mayor, the schepen into an alderman, and the schout into a sheriff." The records were directed to be kept in English and Dutch, and a jury of twelve was required to be impaneled for the trial of civil causes.

There was no court of chancery, but matters in equity were heard in any of the courts organized in conformity to the Duke's Laws. On the 9th of August, 1673, the city was retaken by the Dutch, who immediately undertook to re-establish the former judicial tribunals; but they held the city only a little more than a year, when the English reconquered it and terminated the Dutch dynasty. The English courts were reorganized in 1674, and continued from that time, with various modifications, until 1685, when a momentous change occurred in the system of government. Dongan was appointed Governor in 1682. Upon the advice of William Penn, James, then Duke of York, yielded to numerous requests made by men of every rank in the province, and in 1683, ordered Governor Dongan to call an assembly.

In tracing the institutions of our state, Robert Ludlow Fowler, to whom I am indebted for many facts relating to the early courts, remarks: "Our present law is the result, modified by certain accidents, of all that which has been happening among the European residents of this territory since their sojourn here. It is the result of natural development, and not the result of political miracles, and, if it is looked on in any other light, it cannot be understood * *
* The acts of the first assembly are still discernible in the law of to-day, and some of the courts created then are still tribunals in the same jurisdiction, and precedents then are recognized still."

This assembly passed an act dividing the province into twelve counties. Its seventh act was entitled "An Act to Settle Courts of Justice." By this act

four distinct tribunals were created, - "a petty court for the trial of small causes for every town; a court of sessions for each county; a court of oyer and terminer and general gaol delivery; and a court of chancery for the entire province." The court of assize was abolished. The fluctuation of the jurisdiction of courts in matters of equity cognizance will be observed when we recall the fact that the court of assize, which was the first English court of the province, possessed both law and equity jurisdiction like the present supreme court of the state. The court of oyer and terminer had both civil and criminal jurisdiction, and a term was required to be held in each county once every year.

I have already referred to the change in colonial affairs caused by the death of Charles II., the accession of the Duke of York to the throne in 1685 as James II., his abdication in 1688, and the accession of William and Mary in 1689. I have also referred to the appointment of Governor Sloughter, and the re-establishment of the Colonial Assembly, which began its first session April 9, 1691. The most important act of the assembly, for our present purpose, was the act reorganizing the judicial system of the colony. This was prepared by James Graham, the speaker of the assembly, and was introduced and passed on the 17th of April, 1691.

This act was regularly approved by the Governor and council, and became a law on the 6th of May, 1691. It appears as chapter 4, Laws of 1691, and will be found in. vol. I of the Colonial Laws of New York as published by the Statutory Revision Commission. The act provided for a court of chancery, a supreme court, a court of common pleas, courts of sessions, and justices' courts. Immediately upon the passage of this act the supreme court was organized, and Joseph Dudley was appointed chief justice, Thomas Johnson, second judge, and William Smith, Stephen Van Cortlandt, and William Pinhome, associate judges. The act was to be in force only ten years, but it was re-enacted from time to time and continued by proclamations, and was in force, with some modifications, at the time of the Revolution and the organization of the state government in 1777.

The supreme court was at first composed of five judges. From 1701 to 1758, the number was three, - a chief justice and two associate justices. In the latter year a fourth was added. It may, perhaps, indicate somewhat the growth of the state to note that there are now (1906) seventy-six justices of the supreme court, besides the court of appeals, the various city and county courts, and the inferior local tribunals in towns and villages. The judicial machinery of the state has assumed vast proportions. It is said that in 1741 the duty of revising the laws in force, with notes and references, was assigned to Daniel Horsemanden, a justice of the supreme court, but on account of his advanced age this task was not performed. This is said to have caused the adoption of the principle of limiting the office of the judges to sixty years of age to avoid the inconvenience that might result from the infirmities of advanced age. This limitation has since been extended to the last day of December next after a judge shall be seventy years of age.

The state of New York formerly had a court of exchequer, originally created by Governor Dongan in 1685, discontinued in 1691, and reorganized as a branch of the supreme court in 1786, "for the better levying and accounting of fines, forfeitures, issues, amercements, and debts due to the people of the state." The court ceased to exist January 1, 1830. There was also a court of admiralty, which was discontinued upon the adoption of the Federal Constitution in 1789.

[\[pages 458-462\]](#)

[The New York Judiciary, 1777-1845]

There seems to be no permanency in our judicial system. Its fluctuations have been very marked, both in organization and in detail. In this respect it presents a striking contrast to the other great departments into which our government is divided. There has been little change in the executive from the beginning, except an occasional modification of the term, and in relation to specific powers. The legislature gradually increased in numbers under the first Constitution. In 1801 the senate was fixed at thirty-two members, and in 1821 the assembly was fixed at one hundred and twenty-eight members, and from those dates until 1895, when the first legislature was elected under the fourth Constitution, the only changes were those incidents to reapportionment and alteration of senate and assembly districts. But the judiciary must necessarily lack the stability which characterizes the other departments, for the judiciary is the branch of government through which the rights of the people are principally asserted and enforced, and it must be sufficiently elastic to meet conditions presented by a growing population and constantly enlarging and shifting social, commercial, and political interests. So, from the beginning, our statesmen have manifested deep solicitude concerning the proper structure of the judiciary, and have devoted to this subject the most serious consideration.

I have already pointed out in the chapter on the second Constitution some of the influences-and I think they may fairly be called sinister influences-which produced the judicial system constructed by the Convention of 1821. Chancellor Kent and three justices of the supreme court were members of that Convention, and gave to it the results of an extended judicial experience; but their advice concerning the reorganization of the judiciary was not heeded. The inadequacy of the judicial system then constructed was pointed out by Governor De Witt Clinton in his annual message to the legislature in 1828, only five years after the Constitution had gone into full operation. He said its "radical defects" were seated in the Constitution, and were beyond legislative cognizance, except by proposing amendments. He said it was a "fatal error" to separate "the judges who try the fact from the tribunals that pronounce the law" by "creating circuit courts as distinct and independent forums, and not as emanations from the supreme court." He urged the legislature to "prescribe such emollients as may mitigate, if not extinguish, the evils of the system."

The subject from this point of view was not referred to again in executive messages until 1834, when Governor William L. Marcy, commenting on the judicial system, said it needed to be enlarged to meet the demands of accumulated business, and to prevent the delays which amounted to a denial of justice. At this session of the legislature an amendment was proposed, providing for two additional justices of the supreme court. Governor Marcy referred to the subject again in his annual message in 1835, and amendments

were proposed, increasing the supreme court, creating a state superior court, to consist of a chief justice and four associate justices, and creating a superior court of common pleas with jurisdiction concurrent with the supreme court. Governor Marcy renewed his suggestions in 1836, saying that "something must be done for the public relief," by an amendment to the Constitution if necessary. Amendments were proposed at this session providing for reorganizing the court of chancery with five chancellors and five chancery districts, and for two additional justices of the supreme court. Again, in 1837, Governor Marcy urged the consideration of this subject, and recommended an enlargement of the supreme court and a reorganization of the court of chancery. Amendments on these subjects were again proposed, but the legislature apparently found it inconvenient or impracticable to give the subject the attention it deserved, and, on the 15th of May, passed an act authorizing the Governor to appoint three commissioners "to digest and report to the next legislature an adequate judicial and equity system." Jacob Sutherland, Thomas J. Oakley, and Daniel Cady were appointed commissioners, and their report was submitted to the legislature by the Governor at the opening of the session in 1838. They proposed several constitutional amendments for the purpose of reorganizing the judicial system, providing, among other things, for reducing the number of senators in the court for the correction of errors by one half, making only the senators of the third and fourth classes members of this court, providing for five chancellors and five chancery districts; for two additional justices of the supreme court; giving the legislature power to increase the number of chancellors and justices of the supreme court; continuing circuit courts, but authorizing their abolition by the legislature; grouping the counties in "common pleas districts," with a presiding judge in each, to be appointed by the Governor, and providing for the appointment of a commission of three members to dispose of certain pending business in the supreme court, and a like commission for the court of chancery. The commissioners' plan was not submitted to the legislature in the form of a proposed amendment, but a modified scheme was presented, revising the judiciary article, continuing the court for the trial of impeachments and correction of errors, providing for reorganizing the court of chancery and the supreme court by the appointment of not more than six assistant chancellors and not more than six assistant associate justices, creating a supreme court of common pleas with a chief justice and four associate Justices, giving the judges of the supreme court and of the supreme court of common pleas power to hold trial terms, and abolishing the office of circuit judge.

Governor William H. Seward, in 1839, also referred to this subject in his first annual message, remarking that "every other vice of government is more endurable than delay in the administration of justice;" and that "delays of justice are not less demoralizing than injurious to commercial confidence, and destructive of enterprise." He recommended the abolition of the office of circuit judge, increasing the number of judges of the supreme court, with power to try both issues of fact and issues of law. He also recommended the

creation of a superior court of common pleas, with concurrent jurisdiction and powers coextensive with those of the supreme court, and reorganizing the court of chancery with necessary additional chancellors. One of his arguments for dividing the power and responsibilities of the chancellor was that "the very nature of the controversies which come before him requires the collision of thought afforded by a judicial bench. The powers of the court of chancery are too vast, and its patronage too great, to be vested in a single individual without other responsibility than that provided by the Constitution." Referring to the court of common pleas, he recommended the abrogation of their administrative and political functions, by taking from them the power to appoint county treasurers, commissioners of deeds, and superintendents of county poorhouses. He said that "judges ought not to be compelled to be partisans," and that "democracy is a fallacy" if the supervisors cannot be charged with the power of appointment then vested in the court of common pleas. He also called attention to the large fees received by clerks of the supreme court, and the register, assistant register, and clerks of the court of chancery, remarking that "judges of the supreme court have descended from the bench to enjoy the golden streams supposed to flow into these offices." At this session of the legislature amendments were proposed increasing the number of justices of the supreme court, reorganizing the court of chancery, and revising the judiciary article of the Constitution.

Governor Seward, in 1840, renewed his suggestions concerning the judiciary. He said the "reorganization of the court of chancery, with an abridgment of the jurisdiction and patronage of the chancellors, is alike indispensable to insure the personal security of the citizen, and to preserve the harmony of our judicial system. The proceedings in that court are attended with vexatious delay and intolerable expense. Questions of equity peculiarly demand the consultations of a bench, and the mass of appeals, interlocutory motions, and original causes, is too great for any one chancellor to hear and decide consistently with a proper discharge of the duties required of him as a member of the court for the correction of errors." He said that the benefits expected to be derived from the plan of circuit judges had not been realized, and suggested the expediency of abolishing the offices of circuit judge and vice chancellor, and the appointment of three chancellors, with co-ordinate powers, and additional justices of the supreme court. Amendments were presented at this session of the legislature, providing for the revision of the judicial system, including the election by the people of county judges and masters and examiners in chancery; but no amendment was passed.

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Governor Seward, in his message, in 1841, continued his consideration of the judicial system, and the necessity of its revision by constitutional amendment, referring to the "defective organization of the courts of law and equity," and suggesting that the patronage and power of the chancellor was too great to be reposed in a single judge, that the supreme court was "oppressed with business," and that the common pleas "had in a great degree been deserted by suitors." He noted the difficulties attending a reorganization of the higher courts, consequent on wide differences of opinion among judges and members of the legal profession, and urged the adoption of some plan that would afford needed relief. Referring to his suggestions concerning clerks of courts and the political function of the courts of common pleas contained in a previous message, he noted the passage of laws in 1839 and 1840 reducing the fees of clerks, providing for simplifying the procedure, and transferring from the courts of common pleas to the supervisors the power of appointing county treasurers and superintendents of the poor, the abolition of the office of commissioner of deeds, except in cities, thus dispensing with about 3,000 officers, and increasing the jurisdiction of justices' courts to controversies involving not more than \$100. "It is gratifying to notice the progress of these tribunals in the favor and confidence of the people." In 1841 the legislature passed a proposed constitutional amendment revising the judiciary article, continuing the court for the trial of impeachments and correction of errors substantially as then constituted, reorganizing the court of chancery by providing for a chancellor and not less than two nor more than four assistant chancellors, for two additional justices of the supreme court, and for the creation of not more than two other courts of law with supreme court jurisdiction; providing for general and special terms, also "a court of review," to be composed of the judges of other courts, to hear appeals which might otherwise be taken to the court for the correction of errors, and abolishing the office of circuit judge and vice chancellor. The "court of review" suggested in this amendment was doubtless the germ of the idea which found expression five years later in the provision in the new Constitution for a court of appeals, and showed the tendency to confine judicial functions to judicial officers instead of vesting the highest judicial powers in a body like the senate, composed largely of laymen.

In 1842 Governor Seward referred to the amendment revising the judiciary article, passed by the legislature of 1841, and commended to the new legislature the reconsideration of the amendments "in that spirit of candor, concession, and patriotism which ought especially to prevail in changing fundamental laws. If the amendments shall be found suitable to promote a more efficient administration of justice, they will be hailed with much satisfaction by the people." The legislature did not pass these amendments.

Governor William C. Bouck, in 1843, in his first message, called attention to the suggestion by his predecessors concerning a revision of the judiciary, and

urged further consideration of the subject by the legislature, observing that the Constitution had not "made adequate provision for the expansion of the judicial system with the increased population and business of the state." He said he was not in favor of "radical changes unless there is a plain necessity for making them," but "would enlarge the present system, so as to meet the public wants." The legislature gave the subject no consideration at this session. Governor Bouck, in 1844, discussed the subject at some length in his annual message, urging the importance of its immediate consideration by the legislature. He suggested an increase in the membership of the supreme court and the court of chancery. He said the court for the correction of errors had, "for a considerable time, been overburdened with business; and it has become necessary to apply some remedy without delay. It is probable that so numerous a body can never discharge all the judicial business that may be brought before it; and it seems to be pretty generally understood that there ought to be a new organization of that high tribunal." Amendments were presented at this session of the legislature providing for a supreme court to consist of one chief justice and seven associate justices, for eight judicial circuits, and for two assistant chancellors, reorganizing the court of errors so as to make it consist of eight judges, one to be elected from each senate district, giving the governor power to appoint judges of the court of common pleas and justices of the peace; increasing the associate justices of the supreme court from two to twelve; adding sixteen judges to the court of errors, four to be chosen from each of four prescribed judicial districts; relative to removal of judicial officers; providing for the election of county judges; providing for associate chancellors, and a general revision of the judiciary article. Two judiciary amendments were passed by this legislature, one of which provided for three associate chancellors, and the other for two additional justices of the supreme court.

Governor Silas Wright, in 1845, called attention to the amendments passed in 1844, and recommended them to the consideration of the legislature, but they were not passed again. All these matters were disposed of for the time by an act passed at this session, submitting to the people the question of holding a constitutional convention.

I have now traced somewhat briefly the progress of the discussion and agitation concerning the reorganization of the judicial system. This discussion had continued twelve years without any practical result. But the consideration of this subject through this long period was not without effect. The bench and the bar and the people generally were studying the subject, and numerous plans of greater or less merit were brought to public attention. It was conceded that the situation demanded relief, but great diversity of opinion is manifest from the failure to pass many amendments, and from the failure to repass amendments which had been agreed to by a previous legislature. The result was that no progress was made except in the presentation and comparison of plans, and a general and continued discussion of the whole subject. Hence, when the [1846] Convention assembled, it was untrammelled by any attempted partial revision, and was at liberty to consider the judicial

system as embodied in the Constitution of 1821, and which had continued twenty-four years without constitutional change, and construct a new system or reconstruct and revise the old one in the light of experience, and with the benefit of ample executive, legislative, and other public discussion. How much of the seed of judicial reform sown during this period of agitation bore fruit in the new [1846] constitution will appear when the work of the Convention is under review.

* * * [Article 5 of the Constitution] provides in substance:

For a court for the trial of impeachments and the correction of errors, with the membership, and, substantially, the powers, provided by the first Constitution.

The power of impeachment vested in the assembly under the first Constitution was continued.

The tenure of office of chancellor and justice of the supreme court was also continued, with an age limit at sixty years.

The supreme court was to consist of a chief justice and two associate justices.

The state was to be divided by law into not less than four nor more than eight circuits, and a judge was to be appointed for each circuit in the same manner, and hold his office for the same tenure, as a justice of the supreme court, and who should possess the powers of a justice of the supreme court at chambers, and in the trial of issues joined in the supreme court, and in courts of oyer and terminer, and gaol delivery.

The legislature was authorized to vest equity powers in the circuit judges and in the county courts, or in subordinate courts subject to the appellate jurisdiction of the chancellor.

County judges and recorders were to hold office for five years, subject to removal by the senate, on the recommendation of the governor, for cause. The chancellor, supreme court justices, and circuit judges were prohibited from holding any other office or public trust, and all votes for them for an elective office given by the legislature or the people were to be void.

Four important changes had been accomplished by the new judiciary article; namely, the supreme court had been reorganized and its membership reduced, and the offices of the incumbents were to be terminated when the Constitution took effect. The working force of the supreme court had been increased from five to eleven judges, including circuit judges. The tenure of office of local judges had been limited to a fixed term, and the higher judicial officers had been prohibited from becoming candidates for office. This was the net result of a long and fierce struggle.

[pages 69-73; 687-688]

Excerpts from **The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905, Showing the Origin, Development, and Judicial Construction of the Constitution** by Charles Z. Lincoln (Lawyers Co-operative Publishing Company, 1906).

The Third Constitution, 1846

Vol. II (1822-1894), pp. 140-164

THE JUDICIARY.

I have already called attention to the prolonged discussion on the subject of judicial reform which preceded the Convention of 1846, and a synopsis has been given of the numerous suggestions and proposed amendments intended to modify or revise the constitutional provisions concerning the judiciary. The importance of the subject was fully appreciated by the Convention, and the suggestion was made several times while the judiciary article was under consideration, that the reconstruction of the judicial system was the chief reason for calling the Convention. All agreed that the judicial system contained in the Constitution of 1821 should be superseded by one better suited to the large and expanding business interests of the state, and better adapted to produce harmony and unity in the administration of justice.

The Convention met on the 1st day of June, 1846. On the 12th a judiciary committee was appointed, composed of Mr. Charles H. Ruggles, Charles O'Connor, Charles P. Kirkland, John W. Brown, Ambrose L. Jordan, Arphaxed Loomis, Alvah Worden, George A. Simmons, Ansel Bascom, Orris Hart, John L. Stephens, George W. Patterson, and Thomas B. Sears. Several of the members of this committee had already seen extended legislative or judicial service, and some of them were afterwards chosen to important positions. Mr. Ruggles, the chairman, had already served fifteen years as circuit judge, and was, therefore, familiar with the existing judicial system. He was chosen one of the judges of the court of appeals at the first election under the new Constitution. Charles O'Connor, for many years one of the leaders of the New York bar, devoted his great talents to the work of the Convention, giving to it his close attention, and bestowing on it the results of a large experience in the practice of his profession. Mr. Brown, soon after the Convention, was chosen a justice of the supreme court, and held the office two terms. Mr. Loomis had already served as surrogate and county judge, and soon after the Convention was chosen one of the "commissioners on practice and pleadings" under the act of 1847 passed in pursuance of the 24th section of article 6. Mr. Worden was a member of assembly in 1842, when so much important financial legislation was enacted, and again in 1845, when the Convention was called; and in 1847 he was appointed one of the "commissioners of the Code " under

the act passed in pursuance of §17 of article 1 of the new Constitution. Mr. Jordan had also been surrogate, district attorney, and attorney general. Mr. Hart had also served as surrogate.

The committee at once began the work of preparing a judiciary article, but it was not submitted to the Convention until the 1st of August. The great diversity of views on the subject, as already indicated in the sketch of the preliminary discussion, prior to the Convention, further appears from the fact that several reports were submitted, stating plans for the revision of the judiciary article. There was a majority report, three minority reports, and several independent propositions. Some debate was had on the presentation of the majority and minority reports, and the general consideration of the subject was begun on the 10th of August, and continued a month, with scarcely any interruption. The plan submitted by the majority of the judiciary committee included a court for the trial of impeachments, a court of appeals, composed of eight judges, four to be elected by the people, and four to be designated from the justices of the supreme court having the shortest time to serve; and a supreme court, with eight judicial districts and general and special terms in circuits. The majority plan provided for thirty-two supreme court justices, -four in each district, - and authorized additional judges in the first district, composed of the city of New York. The plan also included justices' courts and other inferior courts of civil and criminal jurisdiction, to be established by the legislature. The majority report proposed to abolish county courts, and it provided no substitute for them.

Charles O'Connor presented a minority report, vesting the general judicial power of the state in the supreme court and other inferior courts, subject to the appellate jurisdiction of the court of appeals. It provided for dividing the state into not less than eight not more than twelve districts, in each of which a judge of the court of appeals should be elected. The court of appeals was to consist of the lieutenant governor, the judges so elected by districts, and any two judges of the supreme court. The lieutenant governor, when present, was to preside. This would have made a court of not less than eleven nor more than fifteen members. The supreme court was to consist of a chief justice and twelve justices. The plan also provided for three or more judges for each district, to be chosen by the supervisors of the towns and wards in the district, who, for this purpose, were to meet in joint convention. The plan provided for county and justices' courts. Appeals might be taken from the county court to the court of appeals. The justices of the supreme court were to be chosen by the senate and assembly, on joint ballot. County judges were to be appointed by the boards of supervisors, and justices of the peace were to be elected by the people. This plan required the enactment of a code of civil procedure within two years. County courts might be held by a district or county judge, and general sessions of the peace might be held by any three district or county judges, or by one of them and two justices of the peace.

Mr. Kirkland also presented a minority report, providing for a court for the trial of impeachments, a supreme court of appeals, superior courts, circuit courts,

surrogates' courts, county courts, and justices' courts. Under this plan the supreme court of appeals was to be composed of seven judges, three to be elected by the people, and four to be appointed by the governor and senate. The senior in years of the judges should preside. This plan also provided for six judicial districts with a superior court in each, composed of four judges, two of whom were to be elected by the people, and two by joint ballot of the senate and assembly. The judges of the court of appeals and the superior court judges might hold courts in any district. There were also to be general and special terms of the superior court, substantially according to the plan of the majority report relative to the supreme court. The Kirkland plan authorized the transfer of causes from one district to another, and fixed the term of the judges of the supreme court and of the superior court at ten years. County courts for the trial of civil causes were to be held by district judges. The plan provided for four of these judges in the first district (New York) and one in each of the other districts. Such judges were to be chosen by joint ballot of the senate and assembly. In criminal cases the two county judges were to be associated with the district judge. This plan also provided for a first judge and associate judge in each county, to be elected by the people. The first judge was to be surrogate. Appeals from county courts were to be taken to the superior court, and a judgment of affirmance was final. Justices' courts were continued, but the right of appeal from these courts was abolished; the plan provided for a rehearing of a case as a substitute for an appeal.

Mr. Bascom also presented a minority report providing for a court for the trial of impeachments, a supreme court, surrogates' courts, and justices' courts. The supreme court was to be composed of thirty two judges, with powers and jurisdiction to be established by the legislature. The plan provided for eight judicial districts, each to be composed of four senate districts. This plan provided for a final review of causes in the supreme court by an "appeal session," to be composed of the supreme court judges whose terms of office should be within one year of their termination, and this appeal session was to hear appeals from the supreme court "banc session," which was substantially like the general terms provided in the other plans. It will be observed that all these reports proposed to abolish the court for the correction of errors, and the court of chancery. The necessity of a court of final review, to take the place of the court for the correction of errors, was universally conceded, and all the plans provided for such a court. The abolition of the court of chancery involved vesting its powers in another court. The Convention was not unanimous in the opinion that law and equity powers could be appropriately blended in one tribunal, and it was only after prolonged debate and minute discussion that a majority of the Convention agreed to vest the supreme court with general jurisdiction in law and equity.

It will doubtless be most profitable to consider each court separately, stating the result as embodied in the Constitution.

1st. The court for the trial of impeachments. - Under the first and second Constitutions this court was composed of the president of the senate, the senators, the chancellor, and the judges of the supreme court, or the major part of them. The abolition of the court of chancery, and the reconstruction of the supreme court, by the Constitution of 1846, required a change in the composition of the court for the trial of impeachments; and the judges of the court of appeals were substituted for the chancellor and judges of the supreme court.

2d. The court of appeals. - When the Convention of 1846 was called, there was a general, if not universal, conviction that the court for the correction of errors, or, as it was familiarly called, "the court of errors," had outlived its usefulness; that a court including one entire branch of the legislature, with only a very small minority of members representing the judiciary, was not the best form of a high judicial tribunal under our system of government, and that the semi political and semi judicial tribunal so constituted could not be expected to work out the best results in the administration of justice. Whatever might have been the advantages of this form of tribunal as illustrated in the English House of Lords, which was the model on which the framers of the first Constitution constructed the court, the radical difference in the official tenure and constitution of the upper branch of the legislature, the unwieldy size of the court, composed, in all, of thirty-seven members, under the second Constitution, and the fact that the majority of the senators were or were likely to be laymen, made such a court an incongruous element in any well-ordered judicial system. I have already called attention to the fact that, under the first Constitution, which provided for a council of revision, there was little occasion to ask the judicial tribunals to pass on the constitutionality of statutes, for the reason that the members of these tribunals, the chancellor and judges of the supreme court, composing a majority of the Council of Revision, had already determined the constitutionality of the statutes before they were passed. One ground of criticism against the court of errors, stated in the Convention of 1846, was that the court had never declared a statute unconstitutional. The reason alleged was that the senators, who controlled the court, were unwilling to declare unconstitutional a statute which they had passed, and which they must have considered constitutional at the time of its passage. An examination of the reported decisions of this court shows that the statement made in the Convention was not quite accurate; but it appears that only three statutes were declared unconstitutional by the court for the correction of errors, during its entire existence, from 1777 to 1847, - a period of seventy years. Of course, it is not to be assumed that the court sustained the constitutionality of statutes from the motive alleged in the Convention; but its record on constitutional questions furnished some ground for urging that a court should not be permitted to sit in judicial review of its own action as a political branch of the government.

The germ of the court of appeals has already been noted in a "court of review," suggested in an amendment proposed in the legislature in 1841. The idea of a court of appeals was also embodied in an amendment presented to the legislature of 1844, which provided for reorganizing the court of errors so as to make it consist of eight judges, one to be elected from each senate district. The Convention seemed to be unanimous in the opinion that there should be a central court, with power to review the judgments of lower tribunals, and thus preserve harmony in judicial decisions. The membership and tenure of the court, and the method of selecting its judges, presented questions which provoked serious and extended discussion, and on which there was a wide divergence of opinion. This diversity of opinion has already been noted in the several reports which came from the judiciary committee. It also appears from the various suggestions made during the progress of the debate. The majority view, which finally prevailed, divided the court into two parts, - one part to be composed of judge selected directly by the people, and another part to be composed of justices of the supreme court, designated by a prescribed rule; and these justices were to be chosen, not by all the people, but by the inhabitants of a particular district. The argument for this division of the court into two parts, presented by the majority of the judiciary committee, in substance was that the court of errors was divided into two parts, - one part, the senators, being elected by the people, and the other, the chancellor and judges, being appointed by the governor, - and it was thought that this distinction should be preserved in the new court, giving the people the right to elect one half of the court, leaving the other half to be supplied from the judges, either appointed by the governor or elected by districts, as the Convention might ultimately determine. Another reason for this division was that the judges elected by the people might come directly from the legal profession, without any previous judicial experience, while the judges of the supreme court, who would become ex officio judges of the court of appeals for stated periods, would bring to the higher court the results of judicial experience in the supreme court. This effort to construct a court composed of original and also secondary elements illustrates the conservatism of the Convention in its unwillingness to cut loose from tradition and experience, and create a new court on new lines. The reform proposed by the Convention, and embodied in the Constitution, was not complete. Its results did not justify the fullest expectations of its promoters. We shall have occasion to note, when the work of the Convention of 1867 is under consideration, the grounds of objection against the half-and-half court of appeals provided by the third Constitution, and the reasons which prompted a reorganization of the court, making it a making it a distinct and independent tribunal, uniform in its composition and in the method of selecting its members.

The opinion that a professional education was not necessary for high judicial position prevailed for a long period prior to the Convention of 1846. This is manifest from the long acquiescence in the court for the correction of errors, composed largely of laymen, and of the old court of common pleas and

surrogates' courts, which also, in many counties, were composed of laymen. In this connection the fact should not be overlooked that, while the court of errors was in existence, some of its most valuable opinions were written by men without special legal training. This fact, which was known to members of the Convention, justified the assertion made by some of them, that there were many laymen amply qualified to dispose of questions relating to public affairs, and not depending on mere technical rules of law. The competency of laymen for high judicial position was suggested by Mr. Ruggles, chairman of the judiciary committee, who in his statement accompanying the majority report, concerning the election of judges of the court of appeals, said: "This preserves and continues in the court of last resort, a popular, and, as your committee believe a valuable, feature existing in the present court. The presence of a portion of laymen in that court, if such should be elected, - of men of extensive general knowledge and sound judgment, not educated to the legal profession, - may, in many cases, be useful. It may serve to correct the tendency which is said to exist in the minds of professional men, to be led away by habits of thought from the just conclusions of natural reason into the track of technical rules, inapplicable to the circumstances of the case, and at variance with the nature and principles our social and political institutions. The committee entertains no fears that a court so constituted will be unstable in its decisions, or that it will fail in paying all respect to uniform rules and established precedents." The opinion expressed by Mr. Ruggles was shared by other members of the Convention, who urged the importance of so constituting the court of appeals that prominent laymen might be chosen judges; and this view was maintained by delegates who were in favor of dividing the court, - half elected, half coming from the supreme court, - as well as by some who favored the election of the entire court, without bringing in justices of the supreme court.

This suggestion that judges of the court of appeals might very properly be laymen evidently did not find favor with the people, for without exception only lawyers have been deemed eligible to that tribunal. Since the Constitution of 1846 was adopted the legislature has frequently imposed the requirement of professional training as a qualification for local judicial officers, and the modern opinion on this subject is crystallized in § 20 of article 6 of the Constitution of 1894, which provides that "no one shall be eligible to the office of judge of the court of appeals, justice of the supreme court, or, except in the county of Hamilton, to the office of county judge or surrogate, who is not an attorney and counselor of this state."

Many of the delegates were in favor of a court of appeals independent of the supreme court and chosen either on a general state ticket, or by districts; some favored single districts, some double districts, some favored a court of eight, and some of twelve, judges; and it appeared that the judiciary committee, while preparing its report, at one time favored a court all of whose members should be elected directly by the people; but later revised its views, and proposed the plan of dividing the court as already indicated. After long debate this plan was adopted by the Convention. Some delegates, for the

purpose of insuring a preponderance of elected judges, proposed a court of twelve, eight to be elected and four to be taken from the supreme court. There was also wide diversity of opinion on the proper term of office. The proposed term ranged from four to sixteen years. The suggestion was also made, for the purpose of avoiding centralization, that the courts should hold sessions at stated times in different judicial districts. The votes on various propositions submitted during the debate show that the judiciary committee was strongly supported by the Convention. The committee could usually muster from 75 to 90 votes in favor of its propositions, while the opposition rarely exceeded thirty.

3d. Supreme court. - When James Graham, speaker of the Colonial Assembly of 1691, drew the act creating the supreme court, he builded better than he knew, for he made a great tribunal, which has had a great history. It has grown from the small beginning of that early day to a court with seventy-six members; and it has been, from the first, a court of general original jurisdiction, and by the act its creation was vested with "cognizance of all pleas, Civill, Criminall, and Mixt, as fully & amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Common Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have, In & to which Supreme court, all & every person & persons whatsoever shall or may if they shall so see meet, Commence, or remove an Action, or suite the Death or Damage Laid in such Action or suit being upward of Twenty pounds And not otherwise." While other tribunals, like the court for the correction of errors, the court of chancery, the superior city courts, and the New York court of common pleas, flourished and filled a large place in our history for a long period, and in the process of judicial development were swept away, the supreme court continued, not only unchanged in its essential features, but absorbing to a large degree the powers and jurisdiction of the other courts, which had served their purpose and were no longer needed. The first Constitution, without any express provision, assumed the continuance of the court by a mere reference; but the provision of article 35, which continued in force the acts of the colonial legislature, confirmed and continued under the Constitution the jurisdiction possessed by the supreme court on the 19th day of April, 1775. This jurisdiction was continued substantially in the same way by the Constitution of 1821, which fixed the number of judges; but did not define the jurisdiction of the court. The Constitution of 1846 for the first time declared in terms that "there shall be a supreme court having general jurisdiction in law and equity," but with the significant qualification that "the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed." The subject of the supreme court, as presented to the Convention of 1846, involved three important considerations: First, the abolition of the court of chancery, and the transfer of its jurisdiction to the supreme court; second, the abolition of the circuit judge system, vesting the justices of the supreme court with full power to preside at circuits, at special term, and in general term; third, while merging the powers of the old supreme court and circuit courts in one system, to be administered by one set of judges, the supreme court was to be one court, and not a specified and distinct number of courts, administering justice independently, by judicial districts.

It was evident from the tone and scope of the discussion which preceded the Convention that the court of chancery must be radically changed or abolished. It had become inadequate to dispose of a large mass of equity litigation without great expense and delay. It had become physically impossible for the chancellor to keep up with the business, and the equitable jurisdiction of the

court, at first administered somewhat liberally, according to the original idea of the court of chancery, had become crystallized in a body of law and rules apparently as inflexible as the common law. The two systems of law and equity thus growing up side by side were not calculated to produce a satisfactory and harmonious administration of justice. It was evident from the first that a large majority of the Convention favored the union of the two courts, and, while a few delegates clung to both courts, and advocated their continuance, the proposition to merge law and equity jurisdiction in the supreme court was adopted without a count. This vote determined the attitude of the Convention toward the court of chancery, and its abolition was the result.

The most serious discussion relating to the subject of the supreme court was the proposed merger of law and equity in one court; and when this was agreed to the rest was mere detail. The Convention was substantially unanimous in the opinion that the circuit judge system ought to be abrogated, and there was little discussion on this subject. There was considerable difference of opinion as to the number of judges, but the Convention, by a large majority, adopted the recommendation of the judiciary committee, fixing the number at thirty-two, to be chosen for eight years, from eight judicial districts, four from each, with a provision for a possible increase in the city of New York. The supreme court ceased to be stationary, but, combining the former circuit judge system and the supreme court, with modifications, circuits and special terms were to be held in each county, where an opportunity would be afforded to dispose of both law and equity business, with a right of appeal to a general term in the same district. An appeal could be taken from the general term to the court of appeals, which was the central and final judicial authority of the state, and whose judgments were intended to harmonize the possible conflicting opinions of the lower courts. The provision in a former Constitution was continued, prohibiting judges from holding any other office or public trust, with the additional provision that they should exercise no power of appointment to public office.

The office of justice of the existing supreme court was abolished from and after the first Monday of July, 1847. This provision seemed necessary, for the reason that the judges then in office held during good behavior, or until they should be sixty years of age and also for the reason that, under the new plan, the judges were to be elected by the people by districts, and the operation of the plan could not have been uniform if the judges in office had been continued.

4th. The county court. The court of common pleas was established by the same statute of 1691 that created the supreme court. By that statute the court of common pleas was to be held by a judge and three justices, appointed in each county for that purpose, or by any three of them, and it had jurisdiction of all common-law actions. By chapter 28 of the Laws of 1692, the jurisdiction of this court was limited by excluding actions concerning the title of land. Such was the court of common pleas when the Constitutional

Convention of 1777 began its work. This Convention did not attempt to define the jurisdiction of the court, but incorporated in the Constitution some provisions relative to the appointment and tenure of county judges. The jurisdiction was continued under the new state government by operation of article 35, which continued in force the colonial statutes. In 1787 the legislature, by chapter 10, enlarged the jurisdiction of this court by including all actions, "real, personal, and mixed, suits, quarrels, controversies, and differences" arising in the county. In 1801, by chapter 110, the jurisdiction was extended to transitory actions, although not arising in the county, and the court was also given power to grant new trials. The Constitution of 1821 did not define the jurisdiction of this court, but recognized and continued it, following substantially the provisions of the first Constitution. I have already noted, in the section on the judiciary, in the chapter on the second Constitution, the report of the judiciary committee of the Convention of 1821, recommending a county court with the jurisdiction then possessed by courts of common pleas, the right to hear appeals from judgments of justices' courts, and also with authority to admit wills to probate, and grant letters of administration; but the report was not approved in all its parts by the Convention, and the court of common pleas remained unchanged. The revision of 1813 continued the court with the same jurisdiction. The Revised Statutes of 1827-28 continued the court, with the powers and jurisdiction "which belong to the court of common pleas of the several counties in the colony of New York, with the additions, limitations, and exceptions created and imposed by the Constitutions and laws of this state." In addition to this general provision the court was vested with the powers it had possessed since 1787. In 1837 the supreme court had occasion to consider the jurisdiction of the court of common pleas in *Foot v. Stevens*, 17 Wend. 483. In that case Judge Cowen said that, in point of subject matter, the jurisdiction of the court "is equal to that of the common pleas in England, and to that of this court in respect to civil actions, with the exception of actions local to another county. It is also a court of record. . . . No doubt that it is a court of general jurisdiction as to subject-matter, united with the character of a court of record, proceeding according to the general course of common law." This was the status of the court of common pleas as a part of our judicial system when the Convention of 1846 began its labors. The majority of the judiciary committee in that Convention proposed the abolition of the county court as then organized. The committee apparently adopted the suggestion made by Governor Seward, in his message in 1841, "that the courts of common pleas had, in a great degree, been deserted by suitors, and had the form and organization of courts of justice, while they enjoyed little of the popular respect due to such tribunals, and performed few of their important functions." Mr. Ruggles, in a statement accompanying the report, said that "in some counties, the county courts are efficient and useful in the dispatch of business. In others, it is said they are not so, and are complained of as a burden rather than a benefit to the county. In the trial of civil causes before a jury, experience has demonstrated that a single judge is more efficient than a greater number, and that those county courts in which the trial of causes is committed to some one of the judges give greater satisfaction to suitors than

when they all take part in the trial" Charles O'Connor, a member of the committee, presented a minority report which continued the county court. In explaining the report he said that he "dissented from the majority in their resolution to abolish the county courts." He said, further, that he thought it to be expedient not to annihilate the county courts because they were now inefficient, as indeed all the courts were. On the contrary, he deemed it a sounder policy to preserve, reorganize, and strengthen, so as to qualify them for the dispatch of business. By this means the greater portion of the business of the state would be performed in these tribunals. Mr. Kirkland presented a minority report also continuing the county court with the jurisdiction it then possessed, and authorizing the legislature to confer equity powers on the court. Mr. Loomis said that the county court was "a court of little pretension but of great utility, one much more needed in the transaction of ordinary, necessary business than the higher tribunals." He proposed a plan for a county court to be composed of two or more justices, with jurisdiction to be established by law, and who should hold courts in different parts of the county. Mr. Crooker proposed a county court without any original civil jurisdiction, but with appellate jurisdiction of all causes tried in justices' courts. The county judge and two justices of the peace were to hold courts of general session for the trial of criminal cases where the punishment could not exceed ten years' imprisonment in a state prison. Mr. Stephens proposed a plan which had been once agreed on by the judiciary committee, but which was not included in its report. This plan provided for a court of common pleas, and continued the jurisdiction then possessed by that court. The plan further provided for the election in each district of a "president judge" who should hold office for eight years, and preside in the court of common pleas in any county in the state. Mr. Crooker, after several suggestions by other delegates concerning the organization of the county court, which did not differ materially from the plans already noted, proposed a county judge in each assembly district, with jurisdiction to try petty offenses and perform the duties of a surrogate, and such other duties as might be required by law. He was to have appellate jurisdiction over justices' courts, but not original civil jurisdiction. Mr. Marvin proposed that the justices of the supreme court should hold county courts.

After the submission of several other propositions involving parts of the subject, and after considerable debate, a plan submitted by Mr. Crocker, as a substitute for the 13th section reported by a select committee, was adopted by a vote of 52 to 44. After some further discussion and amendment the section was finally adopted by the close vote of 52 - 44. After some further discussion and amendment the section was finally adopted by the close vote of 40 to 39, and appears in substance as § 14. Thus, by the narrow margin of one vote, the county court was saved from destruction by this Convention. While the court was saved, its jurisdiction was materially abridged. For more than one hundred and fifty years the court of common pleas had been a court of general jurisdiction. The constitutional provision adopted by the Convention deprived the court of any original civil jurisdiction, except in special cases, prescribed by the legislature.

The legislature, speaking through the judiciary act of 1847, declared that the county court "shall have power and jurisdiction to hear, try, and determine all matters and proceedings specially conferred by statute upon and heretofore triable and cognizable by courts of common pleas of the several counties." After conferring chamber powers on the county judge, the section closes with the declaration that "nothing in this section contained shall be deemed to confer original jurisdiction upon any county court, in any action known to the common law. " Jurisdiction was then conferred on the court in a large class of common-law actions against resident defendants, and also equity jurisdiction in several cases. Existing statutes conferring powers on the court of common pleas were continued and made applicable to the county court. This effort to vest in the new county court the jurisdiction possessed by the old court of common pleas failed to a large degree, for the reason that the court of appeals not long afterwards declared that the legislature could not constitutionally clothe this court with original civil jurisdiction. Chief Judge Bronson, in *Grizwold v. Sheldon* (1851) 4 N. Y. 581, expressed this view, but the point was not decided, because not deemed necessary in disposing of the case. This court also said in *Free v. Ford* (1852) 6 N. Y. 176, that the county court was not a court of general jurisdiction, as was the old court of common pleas: "On the contrary, it is a new court, with a limited statutory jurisdiction." The question came before the court again in *Kundolf v. Thalheimer* (1855) 12 N. Y. 593, where it was held that a provision of the Code of Procedure conferring jurisdiction on the county court in an action for assault and battery was unconstitutional; the court declaring that the legislature could not confer original jurisdiction on the county court in common-law actions. These decisions sustained the evident intention of the Convention, for it was the avowed purpose of some of its leaders to leave only two courts of original civil jurisdiction in ordinary cases; namely, the justice's court and the supreme court. The majority of the committee declared this purpose in the proposed judiciary article, and it was often stated in debate; and while the county court was restored in part, it was only to a limited degree, for the provision authorizing it was coupled with the express declaration that it should not have any original civil jurisdiction except in special cases. This purpose of the Convention is further manifest from the provision in §5 of article 14, that on the first Monday of July, 1847, jurisdiction of all suits and proceedings originally commenced, and then pending, in any court of common pleas (except in the city and county of New York), shall become vested in the supreme court; and that suits and proceedings commenced in justices' courts, and then pending in the court of common pleas, shall be transferred to the new county courts. Later constitutional amendments have enlarged and made more definite the jurisdiction of the county court, and an attempt was made in the Convention of 1894 to rehabilitate this court with its ancient powers and jurisdiction, but it failed, and this court continues as an inferior intermediate court of limited jurisdiction between the justice's court and the supreme court. It now has jurisdiction of a large mass of common-law litigation, but Governor Seward's remark in 1841, "that the court of common pleas had, in a great degree, been deserted by suitors," is still largely true, for comparatively few original actions are brought in the county court. It is quite possible that the

Constitutional Convention of 1918 may conclude to consummate the purpose expressed by the majority of the judiciary committee in the Convention of 1846, and reiterated to some extent in the Convention of 1894, and abolish the county court, merging its general powers in the supreme court and in distinct surrogates' courts.

5th. Surrogates courts The Convention of 1846 the first time put surrogates into the Constitution. These officers and their courts were not mentioned in the first and second Constitutions. The surrogates' courts were, however, continued by operation of article 35 of the first Constitution. These courts were statutory courts, possessing, at first, powers and jurisdiction borrowed from English laws and customs, and which had gradually been developed from the jurisdiction conferred on the early Dutch governors and councils, through the colonial prerogative office, and several statutes passed during the colonial period. The earliest of these statutes was passed November 11, 1692. This act related to intestates' estates. It provided for the selection of two freeholders in each town, who were to inquire concerning the estate of a deceased person within forty-eight hours after his interment, and, if he left property not disposed of by will, to make an inventory thereof, and deliver it to the "supervisor" of such estate, appointed in each county by the governor. The supervisor was to take charge of the estate, and dispose of it for the benefit of those interested. The widow was entitled to administer the estate of her husband. This statute also provided that letters of administration and probate of wills should be granted by the governor, or by such person as he should delegate, under the seal of the prerogative office, and that wills in Orange, Richmond, Westchester, and Kings counties should be proved in New York by the governor or such delegate. In other counties testimony on the probate of a will might be taken by the court of common pleas, or in vacation, by the judges of the court, assisted by justices of the peace; which testimony, with the will, was to be certified to the secretary's office, at New York, except that where the estate did not exceed œ50 the probate of the will or letters of administration might be granted by such court or judges. In 1750 the court and judges of common pleas in Orange county were authorized to grant probate of wills and letters of administration the same as in remote counties under the act of 1692. In 1772 the powers of courts and judges of common pleas were extended to the counties of Tryon, Charlotte, Cumberland, and Gloucester.

The provincial convention which framed the first Constitution apparently gave little attention to these courts. The first Constitution provided for the appointment of a clerk of the court of probate by the judge of said court, but surrogates are not mentioned, and there was no probate court by name at that time, the general powers in such cases being vested in the governor, who, as already noted, had authority to appoint a delegate, who was called a surrogate. In 1778 the governor's authority to grant probate of wills and letters of administration was transferred to a new officer, called the judge of probate, who was given all the power in these respects exercised by the governor during the colonial period, except the power to appoint surrogates,

which power was vested in the Council of Appointment. The act of 1692 continued in force until 1787, - ninety-five years, - when it was repealed, and a general law passed, providing for the probate of wills, and settlement of estates. This law authorized the appointment of a surrogate in each county by the governor, by and with the advice and consent of the Council of Appointment, to hold during the pleasure of the council. Such surrogate had authority to grant probate of wills and letters of administration, and was given power to determine controversies on probate of wills or on granting letters of administration, subject to the right of appeal to the judge of probates.

The judge of probates was given jurisdiction in cases of nonresidents. The surrogates' courts and probate courts were required to proceed according to the course of the common law, except that they had no power to inflict ecclesiastical pains or penalties. Another statute on this subject was passed in 1801, but it did not materially modify the jurisdiction of the judge of probate or surrogate, but it established procedure respecting the sale of decedent's real estate for the payment of debts.

6th. Justices' courts. The Convention of 1846 materially enlarged the scope of the judiciary article, including several courts which had been recognized by former Constitutions, but whose jurisdiction had not been defined. Justices' courts belong to this class. Justices' courts are not mentioned in the first Constitution. These courts as such are not mentioned in the second Constitution, but provision was made in that instrument for the selection of justices of the peace by boards of supervisors and county judges. They were to hold office four years. It has already been noted that, in 1826, the method of selecting justices was changed by providing for their election by the people. The Constitution of 1846 provided for the election of justices of the peace, fixed their term of office at four years, but did not define their jurisdiction. While these courts were under consideration in the Convention, several delegates suggested that the jurisdiction be defined by the Constitution. Mr. Strong proposed that justices' courts be given exclusive jurisdiction to \$100, and concurrent jurisdiction to \$250. This was debated at some length, but the great preponderance of opinion was in favor of leaving the subject of jurisdiction to the legislature, so that it could be regulated from time to time as circumstances might seem to demand. The proposition to define the jurisdiction of these courts was defeated by a large vote.

In the section on the judiciary, in the chapter on the colonial period, I have given a brief sketch of the early courts, including justices' courts, prior to the establishment of courts by the first legislature, in 1683. The act passed May 6, 1691, relating to courts, re-enacted substantially the provisions of the act of 1683, relative to the powers and jurisdiction of justices of the peace. The jurisdiction has been enlarged from time to time, but these courts remain, as they have been from the beginning, courts of limited statutory jurisdiction, intended to afford the people inexpensive tribunals for adjusting minor controversies. The Constitution fixes the term of office, but it does not fix the number of justices to be chosen in each town; and while the general law provides for four justices, several towns have more than four.

7th. Miscellaneous. The Convention also included in the judiciary article several other provisions relating to the administration of justice. It gave considerable attention to the subject of testimony in equity cases. This subject provoked quite extended debate, and the delegates generally expressed their disapproval of the old plan of taking testimony by masters and examiners in chancery. The result was a provision (§10) that testimony in equity cases should be taken in like manner as in cases at law. Provision was also made for the removal of judicial officers, and for the erection of inferior local courts in cities, with civil and criminal jurisdiction, for the election of local officers in each county to perform the duties of county judge and surrogate, for reorganizing judicial districts after each state census, conferring on the legislature authority to regulate the election of judicial officers in cities and villages, making clerks of counties clerks of the supreme court, for the election by the people of the clerk of the court of appeals, prohibiting judicial officers, except justices of the peace, from receiving any fees or perquisites of office, authorizing appeals from certain city courts directly to the court of appeals, and for the speedy publication of laws and judicial decisions, but which were made "free for publication by any person."

Tribunals of conciliation. The Constitution also authorized the legislature to erect tribunals of conciliation. There was considerable discussion in the Convention over this provision, its advocates expressing the opinion that such tribunals could be made available as a substitute for the ordinary judicial tribunals; but the Convention declined to give these tribunals full judicial authority; their judgments were not to be binding, unless the parties to the controversy had consented thereto in the presence of the tribunal. The provisions for a tribunal of conciliation evidently did not excite much interest among the people, for not till 1862, sixteen years after the Convention, was there any legislation on this subject. In that year a tribunal of conciliation was erected in the 6th judicial district, with a judge, to be appointed by the Governor and senate, and with a provision for two arbitrators in each county, to sit with the judge. The statute was limited in its operation to the term of the first judge, which was three years, and was repealed in 1865. The statutory provision for arbitration, which has been in force many years, probably affords all the tribunals of conciliation that are needed under our judicial system.

Codification. One of the most important subjects which engaged the attention of the Convention was the reform of procedure. Early in the Convention the necessity of such reform was stated by several prominent delegates, and as a result of this discussion a section on this subject was included in the judiciary article. The proposed union of law and equity in the same tribunal, the abolition of the court of chancery, with its complex system of procedure, all combined to impress the Convention with the necessity of a revision of procedure, and also the whole body of the law of this state. The result was the adoption of a plan in two parts, one, for the appointment of a commission to prepare a new code of procedure, and another, for the appointment of a commission to revise and codify substantive law. But, while history has justified the action of the Convention, the delegates were not unanimous in favor of codification: the final vote showed sixty for it and forty-five against it. The Code of Procedure of 1848 was one result of this movement for codification, and, while the plan to codify the whole body of law has not been consummated, there has been much piecemeal codification.

The First Constitution, 1777.

The first Constitution of any free people possesses a peculiar interest; especially is this true when, as in the case of New York, the Constitution is the outgrowth and culmination of more than a century of struggle for popular liberty.

Our first Constitution also excites additional interest from the circumstances surrounding its preparation; for it was not framed, as most of the later states Constitutions were framed, to accomplish a peaceful transition from a territorial condition to statehood, and where the authors, with research and deliberation, worked out a plan of government based on the best models. The framers of our first Constitution worked in the stress of war and revolution and without a model, except as they may possibly have derived assistance from Constitutions of other states recently adopted, but under which there had been little, if any, actual experience. Neither was it framed by experienced men of mature years, but by young men reared in luxury, and who had not enjoyed the opportunities of public service and acquaintance with details of public affairs. John Jay, who is understood to have been the chief author of the Constitution, was only thirty years of age, Robert R. Livingston, one of his colleagues, was only twenty-nine, and Gouverneur Morris, the other, was only twenty-four, when they were appointed on the committee to frame a form of government; yet these wise young patriots exercised a controlling influence in preparing a Constitution which was the fundamental law of the state for forty-five years, and many of whose provisions have been continued without change in all subsequent Constitutions.

The first Constitution was framed, adopted, and put in operation by a congress, or convention, chosen by the people of the colony, and which, after three intermediate congresses, was the successor of the colonial legislature. The last Colonial Assembly was chosen under writs of election issued January 14, 1769, and returnable February 14. The assembly met for its first session April 4, 1769. It continued in session at different times until April 3, 1775, when it was prorogued until May 3, 1775. It was prorogued at different times afterwards until March 11, 1776, and then again till April 17, 1776, but it did not meet at that time, and never met after April 3, 1775. Events developing the Revolution were crowding each other rapidly during this period, and, in the absence of an assembly authorized to exercise legislative powers and attend to the affairs of the colony, the people assumed control, and at first by committees, and later through elected congresses, gradually worked out a plan of local administration of the colony, culminating in constitutional government * * *

On the 1st of May, [1775, the] * * * Provisional War Committee * * * requested the people of the several counties of the colony to elect delegates to a Provincial Congress, to meet in New York on the 22d of May, 1775, "to deliberate upon, and from time to time to direct, such measures as may be expedient for our common safety."

This congress met at the time appointed at the Exchange in the city of New York. It is known as the First Provincial Congress, and it became substantially the successor of the Colonial Assembly, which had met for the last time on the 3d of the preceding April.

This congress, on the 18th of October, ordered an election of delegates by ballot, to constitute a new Provincial Congress, to meet November 14, 1775. The first congress adjourned on the 4th of November.

The second congress was organized on the 6th of December, and continued its sessions at different times until its final adjournment May 13, 1776.

In April, 1776, an election was held for delegates to constitute a new Provincial Congress, to meet on the 14th of May.

The Third Provincial Congress, owing to the failure of a sufficient number of members to attend, was not actually organized until May 22, 1776. It continued in session until June 30, 1776.

These congresses had no constitutional sanction, but were expedients resorted to by the people in a great emergency. The Colonial Assembly, which had existed as a component and essential part of colonial government for nearly a century, had been dissolved. Government by the people, in the manner so positively asserted in the Charter of Liberties, had apparently ceased, and the rights of the people had reverted to the people themselves. It should be noted as a significant fact, evincing the deepest patriotism and the most conservative self-poise, that in all this trying period, from the failure of real representative government in the old assembly to the institution of a regular form of government under the new state, there was no attempt by any committee or body of patriots to usurp the recognized rights of the people; but in all cases each delegation to the Continental Congress, and each Provincial Congress, was composed of men chosen, either directly by the people, or by representatives of the people elected for that specific purpose: and the government and administration of colonial affairs exercised by the several Provincial Congresses were strictly representative, and recognized to the fullest extent the right of popular self-government * * *

On the 31st of May the Third Provincial Congress, then sitting in New York, adopted the following pre-amble and resolutions:

"AND WHEREAS, Doubts have arisen whether this Congress are invested with sufficient power and authority to deliberate and determine on so important a subject as the necessity of erecting and constituting a new form of government and internal police, to the exclusion of all foreign jurisdiction, dominion, and control whatever:

"AND WHEREAS, It appertains, of right, solely to the people of this colony to determine the said doubt: Therefore

"Resolved, That it be recommended to the electors of the several counties in this colony, by election in the manner and form prescribed for the election of the present congress, either to authorize (in addition to the powers vested in this congress) their present deputies, or others in the stead of their present deputies, or either of them, to take into consideration the necessity and propriety of instituting such new government as in and by the said resolution of the Continental Congress is described and recommended. And if the majority of the counties by their deputies in Provincial Congress shall be of the opinion that such new government ought to be instituted and established, then to institute and establish such a government as they shall deem best calculated to secure the rights, liberties, and happiness of the good people of this colony, and to continue in force till a future peace with Great Britain shall render the same unnecessary. And

"Resolved, That the said elections in the several counties ought to be on such a day, and at such place or places, as by the committee of each county respectively shall be determined. And it is recommended to the said committees to fix such early days for the elections as that all the deputies to be elected have sufficient time to repair to the city of New York by the second Monday in July next, on which day all the said deputies ought punctually to give their attendance.

"AND WHEREAS, The object of the foregoing resolutions is of the utmost importance to the good people of this colony:

"Resolved, That it be, and it is, hereby earnestly recommended to the committees, freeholders, and other electors in the different counties of this colony, diligently to carry the same into execution.

"Ordered, That the foregoing resolutions be published in all public newspapers in this colony, and in handbills to be distributed in the counties."

This action shows a clear purpose to form a government by a representative body of undoubted authority, and is a high illustration of wise and conservative statesmanship. It is quite probable that, if this third congress had itself acted on the recommendation of the Continental Congress, and had erected a state government, such a government would have been accepted and recognized by the people; but the delegates to this congress had not been commissioned for such a purpose and had no express authority to institute a permanent government. They therefore wisely determined to go back to the people and obtain full and specific authority for themselves, or other representatives, to organize a government with the very clearest title, because coming directly from the people. The people did not reserve the right to ratify the action of their representatives, but clothed them with full authority to frame, erect, and put in operation such a government as they might deem best suited to the interests of the colony. The congress thus chosen combined in itself and exercised the double function of a constitutional convention and a legislature. It administered the affairs of the colony, and at the same time instituted a new government with a written constitution.

A constitutional convention is the highest representative body known to a free people, and may create or alter the legislative department of the government. This congress exercised legislative powers, and at the same time instituted a new government, providing a new legislature to succeed itself, thereby surrendering at the earliest opportunity the authority which had been committed to it by the election held in June, 1776.

On the 30th of June, 1776, the third congress, apprehending an attack on New York by the British, adjourned to White Plains, to meet there on the 2d of July, and also directed that the fourth congress meet at the same place on Monday, the 8th of July. The third congress did not meet again after the 30th of June.

The Fourth Provincial Congress, which became the First Constitutional Convention, met at the court house in White Plains on the 9th of July, 1776. General Nathaniel Woodhull was chosen president, and John McKesson and Robert Benson secretaries. This was one of the most important bodies that ever assembled in this state. It had received a high commission from the people, namely, to institute an independent government in such form and with such component parts as might be best suited to the genius, the spirit, and the traditions of the colony * * *

The Constitution was not submitted to the people, but took effect immediately, and, according to Jackson ex dem. Russell v. White, 20 Johns. 313, above cited, its adoption was deemed the origin of the state government. This day must therefore stand in history as

THE BIRTHDAY OF THE STATE OF NEW YORK,
SUNDAY, APRIL 20, 1777.

* * *

SYNOPSIS OF CONSTITUTION.

The first Constitution was a brief instrument, and was limited to very few subjects. Some important provisions, notably those relating to the Council of Revision and the Council of Appointments were added while the Constitution was under consideration by the Convention, and we learn from Mr. Jay's correspondence that he intended to suggest other additions, which he thought it would be better to submit in convention than in the first draft, but he was called away by the death of his mother, and during his absence the Constitution was unexpectedly, and, as he thought, somewhat hastily, adopted. He afterwards expressed great regret that some other subjects had not been included. Omitting the preliminary part, consisting of the resolutions adopted by the Third Provincial Congress, providing for the election of the Convention, and the Declaration of Independence, which is quoted in full, the Constitution proper consists of forty-five short sections, or "articles," as they were then termed. The range of subjects treated is limited, and the powers conferred on the new government are quite meagerly expressed. The framers of the instrument seem to have taken the colonial government as they found it, and continued its principal features, while eliminating its royal characteristics. The judicial system of the colony, and also the county and town governments, were continued substantially as they then existed. It became necessary to construct a new legislature and provide a new executive. The skeleton of the new government was then complete, and the remainder of the Constitution either asserts abstract rights, or confers or limits power in matters of administrative detail.

The abstract rights asserted are few and briefly stated. In substance they are:

1. All power is derived from the people. This is fundamental in any system of representative popular government.
2. Each citizen is entitled to full protection in his individual rights; stating, in substance, the 39th article of Magna Charta.
3. Each citizen is entitled to the enjoyment of complete religious liberty.
4. The right of trial by jury shall remain inviolate forever.
5. General, but not universal, suffrage was established, and the legislature was authorized to provide for the use of ballots at elections, instead of voting viva voce, which was then the practice.

Three general departments of government were established, namely, the legislative, executive, and judicial. These three divisions were already familiar, both from English precedents, and from colonial experience for nearly a century. The influence of tradition and custom is shown by the unwillingness of the Constitution makers to vest in these departments the distinct and independent powers naturally belonging to them. They did not seem to appreciate fully the importance of a clear separation of the powers of the three great departments into which the government was divided. Subsequent experience and development have marked these lines of distinction with much more clearness than was apprehended by the framers of the first Constitution. There seems to have been an unwillingness to trust either the legislative or the executive department with its appropriate powers under a proper distribution of constitutional authority. The Constitution shows a manifest intention to reserve to and vest in each department some authority over the others. In a representative constitutional government, as now understood, the legislature is the supreme law-making power, subject to the possible check of an executive veto, which may sometimes prevent hasty, ill-considered, and unwise legislation; but even this check may be overcome by the legislature, if a given number of its members, arbitrarily fixed at two thirds, shall be in favor of enacting the statute, notwithstanding executive objections. The executive is charged with the duty of executing the laws, with only the limited veto check on legislation. But both the legislative and executive branches are subject to indirect control or restraint, and may be kept in the path of constitutional duty, by the judiciary; for this branch of the government has the exalted function of determining whether a given statute violates the fundamental law as expressed in the Constitution, thus testing every statute by the principles established by the people for their government.

So clearly have these principles, specially applicable to each department, been enunciated in recent years, that it is now almost axiomatic that the supreme legislative power is vested in the senate and assembly, and that this legislative power cannot be delegated, except as authorized by the Constitution itself; that the functions of the governor are executive, and not legislative, except to the extent of the veto power, and not judicial, except generally in determining questions affecting removals from office, and in the exercise of the pardoning power; and that the functions of the courts are judicial only, and not administrative. The framers of the first Constitution, perhaps from a lack of an apprehension of these principles, now so familiar, and possibly, also, from a lack of experience necessarily incident to pioneer conditions, combined these functions in the several departments in a manner which would not now be tolerated in framing a well-ordered scheme of representative government. They not only made the legislature the lawmaking power, but they vested it with executive functions through the Council of Appointment, composed of four senators chosen annually by the assembly. They gave the higher courts, not only judicial powers, but also authority over legislation through the Council of Revision, composed of the governor, the chancellor, and the judges of the supreme court. By these two contrivances the power of the governor was limited in two very important particulars;

namely: He was deprived of the full veto power, for he might be overruled by the judges in the Council of Revision; and he was deprived of the responsibility for official appointments, by being made subject to the control of the Council of Appointment.

The Constitution contains a few details concerning the separate powers of the senate and assembly, including the power of the assembly to select the members of the Council of Appointment, and to present articles of impeachment. The legislature was to elect the state treasurer; it was also given control over contracts with Indians; and might naturalize aliens; but this right of naturalization was soon superseded by the Federal Constitution. The legislature was prohibited from passing acts of attainder, and from instituting any courts, except those which proceeded according to the common law. Terms of judicial officers were established, and provision was made for the choice of state, county, and town officers. The English common law was continued, and English grants were confirmed. Provision was also made for a state militia; and a curious provision was inserted, by which clergymen were excluded from the right to hold office.

It will be observed that the first Constitution was quite limited in its scope, and many subjects now deemed important were omitted. It was, however, sufficiently elastic to permit the expansion and growth of a great state, and it is a high tribute to the patience, good sense, and patriotism of the men who framed it, and of the men who administered the government under it through a third of the history of the state, that the only amendment in forty-five years was for the purpose of reducing and limiting the number of members of the senate and assembly.

The Jays, the Livingstons, the Morrisises, the Clintons, the Gansevoorts, the Schuylers, the Van Cortlandts, the Van Rensselaers, the Roosevelts, the Spencers, the Lansings, the Lewises, the Ten Broecks, Duane, Scott, Kent, Hamilton, Tompkins, Burr, and others who constructed, set in motion, and maintained this simple machinery of government, did not need elaborate descriptions or limitations of power. They had a Constitution which gave them the right of self-government, and they knew how to use that right judiciously. There was placed in their hands a state to govern and improve, and they appreciated its possibilities and the importance of the trust reposed in them. The Constitution was sufficient for their needs. They were almost wholly unrestrained, for it will be noted that the restrictions in the first Constitution related chiefly to immaterial subjects which soon became obsolete. They did not need to tie their own hands, for they could trust themselves. 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, molded 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. * * *

[O]n the last day of December, 1822, the first Constitution of New York passed into history. It had served its purpose well. It might almost literally be said of it that it was born on the battle-field. Its authors wrote it, musket in hand. They left the arena of war at short intervals to sit in the councils of state, to construct a government for times of peace. It had some defects, not especially manifest at first, but which became apparent as the state increased in wealth, population, and commercial interests, and as new problems were presented for the consideration of the people. It was founded on correct principles; but these principles needed extension and enlargement to meet the growing needs of the state. It was a good Constitution for that time, and deserved the encomiums which it received from statesmen of that period. We may most fittingly quote here the eloquent words of Chancellor Kent, who, in the Convention of 1821, speaking of the first Constitution, said: "This state has existed for forty-four years under our present Constitution, which was formed by those illustrious sages and patriots who adorned the Revolution. It has wonderfully fulfilled all the great ends of civil government. During that long period, we have enjoyed, in an eminent degree, the blessings of civil and religious liberty. We have had our lives, our privileges, and our property, protected. We have had a succession of wise and temperate legislatures. The code of our statute law has been again and again revised and corrected, and it may proudly bear comparison with that of any other people. We have had, during that period (although I am, perhaps, not the fittest person to say it), a regular, stable, honest, and enlightened administration of justice. All the peaceable pursuits of industry, and all the important interests of education and science, have been fostered and encouraged. We have trebled our numbers within the last twenty-five years, have displayed mighty resources, and have made unexampled progress in the career of prosperity and greatness. Our financial credit stands at an enviable height; and we are now successfully engaged in connecting the great lakes with the ocean by stupendous canals, which excite the admiration of our neighbors, and will make a conspicuous figure, even upon the map of the United States. These are some of the fruits of our present government."

Governor Joseph C. Yates, who had been a justice of the supreme court under the first Constitution, in his first message to the legislature, January 7, 1823, referring to the change of Constitutions, said:

"There has been only one period since the declaration of our independence, that the legislature of the state of New York have been called upon to perform such high and responsible duties as at this session will devolve upon you; and when we reflect upon the conduct of those who formed the first Constitution of this state, and organized a government, every well-ordered mind must be led with gratitude to bow before the throne of Grace, returning fervent thanks to the God of heaven and of earth, who raised up for us, in that time of need, men eminently endowed with great intelligence, integrity, and superior, I had almost said inspired, views of the rights and liberties of man. The checks and balances of the old Constitution of this state were admirable, when judged with reference to the time in which it was adopted; just emerging from a state of colonial dependence, and while desperately, and almost convulsively, struggling to break the fetters of trans-Atlantic despotism; almost every man in the community at that time possessing high ideas of the necessity of a strong executive power, and great legislative independence; and although we have amended what we have deemed its errors, and what, in the present state of the community, were really such, yet the candid mind cannot but admire and applaud its great comparative excellence. I could not, gentlemen, withhold at this time, and on this occasion, the expression of my affection and veneration for those men, great in intellect and honesty, several of whom were personally known to many of us, who, having placed and seen their country in prosperity and the enjoyment of liberty, have gone to sleep with their fathers until the great day of retribution.

"This government has, by the late amendments, been adapted to the present feelings and views of the community, the only proper standard by which a good government can be formed: and no time for its reorganization could be more auspicious than the present."

[pages 483-495; 754-756]

[Amendments to the First Constitution]

The Convention of 1801.

The Constitutional Convention of 1801 had its origin in differences of opinion concerning the proper construction of § 23 of the Constitution, which provided for a Council of Appointment. The section is as follows:

"That all officers other than those who, by this Constitution, are directed to be otherwise appointed, shall be appointed in the manner following, to wit: The assembly shall, once in every year, openly nominate and appoint one of the senators from each great district, which senators shall form a council for the appointment of the said officers, of which the governor for the time being, or the lieutenant governor, or the president of the senate (when they shall respectively administer the government), shall be president, and have a casting voice, but no other vote; and, with the advice and consent of the said council, shall appoint all the said officers; and that a majority of the said council be a quorum; and further, the said senators shall not be eligible to the said council for two years successively."

This council was an important part of the state government until abolished by the Constitution of 1821, which took effect on the 31st of December, 1822. The council, therefore, existed more than forty-five years; and while it has gone into history, probably never to return as a feature of our constitutional machinery, it played such an important part in the early history of the state, especially its political history, that it should receive here more than a passing notice.

The first constitution-makers had not gone very far in the direction of choosing officers by popular election. Most of the officers were chosen by appointment; and we shall see, as we note the development of our constitutional system, how slowly the theory of elections by the people made its way. The framers of the first Constitution treated this subject from the point of view of their own experience, and also in accordance with the custom of that time. * * *

GOVERNOR JAY'S SPECIAL MESSAGE.

Governor Jay sent a special message to the assembly on the 26th of February, 1801, and the same message to the senate on the 27th, in relation to the Council of Appointment, reciting the differences which had existed between the council and Governor, not only during his own term, but during the term of his predecessor, Governor Clinton. Governor Jay claimed that under the Constitution the governor had the exclusive right of nomination. Some members of the Council of Appointment claimed a concurrent right of nomination. This the Governor denied, and in this message he recommends that it be settled in some way, either by a declaratory act of the legislature, or by judgment of law. * * *

CONVENTION RECOMMENDED.

On the 6th of April the legislature passed an act recommending a convention for the purpose of considering the question of the construction of § 23 of the Constitution, and also that part of the Constitution relating to the number of members of the senate and assembly. * * *

The first Constitution did not contain any provision for its own amendment, nor for calling future constitutional conventions. The legislature of 1801 could not absolutely direct that a convention be held, but passed a law recommending a convention for the purposes therein mentioned. This act, chapter 159, authorized and proposed the election of delegates to a convention to consider two features of the Constitution, -namely, that relating to the number of members of the senate and assembly, and the section relating to the Council of Appointment. It will be observed that the people were not given an opportunity to express their judgment on the question of holding a convention. While the bill was pending an amendment was once agreed to in the assembly giving this right, but later it was abandoned, and under the law the people were only given power to elect delegates. The people, who might have objected to such a convention, had no opportunity to express their objection, except by declining to vote for delegates, and this meant nothing, for the persons who received votes as delegates would be entitled to sit, if regularly chosen, even if the majority of the people had been opposed to a convention. We shall see in the next chapter that a bill passed in 1820 for a convention, without a previous submission of the question to the people, was vetoed by the Council of Revision on objections prepared by Chancellor Kent, then a member of the council. In this opinion he calls attention to the act of 1801, and distinguishes it from the act then under consideration on the ground that it conferred on the delegates power to determine two questions only; one of which, that relating to the Council of Appointment, was one of construction, and not of amendment; but he expressed the doubt whether a convention called to change the legislature was constitutional unless previously authorized by the people. Chancellor Kent, then an associate justice of the supreme court, was a member of the Council of Revision in 1801, but he and Chancellor Livingston were both absent when the convention bill was presented to the council, and it does not appear that there was any objection to it.

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convention to consider the question of the number of members of the senate and assembly. This seems to have been the only recommendation on the subject, and it is probable that a convention would not have been called at that time for the sole purpose of considering the number of members of the legislature; but when a convention seemed necessary to settle the controversy over the Council of Appointment, the subject of the legislature was included. At that time the senate had increased to forty-three members, and the assembly to one hundred and twenty-six members.

THE CONVENTION.

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The Convention at once addressed itself to the task committed to it, and completed its labors on the 27th of October. The result of its deliberations appears in five paragraphs, four of which relate to the legislature; one, the last, determines the construction of the disputed section relating to the Council of Appointment. The amendments permanently fixed the number of senators at thirty-two. The assembly was given one hundred members, and provision was made for a possible increase to one hundred and fifty, by additions to be made after each census.

The principal subject of consideration was the construction to be given to article 23. A motion for a construction of the article giving the senators the exclusive right of nomination was defeated by a vote of 93 to 6. A motion to give the Governor the exclusive right of nomination was defeated, but the journal does not give the vote.

The resolution of the Convention as finally adopted declares that under the "true construction" of the 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." This resolution was adopted by a vote of 86 to 14. Daniel D. Tompkins voted in the negative; and twenty years afterwards, in the Constitutional Convention of 1821, he referred with apparent self-satisfaction to this vote. The large vote in favor of the resolution is explained by the fact that each of the two great political parties of that day had committed itself in favor of nominations by the members of the council, - the Federalist, in the winter of 1794, and the Republicans, in 1801.

It has already been noted that the convention which framed the Constitution had given this provision a different construction, but in the partisan struggle for power at the beginning of the last century the opinions of the authors of the Constitution seem to have been overlooked or ignored. Under the construction given by this Convention the council became a powerful and sometimes a very objectionable political machine, and at the time of its abolition, twenty-one years later, it wielded a patronage including nearly 15,000 officers, with an aggregate salary list of one million dollars. It often dispensed patronage with a high hand, making appointments and removals at will; it reduced the dignity and responsibility of the governor, so that, instead of being the chief executive of the

state, he had only a casting vote in this appointing body, and only one fifth of the power of making nominations.

The plan of this council, as devised by Mr. Jay, was reasonable; and if it had been administered as intended, it might have continued as a permanent feature in our Constitution. We have adopted, as a substitute for this plan, the confirmation of the governor's appointments by the state senate, where confirmation is required at all, and have given the governor the absolute power of appointment without confirmation, in a large number of cases. Mr. Jay's plan contemplated a joint responsibility for appointments, to be shared by the governor and the legislature, by providing a council composed of four senators, distributed geographically through the state, with power only to confirm or reject nominations by the governor. The whole legislature was charged with a duty and responsibility in the matter by requiring the assembly to choose the council from the senators, thus directly or indirectly bringing both branches of the legislature into cooperation with the governor in making appointments; but the efficiency of the plan was destroyed by the construction given to the article by the Convention of 1801.

The evolution of this council, and its final destruction, without a dissenting vote, by the Convention of 1821, shows that even the cohesive power of patronage as a political force must yield to higher principles of constitutional government when it is discovered that the dispensing of such patronage by an unrestrained and irresponsible body is inimical to the best interests of the state.

[pages 596-612]

[Amendments to the First Constitution]

The Convention of 1801.

The Constitutional Convention of 1801 had its origin in differences of opinion concerning the proper construction of § 23 of the Constitution, which provided for a Council of Appointment. The section is as follows:

"That all officers other than those who, by this Constitution, are directed to be otherwise appointed, shall be appointed in the manner following, to wit: The assembly shall, once in every year, openly nominate and appoint one of the senators from each great district, which senators shall form a council for the appointment of the said officers, of which the governor for the time being, or the lieutenant governor, or the president of the senate (when they shall respectively administer the government), shall be president, and have a casting voice, but no other vote; and, with the advice and consent of the said council, shall appoint all the said officers; and that a majority of the said council be a quorum; and further, the said senators shall not be eligible to the said council for two years successively."

This council was an important part of the state government until abolished by the Constitution of 1821, which took effect on the 31st of December, 1822. The council, therefore, existed more than forty-five years; and while it has gone into history, probably never to return as a feature of our constitutional machinery, it played such an important part in the early history of the state, especially its political history, that it should receive here more than a passing notice.

The first constitution-makers had not gone very far in the direction of choosing officers by popular election. Most of the officers were chosen by appointment; and we shall see, as we note the development of our constitutional system, how slowly the theory of elections by the people made its way. The framers of the first Constitution treated this subject from the point of view of their own experience, and also in accordance with the custom of that time. * * *

GOVERNOR JAY'S SPECIAL MESSAGE.

Governor Jay sent a special message to the assembly on the 26th of February, 1801, and the same message to the senate on the 27th, in relation to the Council of Appointment, reciting the differences which had existed between the council and Governor, not only during his own term, but during the term of his predecessor, Governor Clinton. Governor Jay claimed that under the

Constitution the governor had the exclusive right of nomination. Some members of the Council of Appointment claimed a concurrent right of nomination. This the Governor denied, and in this message he recommends that it be settled in some way, either by a declaratory act of the legislature, or by judgment of law. * * *

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Excerpts from **The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905, Showing the Origin, Development, and Judicial Construction of the Constitution** by Charles Z. Lincoln (Lawyers Co-operative Publishing Company, 1906).

Volume III

Woman Suffrage Addendum

In the chapter on the Convention of 1867 I have given a sketch of the development of the proposition to extend the elective franchise to women, even anticipating later history somewhat by the statement of the more important statutes relating to the rights and privileges of women, from which it appears that women are on a substantial equality with men under the law and the Constitution, except as to the right of suffrage, which makes a fundamental discrimination against women, and deprives them of any direct power in administering the government. For more than forty years prior to the Convention of 1894 the woman suffrage movement had been developing and gaining strength, and it is not surprising that a vigorous attempt should have been made by its advocates at this Convention to eliminate forever the disqualification of women to exercise the highest functions of citizenship, and to place men and women on an equal footing as to their constitutional rights and privileges. The movement was well organized and thoroughly prepared to present the strongest arguments in favor of this extension of the franchise. In addition to a general newspaper discussion, numerous public meetings were held, petitions and arguments prepared, and at the opening of the Convention the advocates of the movement were on the ground, ready to begin their work. There were numerous arguments before committees by the ablest representatives of the cause, and a remarkable symposium of nineteen speakers, who discussed various aspects of the problem before the Convention at an evening meeting. Petitions from all parts of the state were presented to the Convention, urging the adoption of the proposed amendment. Six hundred thousand persons are computed thus to have made known their approval of the movement, while fifteen thousand presented their objections to it. Except for the woman suffrage movement, the suffrage article of the Constitution would have taken comparatively little of the time of the Convention. The scope of the statutes and other forms of enlargement of woman's sphere, which appear in a former chapter, gave the advocates of the woman suffrage movement hope that the Convention of 1894 would concede the right for which women had been contending nearly half a century, and that they might at last enjoy full realization and consummation of the "Declaration of Rights" adopted by the Seneca Falls Convention of 1848. So much had been done by statute, custom, and social reforms that it seemed easy to take the next and last step, eliminate the word "male" from the

Constitution, and abrogate the suffrage distinction between men and women.

The amendments proposed presented the subject in a variety of aspects, including the immediate abrogation of the suffrage distinction in the Constitution; a partial suffrage, limited to questions of taxation and to certain local elections; the submission of the question to women themselves; and the submission of the suffrage amendment to male voters. Mr. Dean proposed to confer the right of suffrage on all citizens, without regard to sex. Mr. McKinstry proposed to add to article 10, § 2 (local officers), the provision that "the legislature may provide that in such local elections all citizens may vote who are otherwise qualified by law, regardless of sex." Mr. Moore proposed to confer on adult women the right to vote on all questions "relating to schools, excise, and taxes." Mr. Lincoln proposed that "any woman who possesses the qualifications for the right of suffrage required of men by this Constitution, and who is the owner of real estate in her own right, and which is assessed to her upon the last preceding assessment roll of the town, ward, or district in which she resides, may vote at any election upon any question which may be submitted to the vote of the taxpayers of the state, or of any political subdivision or municipal corporation thereof;" also that "the legislature may by law confer upon women possessing the qualifications of age, residence, and citizenship prescribed in this article for men, and not otherwise disqualified, the right to vote at any election for any state or local officer or upon any question which may be submitted to the vote of the people of the state or of any political subdivision or municipal corporation thereof, and may also provide that women shall be eligible to any office in this state," Mr. Bigelow, adding the following to § 1: "The legislature shall have power to extend to females all or any of the rights, privileges, duties, responsibilities, immunities, and exemptions to which they would be entitled or for which they would be liable if the word 'male' were stricken from this section." The validity of chapter 509 of the Laws of 1901, authorizing women to vote on tax questions in towns and villages, could not have been questioned under any of these provisions. Mr. Tibbetts proposed to confer on adult women possessing other qualifications the full right of suffrage, from 1895 to 1906, inclusive, and that in 1907 the men should vote on the question of striking the word "male" from the Constitution. Mr. Ackerly proposed to confer on women the right to vote for all school officers and on all school questions. Mr. Moore and Mr. Abbott proposed to submit the question of woman suffrage to women themselves, following Horace Greeley's suggestion in the Convention of 1867. Under both plans the question was to be submitted to adult women who had been registered for the purpose, except that under Mr. Abbott's plan only women who could read and write were permitted to vote on the question or to possess the right of suffrage if the proposition were adopted. Mr. Moore's plan imposed no educational qualification, and under it women were to possess the right of suffrage if 100,000 voted on the proposition, and a majority of them voted in favor of it. Mr. Tucker and Mr. Foote proposed a separate submission

of the question to male voters, and offered amendments for that purpose.

The Tucker amendment was used as the basis of discussion and action by the Convention. This amendment was reported adversely by the majority of the suffrage committee, Mr. Tucker dissenting, and in its final form provided for submitting, at the general election next following the general election at which the new Constitution was to be submitted, the question whether the word "male" should be stricken from § 1 of article 2; and if a majority of the qualified electors should vote in the affirmative, then the word "male" was no longer to be a part of the section, and thereafter women might vote on the same qualifications and conditions as men. The report of the suffrage committee was made a special order, and was the subject of a long and serious debate. Soon after the Convention the speeches on the Tucker amendment were compiled and published in a separate volume, and in that volume, and in the record of the Convention, the reader will find the whole argument on both sides of the proposition to extend the elective franchise to women. Lack of space will not permit even a summary of the discussion. I have already noted, in a previous chapter, that, in the Convention of 1867, the proposition for a separate submission of a woman suffrage amendment was defeated by a vote of 9 to 133. The Convention of 1894 rejected the Tucker amendment by a vote of 58 to 98. If opinion on this subject continues to grow at this rate, the advocates of woman suffrage may reasonably expect the full realization of their hopes in the Convention of 1918.