

CHAPTER II.

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 state 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.

This last Colonial Assembly missed a great opportunity. During the six years of its active existence the acts of the British government which led to the Revolution were from month to month becoming a source of serious irritation to the colonies, and in many quarters were exciting the active resistance of the people. It seems quite clear that the Tory tendencies of this assembly were too strong to permit it to become the efficient agency of the colony in the movement to resist the encroachments of the home government. This Tory sympathy in the assembly, combined with the strong Tory influence of the Governor,

made it difficult, if not impracticable, for the assembly to seize and control a situation fraught with such deep interest to the colony. But the records show that there was a strong patriotic sentiment in the assembly, though apparently not strong enough to control it. This sentiment was strong enough, however, to excite the suspicions of the Governor, and to lead to the numerous prorogations which showed an unwillingness on his part to permit the assembly to meet and resume its ordinary functions.

A few incidents that occurred a short time before this assembly held its last session show the temper of its members, and the efforts made by the patriots to commit it to a policy of union with the other colonies in asserting the liberties of the people. These incidents also show that, while the patriots made a strong and influential faction, they were in a minority, and their efforts in behalf of colonial union and resistance were persistently opposed and defeated.

The first of these incidents occurred on the 26th of January, 1775, when Colonel Abraham Ten Broeck moved that the assembly "take into consideration the proceedings of the Continental Congress held at Philadelphia in the months of September and October last." No vote was taken on this motion, but the previous question moved thereon was lost by a vote of 10 to 11.

The following delegates voted in the affirmative:—Nathaniel Woodhull, Suffolk; Philip Schuyler, Albany; George Clinton, Ulster; Pierre Van Cortlandt, Cortlandt; Charles De Witt, Ulster; Philip Livingston, Livingston Manor; Zebulon Seaman, Queens; Abraham Ten Broeck, Rensselaerwyck; William Nicoll, Suffolk; Simon Boerum, Kings.

This little band of patriots stood firmly together for the cause they had espoused, and, when the assembly suf-

ferred an inglorious extinction, they joined the other patriots in carrying forward the work which soon culminated in the Revolution and independence. George Clinton became first governor of the state; Philip Schuyler was one of the chief military figures of the war; and Philip Livingston was a member of the committee of the Continental Congress appointed to draft the Declaration of Independence; Nathaniel Woodhull was president *pro tem.* of the First Provincial Congress, and president of the Second, Third, and Fourth Provincial Congresses, the latter of which framed and adopted the first Constitution. He was commissioned brigadier general in August, 1775, and died at New Utrecht, September 10, 1776, in consequence of wounds received from British troopers after he had surrendered his sword. Pierre Van Cortlandt was a member of the Second, Third, and Fourth Provincial Congresses, vice president of the latter, president of both councils of safety, member and president of the first senate, first lieutenant governor, which office he held for eighteen years, and was also vice chancellor. Abraham Ten Broeck was a member of each Provincial Congress, and was president of the Fourth a part of the time, and senator, member of assembly, mayor of Albany, and canal and prison commissioner. Charles De Witt was a member of the Third and Fourth Provincial Congresses, and in the latter was appointed a member of the committee on Constitution; he was also in the first Council of Safety, a delegate to the Continental Congress, and member of assembly.

But the efforts of the patriots in this assembly did not cease with the defeat already noted. On the 16th of February, 1775, Colonel Philip Schuyler moved to enter on the assembly journals various letters written by and to the committee of correspondence theretofore appointed by the assembly, including a letter from the committee to

Edmund Burke, the agent of the colony at the court of Great Britain; and that these letters be published in the newspapers. This motion was defeated by a vote of 9 to 16.

Again, on the 17th of February, 1775, Colonel Nathaniel Woodhull moved that the thanks of the assembly be given to the delegates from the colony to the Continental Congress, held at Philadelphia, in the months of September and October, 1774. This motion was defeated by a vote of 9 to 15.

Another significant incident occurred on the 21st of February, when Philip Livingston moved that the thanks of the assembly be given to the merchants and other inhabitants of the colony for declining to receive the importation of goods from Great Britain, and for their firm adherence to the association entered into and recommended by the "Grand Continental Congress," held the previous year. The motion was lost by a vote of 10 to 15.

On the 23d of February, almost a month after the defeat of Colonel Ten Broeck's proposition, another effort was made to commit the assembly to the policy of colonial union. John Thomas of Westchester, who was not present when Colonel Ten Broeck's motion was made, moved that the sense of the assembly be taken on the necessity of appointing delegates for the colony to the Continental Congress, to be held on the 10th of May, 1775. The motion was lost by a vote of 9 to 17.

The action of the assembly on these propositions was sufficient to show that nothing could be expected from that body in support of the cause which so many of the colonies felt must be vigorously asserted and maintained.

But the people did not wait for action by the assembly. In May, 1774, the merchants of the city of New York organized a committee of fifty-one members "to consult

on the measures proper to be pursued," and "to correspond with our sister colonies on all matters of moment." This committee addressed letters to various colonies, recommending a general congress of representatives of the colonies, to take action "for the security of our common rights." This seems to have been the first suggestion for such a congress. Anticipating that the other colonies would accept New York's suggestion, the Committee of Fifty-One recommended that delegates be chosen to the proposed congress. Delegates were accordingly elected by the people on the 28th of July, 1774.

The Continental Congress met at Philadelphia September 5, and, having taken the desired action for a union of the colonies, the New York Committee of Fifty-One felt that its purpose had been accomplished, and it was dissolved in November, 1774. It was succeeded by another committee, consisting of sixty members, called the Committee of Inspection. This committee in March, 1775, issued a call to the several counties in the colony to elect delegates to a Provincial Convention, to be held in New York on the 20th of April, 1775, for the purpose of choosing delegates to represent the colony in a Continental Congress to be held at Philadelphia on the 10th of May. This convention met accordingly at the Exchange in New York, on the day appointed, and selected delegates to the Continental Congress. It dissolved on the 22d of April.

On the 1st of May the Committee of Sixty was increased to one hundred, and reorganized as a Provisional War Committee. This 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.

The people, at the suggestion of a large committee chosen by the people themselves at a public meeting, elected the First Provincial Congress. Subsequent Provincial Congresses were elected by the people on the recommendation of an existing congress; and it is worthy of note that in the space of only thirteen months four Provincial Congresses were elected. This shows a very frequent reference to the people for authority; and these elections, occurring at short intervals, afforded the people opportunity to express their views on public affairs by the election of delegates to the Provincial Congresses.

A striking instance of the jealous care with which popular rights were guarded, and the caution manifested in working out a plan for an independent state government, is shown by the action of the Third Provincial Congress in May, 1776, in providing for a new congress to be elected with express authority to form a new plan of government.

On the 10th of May, 1776, the Continental Congress adopted a resolution recommending that the respective assemblies and conventions of the United Colonies adopt such government as should best conduce to the happiness and safety of the people of the several colonies in particular, and of America in general. This resolution was communicated to the colonies, and was taken up for consideration by the New York Provincial Congress on the 24th of May. The journal informs us that Gouverneur Morris made a "long argument" on the proposition, and

concluded with a motion for the appointment of a committee "to draw up a recommendation to the people of this colony for the choosing of persons to frame a government for the said colony." John Morin Scott opposed the motion in a "long argument," expressing the opinion that the existing congress had power to form a government, "or, at least, that it is doubtful whether they have not that power;" and that therefore, in his opinion, that point ought to be reserved, and a committee appointed to report on that matter. Thereupon Comfort Sands moved an amendment to Mr. Morris's motion, providing, in substance, for the appointment of a committee to take into consideration the resolutions of the Continental Congress on this subject, and report thereon with all convenient speed. Mr. Morris made another "long argument" in opposition to this motion, but it was adopted, and the following committee was appointed: John Morin Scott, John Haring, Henry Remsen, Francis Lewis, John Jay, Jacob Cuyler, and John Broome. May 27th the committee made the following report:

"That your committee are of opinion that the right of framing, creating, or new modeling civil government is, and ought to be, in the people.

"2dly. That, as the present form of government, by congress and committees in this colony, originated from, and so it depends on, the free and uncontrolled choice of the inhabitants thereof.

"3dly. That the said form of government was instituted while the old form of government still subsisted, and therefore is unnecessarily subject to many defects which could not then be remedied by any new institutions.

"4thly. That by the voluntary abdication of the late Governor Tryon, the dissolution of our assembly for want of due prorogation, and the open and unwarrant-

able hostilities committed against the persons and property of the inhabitants of all the United Colonies in North America, by the British fleets and arms, under the authority and by the express direction and appointment of the King, Lords, and Commons of Great Britain, the said old form has become, *ipso facto*, dissolved; whereby it hath become absolutely necessary for the good people of this colony to institute a new and regular form of internal government and police, the supreme legislative and executive power in which should, for the present, wholly reside and be within this colony, in exclusion of all foreign and external power, authority, dominion, jurisdiction, and pre-eminence whatsoever.

"5thly. That doubts have arisen whether this congress are vested with sufficient authority to frame and institute such new form of internal government and police.

"6thly. That these doubts can and of right ought to be removed by the good people of this colony only.

"7thly. That until such new form of internal police and government be constitutionally established, or until the expiration of the term for which this congress was elected, this congress ought to continue in the full exercise of their present authority, and in the meantime ought to give the good people of each several respective county of this colony full opportunity to remove the said doubts, either by declaring their respective representatives in this congress, in conjunction with the representatives of the other counties, respectively competent for the purpose of establishing such new form of internal police and government, and adding to their number, if they shall think proper, or by electing others in the stead of the present members, or any or either of them, and increasing (if they should deem it necessary) the number of deputies from each county, with the like powers as are now vested

in this congress, and with express authority to institute and establish such new and internal form of government and police as aforesaid.

"8thly. That, therefore, this House take same order to be publicly notified throughout the several counties in this colony, whereby the inhabitants of each county respectively, on a given day to be appointed in each of them respectively by this congress, for the purpose, may, by plurality of voices, either confirm their present representatives respectively in this congress in their present powers, and with express authority, in conjunction with the representatives in this congress for the other counties, to institute a new internal form of government and police for this colony, and suited to the present critical emergency, and to continue in full force and effect until a future peace with Great Britain shall render the same unnecessary, or elect new members for that purpose, to take seats in congress in the places of those members respectively who shall not be so confirmed,—the number to be capable of such addition or increase in each respective county, as aforesaid."

On the 31st of May the Third Provincial Congress, then sitting in New York, adopted the following preamble 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

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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 names of the men who so wisely and patriotically performed this great duty should not be forgotten, for they were the pioneers in constitutional government in New York. It has not been easy to ascertain definitely the names of the representatives from the different counties of this congress. The journal of the congress is probably the best evidence of its membership, and this shows, presumably with accuracy, the attendance from day to day. In addition to this, local histories and other publications contain the names of persons said to have been representatives in the Provincial Congress at a period covered by the Fourth Provincial Congress, but whose names do not appear on its journal.

The following list contains the names of representatives as shown by the journal, and also the names of those who appear by other publications to have been members of this congress. The names in brackets do not appear in the journal.

Albany.—Abraham Ten Broeck (1, 2, 3) ; Robert Yates (1, 2, 3) ; Leonard Gansevoort (2, 3) ; Abraham Yates, Jun. (1, 2, 3) ; John

Ten Broeck (3); John Tayler (3); Peter R. Livingston (2, 3); Robert Van Rensselaer (1, 2, 3); Matthew Adgate (3); John James Bleeker (2, 3); Jacob Cuyler (1, 2, 3).

Charlotte.—John Williams (1, 2, 3); Alexander Webster (3); George Smith (1); William Duer (3).

Cumberland.—Simeon Stevens (3); Joseph Marsh (3); John Sessions (3).

Dutchess.—Robert R. Livingston (3); Zephaniah Platt (1, 3); John Schenck (3); Jonathan Landon (1, 3); James Livingston (3); Henry Schenck (2, 3); Nathaniel Sackett (1, 3); Dr. Joseph Crane; Gilbert Livingston (1, 2, 3); Anthony Hoffman (1, 3); Cornelius Humphreys (2, 3); Mr. Hopkins.

[NOTE.—The name of Mr. Hopkins frequently appears in the journal of the Convention, but local histories do not include him in the list of delegates. I think the record kept by the secretary of the Convention justifies the inclusion of the name in this list.]

Gloucester.—Jacob Bayley (3); Peter Olcott.

Kings.—Theodorus Polhemus (1, 2, 3); Nicholas Covenhoven (1, 2, 3).

New York.—John Jay (3); James Duane (3); John Morin Scott (1, 2, 3); James Beekman (1, 2, 3); Daniel Dunscomb (3); Jacobus Van Zandt (1, 2, 3); Abraham Brashier (1, 2, 3); [Comfort Sands] (2, 3); Henry Remsen (3); Garrit Abeel (3); Robert Harper (3); Philip Livingston (3); Francis Lewis (3); Anthony Rutgers (2, 3); Isaac Stoutenbergh (2, 3); John Van Cortlandt (1, 2, 3); Thomas Randall (3); John Broome (3); Abraham P. Lott (3); Peter P. Van Zandt (3); Evert Bancker (2, 3); Isaac Roosevelt (1, 2, 3); William Denning (2, 3); [William Scott]; Robert Taylor.

Orange.—William Allison (1, 2, 3); Henry Wisner (3); Jeremiah Clarke (1, 2); Isaac Sherwood (3); Joshua H. Smith (3); John Harring (1, 2, 3); Archibald Little (3); David Pye (1, 3); Thomas Outwater (3).

Queens.—Jonathan Lawrence (1, 3); Samuel Townsend (1, 3); Cornelius Van Wyck (3); Waters Smith (3); Abraham Kettletas (3); James Townsend (3); Jacob Blackwell (1, 3); Benjamin Sands.

Richmond.—Not represented.

Suffolk.—William Smith (3); Thomas Tredwell (1, 2, 3); John Sloss Hobart (1, 2, 3); Matthias Burnet Miller; Ezra L'Hommedieu

(1, 2, 3); Nathaniel Woodhull (1, 2, 3); Thomas Deering (3); David Gelston (2, 3); [David Hedges].

[NOTE.—The journal of the Committee of Safety (nominally composed of members of the Convention) shows that Mr. Nicoll, of Suffolk, attended, apparently as a member, at the morning session on the 6th of November, 1776. I do not find his name elsewhere in the journal, and am not aware of any other evidence of his connection with the Convention.]

Tryon.—William Harper (3); Volkert Veeder (3); Benjamin Newkirk (3); [George Smith]; Isaac Paris (2, 3); John Moore (1, 2, 3).

Ulster.—Christopher Tappen (1, 3); Matthew Rea (2, 3); Matthew Cantine (2, 3); Charles De Witt (3); Levi Pawling (3); Henry Wisner, Jr. (2, 3); George Clinton (3); Arthur Parks (3).

Westchester.—Pierre Van Cortlandt (2, 3); Gouverneur Morris (1, 3); Gilbert Drake (2, 3); Lewis Graham (1, 2, 3); Ebenezer Lockwood (2, 3); Lewis Morris (3); William Paulding (1, 2); Samuel Haviland (3); Benjamin Smith (3); Zebadiah Mills (3); Jonathan Platt (3); Jonathan Tompkins (3).

[NOTE.—According to the rough draft of the journal of the Committee of Safety, Col. Gil. Budd appeared as a delegate from this county on the 10th of September, 1776; but in the engrossed copy the name "Drake" seems to have been written over the name "Budd." I do not find the latter name in any list of delegates in the journal, nor in any local history.]

The list contains one hundred seven names besides the names of Mr. Nicoll and Mr. Budd, and the names in brackets. The figures in parenthesis opposite a name indicate membership in previous congresses. Of the one hundred seven actual delegates, twenty-three were members of all previous congresses, thirty-six served in the first congress, forty-two in the second, and ninety-eight in the third, leaving only six without previous service.

The re-election of such a large number of members of the third congress to the fourth was a significant expression of popular confidence, and indicated an intention on the part of the people to clothe their representatives with all the authority needed to administer the affairs of the colony, and erect a new state government.

In the interval between the adjournment of the Third Provincial Congress and the assembling of the fourth,

the Continental Congress, at Philadelphia, had taken the decisive step for a separation of the colonies. The Declaration of Independence had been proclaimed on the 4th of July, and when the Fourth Provincial Congress met at White Plains on the 9th, almost its first business was to consider a letter received from the New York delegates in the Continental Congress, transmitting a copy of the Declaration. After full consideration of this momentous subject, a resolution, prepared by John Jay, was adopted unanimously, by which it was resolved "that the reasons assigned by the Continental Congress for declaring the United Colonies free and independent states are cogent and conclusive, and that, while we lament the cruel necessity which has rendered that measure unavoidable, we approve the same, and will, at the risk of our lives and fortunes, join with the other colonies in supporting it."

The next day, the 10th, the Provincial Congress adopted the following resolution:

"Resolved and Ordered, That the style and title of this House be changed from that of 'The Provincial Congress of the Colony of New York,' to that of 'The Convention of the Representatives of the State of New York.'"

On the same day the Convention fixed the 16th inst. as the time for considering the resolution of Congress relative to establishing independent state governments, and all the members were ordered to attend on that day.

The dual character of the functions with which this Convention had been clothed, namely, to administer the affairs of the state until a settled government could be organized, and in the meantime prepare a suitable plan for a permanent government, and the opinion entertained by the Convention that a written constitution was then of secondary importance, appears from the action of the

Convention on the 16th of July, the time fixed to begin consideration of a plan of government, when a preamble was adopted reciting that, "whereas the present dangerous situation of this state demands the unremitting attention of every member of this Convention," followed by a resolution that "the consideration of the necessity and propriety of establishing an independent civil government be postponed until the 1st day of August next, and that in the meantime all magistrates and other officers of justice in this state who are well affected to the liberties of America be requested, until further orders, to exercise their respective offices, providing that all processes and other their proceedings be under the authority and in the name of the state of New York."

The status of residents was declared by the additional resolution that all persons abiding within the state of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state, and the status of transients was declared by the provision that "all persons passing through, visiting, or making a temporary stay in the said state, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe during the same time allegiance thereto." Treason was defined and made punishable as follows: "That all persons, members of or owing allegiance to this state, as before described, who shall levy war against the said state, within the same, or be adherent to the King of Great Britain or others the enemies of the said state within the same giving to him or them aid and comfort, are guilty of treason against the state, and, being thereof convicted, shall suffer the pains and penalties of death."

The Convention by another resolution "earnestly recommended to the general committees of the counties and the subcommittees of the districts of the several

counties in this state immediately to apprehend and secure all such persons whose going at large at this time they shall deem dangerous to the liberties of this state; provided always that the parties arrested by the sub-committees have a right of appeal to the general county committee, who may recommit or discharge them as to them shall seem meet; and that the county committees report the steps they have taken in consequence of this resolution." These resolutions were considered by the supreme court in *Jackson ex dem. Russell v. White*, 20 Johns. 313, where a doubt was expressed "whether, until the adoption of our Constitution, treason could be committed against that imperfect and inchoate government which was called into existence by the necessity of the case, and was continued until the people could deliberate and settle down upon a plan of government calculated to secure and perpetuate their liberties."

The Convention, by these resolutions, asserted and proposed to exercise the highest powers of sovereignty, providing executive and judicial machinery for the enforcement of the ordinances which the Convention might adopt, reserving to itself full legislative power without any charter or specific commission defining the limitations of that power, exercising authority to establish judicial tribunals, borrow money, create debts, maintain order, prosecute the war, and at the same time, at its convenience, frame a plan for a permanent state government. History shows that the local committees which the foregoing resolution clothed with such large administrative and judicial powers actually exercised such powers, even to the extent of inflicting the death penalty on persons charged with disloyalty. This government, revolutionary in its inception and organization, self-created, and irresponsible except very indirectly to the people, who might overturn it and establish another in

the same way, was the highest expression of the original sovereignty of a people engaged in a great struggle for independence; but this new government, maintained and enforced with wisdom, prudence, and self-restraint for fourteen months, was not continued from any love of power, but was terminated at the earliest possible moment; and, while more than nine months elapsed after the organization of the Convention before the adoption of the Constitution, they were months full of serious problems requiring constant attention, and of difficulties which taxed the wisdom of the patriots to its utmost limit. The government, such as it was, must be maintained; a written constitution could wait. But there was no intention to postpone unreasonably the task committed to the Convention by the people, and sixteen days later the Convention began the great work of

MAKING A CONSTITUTION.

On the 1st of August, in accordance with the resolution adopted on the 16th of July, Mr. Morris moved the appointment of a committee to take into consideration and report a plan for instituting and framing a new form of government. Mr. Adgate moved that the committee first prepare and report a bill of rights. After considerable debate this subject was included in the Morris resolution, by requiring the committee also to prepare a bill of rights "ascertaining and declaring the essential rights and privileges of the good people of this state, as a foundation for such form of government." The Convention then appointed a committee of thirteen, consisting of John Jay, John Sloss Hobart, William Smith, William Duer, Gouverneur Morris, Robert R. Livingston, John Broome, John Morin Scott, Abraham Yates, Henry Wisner, Sr., Samuel Townshend, Charles DeWitt, and

Robert Yates. James Duane was added to the committee on the 28th of September.

The real character of the men who laid the foundations of the state, the deep, but not self-sufficient, spirit of patriotism that animated them, and their sincere and solemn appreciation of the great task committed to them could not have been more clearly shown than by the resolution adopted unanimously by the Convention on the 2nd of August, the next day after the appointment of the committee on the Constitution, directing that the 27th day of August "be kept throughout this state as a day of fasting, humiliation, and prayer to Almighty God for the imploring of His Divine assistance in the organization and establishment of a form of government for the security and perpetuation of the civil and religious rights and liberties of mankind, and to supplicate His farther protection in the war which now rages throughout America." The resolution was ordered published in all public newspapers throughout the state. A resolution was also unanimously adopted providing that three sermons "suitable to the occasion be preached on that day before the Convention," in the church at Harlem; and Reverend Mr. Schoonmaker of Harlem, Reverend Mr. Provoost of the county of Albany, and Reverend Dr. Rodgers of the city of New York were selected as the clergymen to perform this service.

The committee found little opportunity to write a constitution. In addition to the urgency of public affairs which demanded immediate attention, and the numerous difficulties which beset the Convention on all sides, it was subjected to the danger of attack and possible capture by the British. To avoid this, it became necessary for the Convention to move from place to place. It went from White Plains to Harlem, where its sessions were held in the church. It afterwards met successively at

King's Bridge, Odell's in Phillipp's Manor, Fishkill, Poughkeepsie, and finally at Kingston, where the Constitution was adopted.

On the 16th of July a committee consisting of John Jay, Robert Yates, Christopher Tappen, Robert R. Livingston, Gilbert Livingston, and William Paulding, was appointed "to devise and carry into execution such measures as to them shall appear most effectual for obstructing the channel of Hudson's river or annoying the enemy's ships in their navigation of the said river." This committee at once began the performance of the duty assigned to it, and was necessarily absent from the Convention several weeks. On the 3d of August a letter was addressed by the Convention to John Jay, Robert R. Livingston, and Robert Yates, who were absent with the secret committee, informing them of their appointment as members of the committee on a constitution, requesting early action by the committee, and informing them that congress would expect their attendance on the 26th inst., when the plan of government was expected to be reported. On the 12th of August a letter was sent to Livingston and Jay informing them that the Convention thought it highly proper that they attend on the business of framing a new government, unless their presence was absolutely necessary in the secret committee. The next day, the 13th, the Convention concluded that it would be improper to call Mr. Jay and Mr. Yates from the secret committee, and Mr. Livingston was excused from the Convention for the purpose of attending that committee. On the same day, the 13th, Robert Yates, chairman of the secret committee, wrote to the Convention from Poughkeepsie: "Business grows upon our hands, and, if Messrs. Yates, Jay, and Livingston are recalled, there will not be a quorum of the committee left," and expressed the opinion that the business of the

committee would not admit of their returning to the Convention by the 26th inst. The committee on plan of government did not report on the 26th as directed, and apparently had done nothing toward preparing a constitution.

On the 14th of September the Convention adopted a resolution directing the committee to report with all convenient speed. On the 28th of September the Convention began to show signs of impatience, and directed the committee to report a plan of government on or before the 12th of October, "and that the said committee may no longer be detained from that important business: Ordered, That the said committee sit every afternoon until they shall be ready to report." The committee did not report on the 12th. On the 14th of October Mr. Jay was appointed a member of a special committee to go to King's Bridge, and this, of course, prevented him from devoting his attention to the work of preparing a constitution. On the 15th of October the Convention resolved itself into a committee of safety under a resolution which authorized the committee to do any act which the Convention might do, "except forming a government." The Convention as such did not meet again until the 5th of December, and during this time no action could have been taken relative to forming a state government, except by the committee appointed for that purpose. There is no evidence that the committee did anything during that interval towards preparing a plan of government. The difficulties under which this convention labored clearly appear from the resolution of the 12th of November, notifying the committee of each county not in possession of the enemy that the Convention are now proceeding on the business of forming a system of government, and that it is necessary that the members give their attendance without delay.

This attempt to bring in the absentees did not result in materially increasing the membership of the Convention, and it is a fact worth noting that the work of that body was usually transacted by less than one third of its members. The Convention met on the 5th of December, but according to the journal "the committee appointed to prepare the form of government, and sundry other members of the Convention having withdrawn," the remainder proceeded to business as a committee of safety. The next day the Convention met again, and, among other things, ordered that the "committee on government retire to consider that business." On the 12th of December Mr. Abraham Yates, chairman of the committee on government, gave notice that the committee "will report this day eight days," and requested Mr. McKesson, one of the secretaries of the Convention, to attend the committee and copy its report. According to this notice the report should have been presented on the 20th, but on that day the report of a draft of a form of government was postponed "until to-morrow," and on the 21st there was another postponement until "Monday next," the 23d, at which time Abraham Yates was given a leave of absence on account of ill-health.

On the 1st of March a motion by Mr. Morris directing the Constitution committee to sit the next day was rejected. On the 4th the committee was ordered "to meet this afternoon at 4 o'clock." On the 6th the Convention adopted a resolution offered by Leonard Gansevoort directing the committee on form of government to report on Wednesday next. On the 12th, in compliance with this resolution, the committee for preparing and reporting a form or plan of government brought in their report, which, according to the journal, was read by Mr. Duane in his place, and delivered in at the table where the same was again read. Abraham Yates, chairman of

the committee, was not present, neither was Mr. Jay, and Mr. Duane was doubtless selected to present the report because of his position as one of the recognized leaders of the Convention. It was evidently the intention of the Convention to proceed at once to the consideration of the proposed constitution. It rejected Mr. Adgate's motion that the said plan of government lie on the table four days for the perusal of the members, and that they be at liberty to take copies thereof, and adopted a motion by Colonel DeWitt that the proposed plan of government lie on the table until the next morning, and that it then be taken into consideration. But, to facilitate preparation for such consideration, it was ordered, on motion of Robert R. Livingston, that "one of the secretaries attend in this room at 4 o'clock this afternoon with the said plan of government, and read it to any of the members who shall choose to attend."

Who was the author of the first Constitution? We are considering first things, and the beginnings of our institutions. The first Constitution was not only an important document viewed as a statement of principles underlying a new government, but it was a political instrument of high character, and our state to-day, with all its growth and development through a century and a quarter, still rests on the foundations laid by the statesmen of that early convention. It was a great instrument, and embodied in concrete form great ideas and great purposes. It represented political wisdom of a very high order, and was a radical departure in many respects from the functions and customs of government with which the Convention was familiar. Its principles and policies and methods of administration have proved beneficent far beyond the expectations of its authors. It was constructed in part from materials offered by the extended political experience which many members of

the Convention possessed; but this experience was too limited for the exigencies of a new and independent government, and its framers were therefore compelled to put into proper written form ideas intended to provide methods of administration hitherto unknown; and we may fairly say of the result that it expresses a political inspiration born of great genius and animated by a prophetic vision which enabled the authors of the instrument to see, beyond the words they wrote, a commonwealth destined to occupy the place of primacy in a great nation. If it was a "time which tried men's souls," it was also a time which developed their highest talents. The journal of the Convention clearly shows that several members were active in suggesting provisions to be incorporated in the Constitution, but three men—John Jay, Robert R. Livingston, and Gouverneur Morris—were, more than all others, responsible for the instrument as a whole. It has been suggested that they acted as a subcommittee of the general committee on the Constitution. I find no direct evidence of this, but evidence is abundant that they were associated together in preparing and procuring the adoption of many important provisions. They usually, but not always, worked in harmony. They were apparently congenial spirits, and held frequent consultations together concerning various parts of the instrument. It seems equally clear that John Jay was the leader of the three, and, according to his biographers, he is entitled to the credit of the authorship of the first draft of the instrument. On this subject his son, William Jay, in his biography of John Jay, published in 1833 about five years after his father's death, says that he was chairman of the committee appointed to prepare a plan of government, "and its duty appears to have been assigned to him;" and he also says that the draft of the Constitution presented on the 12th of March was in his

father's handwriting. I have sought diligently, but in vain, for this draft. There are two drafts in the Convention archives, but neither of them seems to be in Jay's handwriting. William Jay also informs us that, "for the purpose of framing the new form of government," his father "retired to some place in the country;" but the place is not named. How much aid Mr. Jay received from his colleagues on the committee does not appear. I have noticed with sufficient detail some of the incidents connected with the Convention's work which prevented the early framing and consideration of the Constitution, and also the items from the journal showing action by the Convention and the committee on this subject prior to the presentation of the proposed draft. John Jay's name appears first in the list of members of the committee on the Constitution, and according to the modern parliamentary rule he would have been its chairman. But it seems to have been the practice in this Convention for a committee to select its own chairman, and it appears from the journal that Abraham Yates was chairman of the committee, although he does not seem to have taken any active part in framing the Constitution. Probably Mr. Jay was the actual head of the committee. The journal also shows, as already noted, that Mr. McKesson, one of the secretaries, was asked to copy the report of the committee, and I think one of the drafts is in his handwriting. It also appears that the proposed Constitution was presented to the Convention and read by James Duane, and, according to the journal, Mr. Jay was not present at that time. It is not improbable, however, that Mr. Jay prepared a draft of a Constitution for the consideration of the committee, which was adopted, and, with its approval, presented by Mr. Duane. William Jay's statement on this subject ought to be conclusive, for his father lived fifty-two years after the Con-

stitution was adopted, and the biographer had ample opportunity to ascertain the facts concerning the authorship of the Constitution. I have examined other sources of information, including the biographies of several of Jay's colleagues, and correspondence relating to the work of the Convention, but am unable to add to the information furnished by William Jay and the journal of the Convention. I am not disposed to dispute William Jay's statement that his father was substantially the author of the first Constitution. The facts disclosed by the journal show, I think, that other members of the committee participated in preparing the report, but this participation is not inconsistent with the suggestion that the draft on which the committee acted was written and submitted by Mr. Jay.

I find among the Convention manuscripts now in the State Library at Albany two papers purporting to be drafts of a proposed constitution. One of these, apparently the original, is indorsed "Dr. 1777 of Form of Government." There are several addenda to this draft marked for insertion at appropriate places. These are evidently afterthoughts, as they involve propositions not especially germane to the original provisions, but introduce new subjects. This original draft has numerous erasures, interlineations, and marginal notes, which show clearly the process of evolution through which the Constitution was passing, either during its actual consideration by the Convention, or in private discussion among the members. The other draft appears to be in many respects a corrected copy of the first, embracing changes indicated in the first by erasures, interlineations, and marginal notes, and also containing a copy of parts of the addenda to the first draft. I think this corrected draft is in Mr. McKesson's handwriting. The second draft also contains several paragraphs embracing new

subjects not in the first draft or the addenda. It seems clear from the journal that, while the Constitution was under consideration, the discussion and the motions and amendments incident to the debate related to both drafts, although principally to the second, and probably for the reason already suggested,—that the second draft was made up from the first with corrections and additions. According to the record, the first draft was presented and read by Mr. Duane on the 12th of March, 1777. Neither of these drafts shows who presented it, but I do not think that either of them is in Mr. Jay's handwriting. It should be stated, however, that Carter & Stone's edition of the Debates of 1821 contains, in the appendix, an article from the New York "Columbian" over the signature of "Schuyler," concerning the adoption of the first Constitution, in which the statement is made that draft A "was chiefly or wholly drawn up by Mr. Jay, and is in his handwriting." The same writer says: "There were annexed to it addenda which I believe are chiefly in the handwriting of Mr. Duane, and were mostly framed by him." The journal does not show the presentation of the second draft. It was probably prepared and presented informally, and, by general consent, was used as the working model in constructing the Constitution.

For the purpose of showing the evolution of the Constitution, I have arranged both of these drafts so that the reader can obtain the original suggestion concerning each subject proposed to be included in the Constitution. I have called the first draft "A" and the second "B," and where practicable, in order to economize space, have put both forms together in one section, following the practice in printing legislative bills, treating "A" as the original form and "B" as an amendment. Words in brackets indicate parts of "A" that were excluded in "B;" words

underscored were added in "B." This arrangement presents both forms, and both the original and amendments can be readily ascertained. The paragraphs as presented contained the usual introduction, "And this Convention doth further ordain, etc.," but these are omitted for obvious reasons. They appear in its final form, but here are not essential to show the provision actually proposed or adopted. For convenience I have prefixed a title to each paragraph. The votes taken during the discussion of the Constitution were by counties, and at the beginning of the debate Mr. Morris moved "that every member who shall dissent from his county, on any section or part of the said form or plan of government, have leave to enter his dissent with the reasons thereof, and that such reasons be entered at length in the minutes, but not published." The motion was lost by a vote of 11 to 22. Under the plan of voting by counties the journal shows only the names of those who voted in the negative. The journal shows that many propositions provoked long and apparently animated debates, but the debates were not reported, and the reasons for the action of the Convention or of individual delegates are not shown, except as they appear from the proposed amendments and provisions effected by them, with occasional brief notes by the secretary. The discussion on the proposed Constitution began on the day of its presentation, March 12, and continued until its adoption on the 20th of April. The following drafts and notes show the original form in which the Constitution was proposed and the amendments adopted, together with several additional paragraphs proposed in the Convention. These drafts are not entered in the journal of the Convention, and I think are now published for the first time. In them the New York statesmen of 1776 present an interesting view of their impressions

concerning the proper scope and form of a written constitution.

(Territorial Limits of State.) This Convention do therefore and by the Authority of the good people of this State ordain determine and declare—here insert boundaries of the State of New York—that all the Lands and Territories included within the Lines and Boundaries of this State do belong and of Right appertain to the people and members thereof. And that they will to the utmost of their power maintain & defend their Title to and possession of the same, against any Kingdom or State which may attempt to deprive them of the same or any part thereof.

Not adopted.

I do not find any description of the state in the records of the Convention, and apparently this section did not receive any attention.

(People the Only Source of Authority.) A & B. That no authority [whatever] shall on any pretence or [domination] whatever [shall] be exercised over the people or members of this State but such as shall be derived from & granted by them.

Adopted without change.

(Legislative Power Vested in Senate and Assembly.) That [all legislative authority] the supreme legislative power within this State shall be vested in two distinct and separate [Bodies] Branches of men—the one to be called the General Assembly of Representatives of the State of New York—the other to be called the [Council] Senate of the State of New York—who together shall form & be called the Legislature of the State of New York, and meet [twice] once at the least in every year for the dispatch of Business.

The words in brackets were erased in the original

and "senate," "branches" and "once" respectively substituted. The section appears in draft B as follows:

"They do further in the name and by the Authority of the good people of this State ordain determine and declare that the supreme legislative Power within this State shall be vested in two distinct and separate branches of Men—the one to be called the General Assembly of Representatives of the State of New York—the other to be called the Senate of the State of New York—who together shall form and be called the Legislature of the State of New York, and meet once at the least in every year for the dispatch of Business."

It seems clear, from the form in which this paragraph was originally presented, that the draftsmen intended to continue the council as a part of the legislature, thus preserving the legislative system which was established in the colony in 1691 and had continued without substantial change. This shows the tendency of the Convention to preserve existing forms. In the original draft "council" is erased and "senate" is written above it, but it does not appear when this change was made. It was evidently made before draft B was prepared, for that draft provided for a senate, and makes no mention of a council. Ten states—Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia—preceded New York in adopting a constitution, and in two states—Virginia and New Jersey—a constitution was adopted before the Declaration of Independence. It may fairly be presumed that the statesmen of New York were familiar with the other Constitutions. The close relations with the states, their intimate association in a great cause, the mingling of representatives of the people in the army and in the Continental Congress, as well as the means of communication afforded by the newspapers and

mails, doubtless enabled the New York Convention to obtain early information of the proceedings in other states. How much other Constitutions influenced the action of the New York Convention, we do not know, and I refer to this subject now only for the purpose of calling attention to the structure of the legislature. The influence of colonial conditions and experiences is manifest in seven Constitutions, which provided for a council which in some cases was vested with legislative powers, and in others was limited to executive functions. In three—Virginia, Maryland, and North Carolina—one branch of the legislature was called a senate, Virginia being the first to give it this name, which was done by its Constitution adopted June 29, 1776. It seems clear that Thomas Jefferson first suggested this name for the upper branch of the legislature. While the Virginia convention was in session, Jefferson, then being in attendance at the Continental Congress at Philadelphia, prepared a draft of a form of government for Virginia, and sent it to Mr. Pendleton, president of the convention. This draft proposed a senate to be composed of senators appointed by the House of Representatives for terms of nine years, one third to go out of office every three years. When this proposed Constitution reached the convention a plan of government was already under consideration, and had been substantially agreed to in committee of the whole. This plan was based on a draft prepared by George Mason, in which the upper branch of the legislature was called the "upper house" without any specific designation, to be composed of twenty-four members. It was too late to consider Jefferson's Constitution as a whole, but his preamble was taken, and also some other parts not specified, which were used in amending the Mason draft. In view of the fact that the Mason draft did not propose a senate, and that Jefferson's draft did,

and that the Constitution as adopted designated the higher branch of the legislature the senate as suggested by Jefferson, instead of an "upper house" as suggested by Mason, it seems reasonably certain that during the last few days of the consideration of the Constitution this provision, among others, was borrowed from the Jefferson draft, and became a part of the Constitution as adopted. The reader will find Jefferson's draft in Ford's "Writings of Thomas Jefferson," vol. 2, p. 9, and Mason's in Rowland's "Life of Mason," vol. 1, p. 444. It is not surprising that the author of the first draft presented to the New York Convention should have proposed to continue the council, which for eighty-five years had constituted a distinct branch of the colonial legislature with full legislative powers. Whether the Convention, in changing the designation of the highest branch of the legislature from the council to senate followed the three states already named, or whether, being familiar with the Athenian, Spartan, and Roman senates, they determined to follow the high examples of antiquity and create a legislative body of great dignity and power, with peculiar privileges vested in representatives chosen from a select body of citizens possessing qualifications not required in the more popular branch of the legislature, we are not informed, but it seems quite clear, from other proposed provisions to which I shall presently refer, that the authors of the proposed Constitution intended to establish two legislative branches or orders with different and very distinct qualifications.

While this section was under consideration Joshua H. Smith proposed that the legislature consist of three separate and distinct branches, intending to add the governor as the third branch, also giving the governor a negative on all laws passed by the senate and assembly. While this motion was pending Mr. Morris moved to add the

following words at the end of the section: "Providing that the governor shall have no power to originate or amend any law, but simply to give his assent or dissent thereto." The Smith amendment, as modified by Mr. Morris, was adopted by a vote of 19 to 7. This made the governor a distinct part of the legislature, but without giving him any specific status in either branch. This arrangement was, perhaps, suggested by the condition which existed during the first half of the colonial legislative period, when the governor sat as a member of the council, voted on each bill, and also had a casting vote in case of a tie, and in addition to these two votes might finally veto the bill. In the chapter on the colonial period I have referred to the difficulties sometimes resulting from this peculiar condition and the change made in 1735, which deprived the governor of specific legislative functions, but without disturbing his veto power.

Mr. Jay, as already stated, was not present when the proposed Constitution was presented, and we do not find him in the Convention until the 17th. He was evidently not pleased with the Smith amendment, and on the 20th gave notice that he would move its reconsideration. Two weeks later the Convention retraced its steps, struck out the Smith amendment, and restored the section to its original form. No further change was made, except to eliminate the word "general" before "assembly," which was done just before the Constitution was adopted.

(Assembly, How Constituted.) A & B. That the General Assembly of Representatives of the State of New York shall always hereafter consist of at least Seventy Members, to be chosen in every County out of the Freeholders resident therein in proportion to the number of [taxables] electors in such county.

The Convention rejected a proposition offered by General Scott, providing that each county should be entitled to representatives not less than the number it had in the last session of the Colonial Assembly, and that Cumberland and Gloucester should each be entitled to not less than two representatives, notwithstanding the erection of a new county. Mr. Duane proposed that the Convention apportion the representatives among the several counties. This was at first rejected, but later a committee was appointed on this subject, who reported in favor of an apportionment, which was accordingly made, and appears in § 4 as finally adopted.

(Assembly Districts.) A. That every County within this State shall be divided into as many Districts by the ensuing legislature as it sends Representatives containing as nearly as may be an equal number of Inhabitants—which Districts shall from time to Time be altered in any County when the number of Representatives in such county shall be increased or diminished.

That all Elections for Representatives in general Assembly be made in every district annually by Ballot in such mode as the Legislature may prescribe. That every district chuse one person to represent the County out of the Freeholders who shall actually and in fact reside within such district; and that no persons shall have a right to vote for a Representative in any District but that in which he shall usually and in fact reside.

Marginal Note. "Agreed that the elections for representatives shall be by Counties at large as usual—but by ballot out of the freeholders resident in the county for which he is elected."

This subject was not included in draft B. The Convention does not seem to have given it any attention. It suggested an important change in the plan of assembly representation, but the Convention adhered to the method

with which the colony had been familiar since 1683, and continued the plan of choosing members of assembly by counties. The development of this subject will be shown in subsequent chapters where it will appear that in 1847—one hundred and sixty-four years after the assembly was established—its members were for the first time chosen by districts, and that the Convention of 1867 agreed to an amendment restoring county representation.

(Census; Reapportionment of Assembly.) B. And to the end that the ~~number of Taxables~~ Representation may always continue equal, be it ordained that once in every seven years a just account of all the ~~Taxables~~ Electors resident therein be taken in every County in such manner as some future Legislature shall direct. And if on such Account it shall appear that the number of ~~Taxables~~ Electors has encreased or diminished in any County one Seventieth part of the whole number of ~~Taxables~~ Electors now in the State, the Representation of that County shall encrease or diminish in the same proportion so that the Number of Representatives in General Assembly shall bear as nearly as may be the same proportion to the Inhabitants of this state as it does at this Time.

While this section was under consideration Mr. Jay moved that Richmond county should always have one representative in the assembly, for the reason that it could not be conveniently annexed to any other county. This motion was lost by a tie vote of 18 to 18. The Convention also rejected Mr. Morris's motion that "no county shall be left without at least one representative."

(Members of Assembly; How Chosen.) A (addendum) and B. And this Convention doth further ordain that all Elections for representatives in General Assembly shall be made by ballot in every county out of the Freeholders per-

sonally residing in each respective county. That the laws in force in the colony of New York for regulating elections shall continue to have their full effect where they shall not be repugnant to the Constitution hereby established and until they shall be altered or repealed by a future legislature.

(Ballots.) And forasmuch as nothing is more essential to the security of a people than the freedom of elections, and it is of the utmost importance to prescribe such regulations as will most effectually guard against undue Influence, Partiality, Fraud or Corruption: This convention doth therefore ordain That every future election for Representatives of the State in general Assembly each elector shall vote by delivering to the sherif or returning officer a ticket tied up, containing the names of the persons for whom he gives his voice to be Representatives. That the sherif or returning officer shall number or cause to be numbered the said ticket.

(Poll Books.) That the sworn clerk shall enter the name of the elector and number of the ticket in the Poll Books, and therein designate whether the Elector votes as a free-man or Freeholder.

(Ballot Box.) That each ticket being thus numbered and entered shall be publicly put into a locked box thro a hole for that purpose, ~~so continuing until the~~

(Inspectors.) That every polling shall be thus carried on in the presence of a number of reputable Inspectors. That in the City and County of New York the several aldermen, assistants and assessors of the different wards shall ~~be~~ on the day of in every year assemble at the City Hall of the said city and there in the presence of the town clerk and Chamberlain elect by Ballot substantial freeholders and residents in the said City and County to be inspectors ~~for~~ of elections for representatives in General Assembly, and that the supervisors and assessors of every County, town, manor Burrough & precinct within this State at the yearly meeting of the supervisors of each respective County shall assemble together and there by ballot in the manner above directed & in the presence of the county treasurer chuse substantial Freeholders and actual residents

of the places for which they shall be elected to be Inspectors of election for Representatives in their respective Counties. That the Ticketts at every such election for inspectors being all delivered in and put into such Box as aforesaid the Key of the Box shall be sealed up with the seals of supervisors and assessors or a majority of them in each respective County; and in the City of New York by the Aldermen assistants and assessors or the major part of them and kept by such ~~per~~ one of them as they or the major part of them shall appoint and the box shall be lodged either with the county Treasurer or Clerk of the County. That until such election be made in the respective Counties the supervisors in each County and the Aldermen and assistants in the City of New York shall serve as Inspectors.

(Election of Inspectors.) That when any writ or precept shall issue for the Election of any one or more Representatives to serve in general assembly the Returning officer shall by public notices thro the County fix and notify the day of election upwards of Twenty and not more than days from the Time of issuing such notices and shall give at least sixteen days notice thereof to the County Treasurer and Clerk of the County who shall forthwith notify the Supervisors and assessors in ~~each~~ his respective county and the Aldermen assistants and assessors in the City of New York to assemble together at least eight days before the day of Election and the ~~Box containing~~ And whereas by the ~~method above prescribed to prevent a defect of proper inspectors for Elections of Representatives a number of Inspectors be elected every year. The Ballotts for Inspectors shall be publicly opened~~ said Electors of Inspectors being thus assembled the box containing the ballotts for Inspectors shall be publicly opened in the presence of the said electors and the ballots being counted the names of the persons found to be elected by a majority of votes to be inspectors shall by the Treasurer or Clerk of the County be certified to the returning officer of the City, County, Manor Burrough or Township in which such election is to be held who shall immediately notify such inspectors respectively of their ap-

pointment and demand their attendance at the day and place of election.

(Poll Clerks.) That ~~on the first day of~~ the sherif or returning officer for every Election shall provide two or more proper clerks of the Poll with Books for that purpose.

(Oath of Election Officers.) That on the first day of each such election and before any ticket ~~or ballot~~ shall be received the sheriff or returning officer, each inspector present and each clerk of the polls shall be duly sworn by one of the judges of the supreme court for this State or one of the judges of the court of Common Pleas of the County in which such election shall be held not to discover the vote of any elector and well and truly to perform his ~~their~~ ~~respective~~ duty ~~faith~~ during that election faithfully and impartially without fear favor of affection according to the best of his skill and understanding.

(Election, How Conducted; Illiterate Voters.) That the returning officer in the presence of the inspectors shall proceed to receive the Tickets of the electors successively as they offer in the manner hereinbefore directed; and if any elector should be suspected of being unable to read and it shall be so found on trial by his oath or otherwise the ticket of such elector shall be opened and he shall name the person or persons for whom he gives his voice and if therein he differs from his ticket another Ticket shall be made for him agreeable to the vote he shall have given.

(Adjournments.) That when any such Election ~~shall~~ for a Representative or Representatives shall have begun the poll shall not be adjourned without the consent of at least a majority of the Inspectors present.

(Challenge.) That any Inspector at such Election may put or cause to be put to any suspected Elector the oath required in such cases by the present laws of this State; and the ticket of such Elector shall either be rejected or put into the box as the major part of the Inspectors shall determine thereon. That when any ~~Electo~~ Inspector shall doubt of the validity of the vote of any Elector he shall cause a minute to be affixed to his name in the poll Books and after

any such election at the request of any Candidate or Inspector a list of all such names certified by the returning officer on his oath of office shall be made public and delivered to such candidate or Inspector for the purpose of a scrutiny; but for whom such Elector gave his voice shall not be divulged until the time and in the manner hereafter mentioned.

(Canvass.) That when the poll at any such Election shall be finally closed all the poll Books shall be immediately sealed up; and the Tickets shall be successively drawn out of the Box and opened in a public manner in the presence of the Inspectors or a major part of them ~~and~~ the returning officer and sworn clerks of the poll and discovery made by entering the Tickets successively in a Book who has the majority of Votes; and the said Tickets then respectively rolled up put into a Box locked up with the said Poll Books and the key thereof sealed up with the seals of the said returning officer Inspectors or a major part of them. And if upon opening the Tickets more than one shall be found to have been rolled up and included under one string they shall be rejected as void.

(Certificate of Result.) That the returning officer shall then prepare execute and cause to be executed and returned to the secretary of state proper Indentures of the person or persons elected for Representative or Representatives by a majority of votes taken in manner aforesaid.

(Assembly; Contested Elections; Examination of Ballots.) And this convention doth farther ordain that when the House of Representatives shall have allowed a scrutiny as to the seat of any Member the returning officer shall on notice thereof deliver to the Clerk of the General Assembly the Box containing the sealed poll Books and Tickets with the Key or Keys thereof sealed up ~~with his the said return~~ in manner aforesaid. And when it shall be adjudged that any person who polled as an Elector had not a right to vote, the poll Books shall be opened and the Ticket of such ~~Elector~~ person untied and discovery made for whom he voted. And when all the votes first adjudged to be

illegal are discovered to the ~~House~~ General Assembly, the other Ticketts shall without examination be burnt in the Assembly Chamber while the speaker is in the chair.

(When Poll Books and Tickets to be Destroyed.) And in Case no scrutiny shall be demanded within forty days after the first meeting of any General Assembly at their stated times of meeting or on public summons the returning officer of each election shall cause the poll Books and Ticketts (after public notice thereof given) to be burnt, in the city of New York in the presence of the Aldermen or a major part of them and each other City, County, Manor, Burrough or Town having a Representation, in the presence of the supervisors or a major part of them at their next meeting after the expiration of the said forty days.

(Appointment of Inspectors to Fill Vacancies.) And in case of the decease or necessary absence of any Inspector at the time of any such election that the returning officer shall summon the Supervisor living nearest to the place of residence of such absent Inspector whose duty it shall be to attend such election in the place of such Absent Inspector.

The expense of the wages of clerks at such Election and of Boxes and Poll Books shall be defrayed by the inhabitants of the district ~~having a right to vote~~ for which such election shall have been held, to be assessed and raised as the other County or public charges of such district.

~~That the Election for Representatives shall be by the Counties at large as usual but by Ballot out of the Freeholders resident in the County for which he is elected.~~

The foregoing appears in the draft as one solid section, but for convenience of reference I have arranged it in paragraphs with appropriate headings. It will be observed that this scheme is quite like the modern election law, but the Convention was not prepared to adopt it, and apparently did not seriously consider it. While it was under consideration the provision for an election by ballot was, on motion of Mr. Morris, stricken out, and elections

were required to be held according to the laws of the colony. April 5th, Mr. Jay offered the following substitute for the section :

“And whereas it hath been a prevailing opinion among the good people of this State, that the mode of election by ballot would tend more to preserve the liberty and equal freedom of the people than the manner of voting *viva voce*, and it is expedient that a fair experiment be made as to which of those methods of voting is to be preferred :

“Be it ordained, That as soon as may be after the expiration of the present war between the United States of America and Great Britain, an act or acts be passed by the Legislature of this State for causing all elections hereafter to be held in this State for senators and representatives in assembly to be by ballot and directing the manner in which the same shall be conducted.

“Be it further Ordained, That whenever thereafter the mode of voting by ballot, shall, on experience, appear to be attended with more mischief and less conducive to the safety or interests of this State than the method of voting *viva voce*, it shall be lawful and constitutional for the legislature of this State to abolish the same, providing two thirds of the members present in both houses shall concur therein ; and further, that in the meantime all elections for senators and representatives in assembly be made *viva voce*, according to the laws of the colony of New York for regulating elections so far as the same may be consistent with this constitution or according to such laws as by the legislature of this state may for that purpose be enacted.”

The Convention unanimously rejected Mr. Morris's motion to strike out the word “senators” whenever it occurred, so that the section would apply only to members of assembly. Gilbert Livingston's motion to strike out the proviso requiring a two-thirds vote of the legislature to restore voting *viva voce* was also rejected. The

section was adopted by a vote of 33 to 3. On the 20th of April, the last day of the consideration of the Constitution, Mr. Yates moved to strike out the provision authorizing the legislature, after an experiment in voting by ballot, to restore *viva voce* voting, but the Convention was unwilling to change the section, and a motion for the previous question was carried by a vote of 18 to 12, which, by the rule then in force, precluded any vote on the Yates motion.

(Qualifications of Electors of Members of Assembly.)
A & B. That every male Inhabitant of this State of & above the Age of Twenty-one years shall have a right to vote for Representatives in General Assembly in the [district] county in which he or they [actually] personally resides. Provided that he is a Freeholder in the County, or that he has resided therein for one year immediately preceding the said election and has been rated and actually paid [both] public [and] or County Taxes in the said County [within the said year] at least one year before the day of such election.

It will be observed that, under the original section, a voter must have been a freeholder, or must have resided in the county a year and paid both public and county taxes. The owner of taxed personal property would have been a voter under this provision, but the scope of the section was materially limited by several amendments. One offered by R. R. Livingston required a nonfreeholder to be, not only a resident, but to have rented a tenement, which was further modified on motion of Mr. Tredwell by requiring the tenement to be of the yearly value of 40s.; and the Convention also, by a vote of 18 to 12, adopted an amendment offered by Mr. Morris that the freehold owned by a voter must be worth £20. These amendments limited the qualifications of voters to owners or lessees of real property. The Convention adopted

Philip Livingston's amendment reducing the required residence from one year to six months. Freemen in the cities of Albany and New York had been entitled to vote for members of assembly since 1691. Those who were not owners or lessees of real property would have been disfranchised under the foregoing amended section. To avoid this result Mr. Jay offered an amendment which was accepted, preserving the right of suffrage to persons who were then freemen in Albany, or who became freemen in New York on or before October 14, 1775.

(Voters' Oath of Allegiance.) A & B. That every elector shall if required [by any person having a Right to Vote] the returning officer or either of the election inspectors take an Oath, or if of the People called Quakers an Affirmation of Allegiance to the State.

Adopted without amendment.

(Powers of Assembly; Quorum.) A. That the General Assembly thus Constituted shall chuse their own Speaker, be judges of their own Members and proceed in doing Business in like manner as the former Assemblies of the Colony of New York did and that forty of the Members be a Quorum, which Quorum shall hereafter consist of an additional number in proportion to the additional number of representatives "which the legislature may in future direct."

B. That the General Assembly thus constituted shall chuse their own speaker, be judges of their own members, and proceed in doing business in like manner as the former Assemblies of the Colony of New York did; and that forty of the members shall constitute a House sufficient to proceed on Business; which number shall hereafter be encreased in proportion as nearly as possible to the additional number of Representatives which the Legislature may in future ~~direct~~ provide.

This section was amended by adding after the word "members" the words "enjoy the same privileges," and after "New York" the words "of right." On motion of Mr. Morris all of the section after "did" was stricken out, and the following substituted, "and that a majority of the said members shall from time to time constitute a House sufficient to proceed upon business."

(Senate, How Constituted.) A. And this Convention do further ordain determine and declare ~~that the Burthen of supporting and defending this State does at all times rest principally on the freeholders thereof and therefore that they of right ought to have an ascendancy in the Legislature Wherefor this convention do ordain that~~ That the council senate of the State of New York shall consist of ~~Twenty four~~ wise and discreet freeholders (marg. note, "to be chosen out of the Body of Freeholders") and that they be chosen only by the Freeholders of this State, possessed of freeholds of the Value of £40 over and above all debts and incumbrances thereon.

That the said ~~council~~ senate be vested as aforesaid with legislative authority, and ~~with~~ that the Assent of the said ~~council~~ senate and General Assembly be essential to the enactment of Laws binding on the people of this State.

B. That the senate of the State of New York shall consist of Twenty-four ~~wise and discreet~~ freeholders to be chosen out of the body of the Freeholders. And that they be chosen ~~only~~ by the freeholders of this State possessed of Freeholds of the value of ~~forty~~ one hundred pounds over and above all Debts and Incumbrances thereon.

That the said Senate be vested as aforesaid with Legislative authority and that the assent of the said senate and General Assembly be essential to the enacting of laws binding on the people of this State.

The Convention rejected Robert Harper's motion to strike out the property qualification in draft B. On Mr.

Jay's motion the word "charges" was substituted for "incumbrances." As finally adopted no property limit was fixed for senators, but they were required to be freeholders without regard to the value of the freehold owned by them; but they could be voted for only by persons owning a freehold worth £100 over and above all debts charged thereon. This required a much higher qualification for voters than for candidates.

(Senators, Term and Classification.) A. That the members of the ~~council~~ senate be elected for four years. That immediately after the first Election they be divided by Ballott into four classes, four in each class, and numbered, 1, 2, 3, 4. That the members of the first class vacate their seats at the Expiration of the first year, the Second Class the second year, and so on till a compleat rotation be had. Hence it will happen that after first Election ~~Counsellors~~ senators will annually be chosen.

B. That the members of the Senate be elected for four ~~one~~ years. That immediately after the first election they be divided by ~~ballot~~ lot in four classes ~~four~~ six in each class and numbered 1, 2, 3, 4. That the seats of the members of the first Class shall be vacated ~~their~~ seats at the expiration of the first year, of the second Class the second year, and so on till a compleat rotation be had.

According to the journal William Harper's motion to reduce the senatorial term from four years to one year was rejected "by a great majority." Draft B was substantially adopted, providing for a senate of twenty-four members divided into four classes with six in each class.

(Senators, How Chosen.) A. The election of ~~Counsellors~~ senators shall be after this manner:

The convention do ordain that this State be divided into four great districts of extent as near as may be to the number of Freeholders in this State and shall be extended or

diminished in future as the number of Freeholders in them may encrease or diminish. That the several Counties of which each of the said great districts shall be composed do obtain the voices of their respective Freeholders for Counsellors in like manner and at the same time as for Representatives, and the County Clerks of each of the said Counties after receiving all the Ballotts of their little districts, shall together with two of the judges of the said respective counties meet at a place for that purpose to be by the legislature appointed and there examine the said Ballotts & the Judges aforesaid shall certify upon Oath to the Council the names of the Counsellors for that District for whom a plurality of voices shall appear.

And this convention do ordain that no freeholder shall be eligible to the office of ~~counsellor~~ senator in any other of the great districts than the one in which he shall usually and in Fact reside nor shall any Freeholder vote for ~~counsellors~~ senators in any other than the little District in which he shall usually and in fact reside—nor shall any Freeholder be capable of voting for a Counsellor, or be eligible to that office unless he shall previously have taken an oath of Allegiance to this State ~~and abjured all foreign authority whatsoever.~~

This paragraph was repeated in B, but seems to have been erased and the second paragraph below substituted for it as a marginal note.

A. (Addendum.) And this convention doth further ordain that the Election of Senators shall be after this manner. The Freeholders of each respective County within this State qualified to vote as aforesaid shall at every Election of Representatives in General Assembly also chuse by Ballot ~~double the number of Freeholders other~~ wise and discreet Freeholders double in number to the Representatives in General Assembly for their respective Counties Who shall be called Deputies for electing the Senate, but no Representative in General Assembly shall be eligible to the office

of Deputy; and if it shall so happen that the Person chosen to be a representative shall at the same time have the greatest number of Suffrages as Deputy then he who shall have the next and greatest number not being a Representative in General Assembly shall be the Deputy. And this Convention doth further ordain that the Deputies being so chosen shall within days thereafter assemble at the Court House in or at such other place as shall hereafter be appointed by the Legislature and then proceed by Ballot and a majority of the Suffrages to elect the said twenty-four Senators, eighty-one of the said Deputies being always necessary to constitute a quorum and in order that the Representatives of the People in both Branches of the Legislature may be equal the Senators shall be taken out of the respective Cities and Counties in the proportion and manner following that is to say: From the City and County of Albany , from the County of Suffolk , from the County of Ulster , from the County of Dutchess , from the county of Westchester , from Queens County , from Kings County , from Orange County , from Richmond County , from Tryon County , from Charlotte County , from Gloucester County . ~~And this Convention doth ordain that~~ of the said senators shall be chosen out of the Freeholders personally residing shall be chosen out of the Counties at all times be chosen out of the Freeholders actually and personally residing.

~~But after conferring on the Deputies a free conference respecting the persons and there proceed by Ballot to elect the said twenty four senators by a majority of suffrages eighty one members being necessary.~~

And this Convention doth ordain that the Election of Senators shall be conducted in the presence of the Chancellor ~~or one~~ two of the Judges of the Supreme Court who shall make a return of such Election ~~into the Chancery~~ under their hands and Seals into the Chancery where it shall remain until the succeeding meeting of the Legislature when the Chancellor or in case of his Death Sickness or Absence the

Master of the Rolls shall . attend with the same in the House of Assembly in whose presence each of the Senators shall be duly qualified according to the Direction of this Constitution or of a future Legislature. And this Convention doth further ordain that Annually after the said first Election of Senators the Deputies for electing Senators shall in the same manner chuse Senators to succeed those who shall from time to time die remove resign or be displaced or who agreeable to the Rotation hereby established shall vacate their seats observing as an invariable Rule that the Senator chosen to supply any Vacancy shall be taken out of the County in which the Senator to whom he may be appointed to succeed personally resided. And this Convention doth further ordain that whenever a new County shall by Act of the Legislature be established and entitled to a Representative in General Assembly of members an additional Senator shall be elected out of such County in the same manner in all respects as other Senators are hereby directed to be chosen. And this convention doth further ordain that the Senators shall be eligible out of the Body of the Deputies or out of the Representatives in General Assembly or the body of Freeholders of the respective Counties.

This scheme apparently received no attention in the Convention. The idea seems to have been borrowed from the Maryland Constitution, which provided for the election of two delegates from each county, who were known as "electors of the senate." They were required to meet at the seat of government once in five years and choose fifteen senators. Both of these plans suggest the principle embraced in the method of choosing the President by electors, afterwards included in the Federal Constitution.

B. Marg. note. The election of Senators shall be after this manner. The state shall be divided into four great Districts; the Southern District to comprehend the City and

County of New York, Suffolk, Westchester, Queens, Kings, and Richmond Counties. The Middle District to comprehend the Counties of Dutchess, Ulster and Orange. The Western District, city and county of Albany and Tryon county and the Eastern District the Counties of Charlotte, Cumberland and Gloucester. That the ~~Freeholders~~ Senators shall be elected by the Freeholders of the said Districts qualified as before described in the proportions following: in the Southern District nine; the Middle District six; the Western District six and the Eastern District Three. That ~~whenever~~ the number of Electors within any of the said Districts shall have increased one thousand which is estimated to be one-twenty-fourth part of the whole number of Electors now in this State an additional senator shall be chosen ~~within~~ by ~~such~~ the electors of such District. (and this rule shall be always observed whenever such an augmentation of Electors in any of the said Districts shall happen.) That thirteen members shall be necessary to constitute a senate capa sufficient to proceed upon Business; and that the senate shall be the judge of its own members ~~and shall have power~~

It seems from the journal that this paragraph was the only one on this subject considered by the Convention. Mr. Wisner proposed to increase the number of districts from four to fourteen, and to strike out the word "great," so that senators might be chosen by counties. This was the North Carolina plan of senate representation, but the journal tells us that it was rejected "by a great majority." The proposition by Robert Yates to divide the state into five districts instead of four received only three affirmative votes. The quorum was changed from thirteen to a majority, probably in view of the provision for additional senators under subsequent reapportionments. It will be observed that the section estimates the number of freeholders at 24,000, and provided for an additional senator for each additional one thousand freeholders. This was

changed on motion of Mr. Morris by striking out the one thousand ratio, and providing for an additional senator on every increase of one twenty-fourth of the electors as shown by the latest enumeration. R. R. Livingston moved that, as soon as practicable after the close of the war, a census be taken, and the senate reapportioned on the basis of such enumeration. The Convention adopted an amendment offered by Philip Livingston that the census be taken seven years "after the close of the present war," and as thus modified the provision was included in § 12 as finally adopted.

(Political Rights Limited by Legislature Only.) A & B. That no person shall be disqualified to vote or to be elected, who is or shall be qualified in the manner herein described, unless by act of the Legislature of this State, any separate vote or resolution of either House notwithstanding who shall never by their votes create any such disqualifications, the people in this State being only fully represented in the whole Legislature; and consequently not to be otherwise bound than by acts of the whole Legislature.

Gilbert Livingston offered the following substitute for this section :

"That no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to the subjects of this state by this Constitution unless by the law of the land and the judgment of his peers."

This was, in substance, the famous 39th Article of Magna Charta, and with the substitution of "or" for "and" in the last line, which was made on the motion of General Scott, the section was adopted, and has since been included in all our Constitutions, and, beginning with 1846, each Constitution has opened with this declaration of the citizen's rights.

(Adjournments.) A. That neither the General Assembly of Representatives of the State of New York nor the council Senate of the State of New York shall respectively have power (marg. note, "to adjourn except from day to day without the mutual consent of both Houses").

B. That neither the General Assembly of Representatives of the State of New York, nor the Senate of the State of New York shall have power to adjourn for any longer time than two days ~~except from day to day~~ without the mutual consent of both Houses.

Form B was, in substance, adopted, and appears as § 14.

(Conference of the Two Houses.) A. That whenever the two Houses disagree a Conference shall be held in the presence of both Houses and be managed by committees to be ~~chosen~~ by them respectively chosen by Ballot, and that the doors of both Houses shall be open to all Persons except when the welfare of the State shall require their Debates to be kept secret and that ~~both Houses~~ the journals of the proceedings of both Houses shall be ~~published weekly~~ kept in the manner heretofore accustomed by the general assembly in this State and weekly published. ~~To sit on their own adjournments, provided they do not exceed a Week and that prorogations be made by the assent of both Houses but not a longer term than Six Months.~~

B. That whenever the two Houses disagree a Conference shall be held in the presence of both Houses and be managed by Committees to be by them respectively chosen by Ballot; and that the doors of both Houses shall be ~~kept~~ open to all persons, except when the welfare of the state shall require their debates to be kept secret. And the journals of the proceedings of both Houses shall be Kept in the manner heretofore accustomed by the General Assembly and except in the case aforesaid weekly published.

Both forms are quite similar, but draft B seems to have been used in the discussion. After an amendment by Mr.

Jay giving the legislature discretion concerning the publication of its proceedings, and another by General Scott providing for a daily, instead of weekly, publication of such proceedings, the section was adopted and became § 15.

(Senate and Assembly, Number of Members.) B. Provided that the number of Senators shall never exceed 100 nor the Representatives in Assembly 300, and that whenever the number of Senators shall amount to 100 or the Representatives to 300 that then and in such case the Legislature shall have it in their power by law to settle from time to time the representation of this State in either of both Houses in such manner as will be most just and equal.

Draft B also contained the following provision as a marginal note, but which was apparently erased, and the foregoing provision substituted:

“That when the Senate of this State shall amount to one hundred members and the assembly shall consist of more than 500 Representatives a general convention of this State shall be convened in order to limit the number of members in either house to settle a just and equal representation of this state in the future.”

The Convention rejected a substitute proposed by General Scott providing that on an increase of members in either house the proportion as established by the Constitution be continued without any reduction in the relative number. An amendment proposed by Mr. Jay was adopted, providing for an apportionment whenever the number of senators or members of assembly reached the constitutional limit. This provision appears at the end of § 16 as adopted.

(Executive.) A. And this convention doth further ordain ~~that that supreme executive power shall be vested~~

~~in a Governor and Council of State~~ that a wise & discreet freeholder of this State be elected Governor by Ballot by the Freeholders of this State qualified as above to elect ~~counsellors~~ senators.

A. (Addendum.) That the supreme executive power shall be vested in a Governor and Council of State (marg. note, "~~and as often as the office of governor shall be vacant at the usual time and place of electing representatives in general assembly~~ that stately once in every four years and as often as the seat of government shall become vacant") a wise and discreet Freeholder of this State shall be by Ballot elected Governor by the Freeholders. of this State qualified as before described to elect Senators (marg. note, "which election shall be always held at the times and places of choosing the Representatives in General Assembly for each respective County.")

B. That the ~~supreme~~ executive power and authority of this State shall be vested in a Governor and Council of State. That stately once in every four years and as often as the seat of government shall become vacant a wise and discreet Freeholder of this State shall be by ballot elected Governor by the Freeholders of this State qualified as before described to elect Senators; which elections shall be always held at the Times and places of choosing the Representatives in General Assembly. for each respective County.

Draft B and the addendum to A are similar in principle. Both contemplate executive powers to be shared by the governor and a council, and both manifest an intention to deny the governor exclusive executive authority. The experience with the colonial governors was not calculated to induce the men who framed the Constitution to vest him with any considerable unrestrained authority. This is manifest, not only from these proposed provisions, but also from several others which will be considered in notes to subsequent sections. On motion of General Scott "supreme" was inserted before "executive," and,

on motion of Mr. Adgate, the term of office was reduced from four years to three. As thus amended, draft A was adopted and appears as § 17.

(Governor, Term of Office.) A. That he shall ~~be~~ ex officio be a member and president of the council of ~~the state~~ State to be formed in the manner & for the purposes hereafter prescribed. That the governor so to be elected continue in office four years and have power to convene the legislature on extraordinary occasions. That he be general of the militia of this State and have power with the advice of the Council of State to grant Reprieves and Pardons except ~~in cases of~~ ~~Treason~~ for Treason & Murder in which cases he shall have power with the advice of the Council of State to suspend execution till the subsequent sessions of the legislature.

A. (Addendum.) That he shall continue in Office four years and shall ex officio be Captain General and Commander in Chief of all the militia and ~~the navy~~ and High Admiral of the Navy of this State (marg. note, "and preside at the Council of State") that he shall have Power with the advice of the Council of State to convene the General Assembly and Senate on extraordinary occasions and to grant Reprieves and Pardons except for Treason and Murder in which cases he may with the advice of the Council of State suspend the Execution of the Sentence until it shall be reported to the Legislature at their ~~next~~ Subsequent meeting and they shall either Pardon or direct the Execution of the criminal (marg. note, "or grant a further Reprieve").

B. That he shall continue in office four years and shall ex officio be by virtue of his office Captain General and Commander in Chief of all the militia and High Admiral of the navy of this State ~~and preside at the Council of State~~. That he shall have power ~~with the advice of the Council of State~~ to convene the General Assembly and Senate on extraordinary occasions ~~to prorogue them for any time not exceeding sixty days~~ (marg. note, "to prorogue them from time to time provided such prorogation shall not exceed sixty days in the space of any one year. And upon the Recommendation

of the Judges or Court before whom the criminal shall have been tried at his Discretion ~~except to grant reprieves and pardons except in cases of~~ [marg. note ends]). ~~And to grant reprieves and pardons except for Treason and Murder in which cases he may with the advice of the Council of State suspend the execution of the sentence until it shall be reported to the Legislature at their subsequent meeting; and they shall either pardon or direct the execution of the Criminal, or grant a further Reprieve.~~

In draft A we again discover the council of state, showing an evident intention to limit the powers of the governor. Mr. Tredwell objected to the governor's power to prorogue the legislature, but the Convention declined to strike it out. Draft B, with some verbal modifications, was adopted and appears as § 18.

(Governor, Duties of.) A. And that it shall be his duty at every session of the Legislature to inform them of his proceedings, and of the Condition of the State so far as may respect his department. And further that he shall be liable to be impeached for Mal & Corrupt Conduct in his office by the General Assembly provided three-fourths of the members present agree to such impeachment ~~and that the said Impeachments shall be tried by the council senate with the assistance of in conjunction with the chancellor and judges of the supreme court, agreeable to such laws as shall by the legislature be for that purpose enacted.~~

A. (Addendum.) That it shall be the duty of the Governor to inform the Legislature at every Session of his proceedings and of the Condition of the State so far as may respect his Department and to recommend such matters to their Consideration ~~as shall appear to him with the advice of the Council of State to concern its good Government Welfare and Prosperity.~~ And also to correspond with the Continental Congress and other States; transact all necessary Business with the Officers of Government civil and military; to take Care that the Laws are faithfully executed

and to expedite all such measures as may be resolved upon by the Legislature. That he shall also have power with the advice of the Council of State and in the Recess of the Legislature to lay Embargoes or prohibit the Exportation of any Commodity for any time not exceeding thirty Days (marg. note, "and in Case any Emergency shall require an Embargo to be prolonged beyond the time above limited that then it shall be the Duty of the Governor to convene the Legislature and recommend it to the consideration") ~~that the Governor and Council of State shall appoint a Secretary of State shall officiate.~~

B. That it shall be the duty of the Governor to inform the Legislature at every Session of his proceedings and of the Condition of the State so far as may respect his department and to recommend such matters to their consideration as shall appear to him to concern its good government, welfare and prosperity; and also to correspond with the Continental Congress and other States; transact all necessary business with the officers of Government civil and Military; to take care that the laws are faithfully executed; and to expedite all such measures as may be resolved upon by the Legislature.

Draft B was, in substance, adopted and became § 19.

(Council of State.) A. And this convention doth further ordain that once in every five years five wise and discreet Freeholders shall be chosen by the Joint Ballot by both Houses of Legislature as Counsellors of State three of whom to be a quorum to assist the Governor in exercising the Supreme executive Power; and to continue in office for the Term of five years; and all Vacancies by Removal of office Death Resignation or Absence from the State shall be supplied by the same authority. And this Convention doth further ordain that the Secretary of State shall officiate as Secretary of the Council of State and keep regular Journals of their Acts and Proceedings to which every Counsellor of State shall have free Access and the Privilege of entering his Dissent to any Resolution and the Reasons at large.

Not in draft B. The idea of an executive council was doubtless inherited from the colonial period, and such a council had already been established by the Constitutions of several states. So far as it was intended to control or diminish the governor's authority its powers were vested in the Council of Appointment which was clothed with large executive functions, and, by construction, at first practical and later constitutional by the amendment of 1801, its members were given complete control of executive appointments. The provision in this paragraph making the secretary of state secretary of the council of state was followed, in substance, by the act of 1778 (chapter 12), which made the secretary of state *ex officio* clerk of the Council of Appointment. The limitation of the governor's veto power appears in the section creating the Council of Revision, which vested the joint veto power in the governor, the chancellor, and judges of the supreme court.

(Deputy Governor.) A. And this Convention doth further ordain that the ~~vice~~ president of the ~~council~~ state senate for the Time being shall be the Lieutenant or Deputy Governor of this State & ~~exercise all the authority not appor-~~
~~tioned to the office of governor~~ but as such shall have no Authority except in Case of the Death, Removal, Resignation or Absence from the State of the governor and until another be chosen or the governor so absent return.

Not in B. The essential parts of this paragraph were included in the sections providing for a lieutenant governor and a president of the senate.

(Lieutenant Governor.) A. (Addendum.) And this Convention doth further ordain that at every Election of a Governor a Lieutenant Governor shall in the same manner be elected, who shall always *ex officio* be President of the

Senate and in case of the Impeachment of the Governor or his Removal from Office, Death, Resignation or Absence from the State shall exercise all the Power and Authority pertaining to the office of Governor of this State until another shall be chosen or the Governor so absent shall return or be acquitted.

B. And this convention doth further ordain that at every election of a Governor a Lieutenant Governor shall in the same manner be elected who shall always by virtue of his office ~~ex officio~~ be president of the senate and upon an equal division have a casting voice in the ~~deliberations~~ Discussions; and in case of the Impeachment of the Governor or his removal from office, Death, Resignation or absence from the State ~~of the Governor~~ shall exercise all the power and authority appertaining to the office of Governor of this State until another shall be chosen or the Governor so absent or impeached shall return or be acquitted.

Draft A contained no provision for a lieutenant governor. In draft B the lieutenant governor was a constituent member of the senate to the extent that he could vote to dissolve a tie, which apparently would have given him the right to vote on a bill. The provision for a lieutenant governor appears as § 20.

(President of Senate.) A (addendum) & B. And whenever the Government shall be administered by the Lieutenant Governor, the Senators shall have power to elect one of their [Numbers] Members to the office of President of the Senate which he shall exercise during such Vacancy; [but] and if, during such Vacancy of the office of Governor the Lieutenant Governor shall be impeached, displaced, resign or be absent from the State the [Council of State] President of the Senate shall [jointly] administer the Government and immediately issue a Proclamation for convening the Legislature at the End of thirty days, and at their meeting a Governor and Lieutenant Governor shall be appointed by Joint

Ballot of both Houses to continue in Office until others shall be elected by the Suffrages of the People at the succeeding Election.

This provision is not in draft A, and does not seem to have elicited any serious discussion; it appears as § 21.

(State Treasurer, How Chosen.) A & B. That the Treasurer of this State shall be appointed by act of the Legislature [by the General assembly by Ballot & hold his office during their will and pleasure] to originate with the General Assembly provided that the (marg. note, "treasurer shall not be elected out of either Branch of the Legislature").

This provision appears as § 22.

(Officers, How Appointed.) A. And this convention doth further ordain that all other civil officers (and military) in this State shall be appointed in the manner following, viz.,

The governor for the Time being shall name to the Legislature such persons as he may deem qualified for the same, and the Legislature if they think proper may appoint them, if not the Governor shall continue to name others till he shall name such as may be agreeable to the Legislature; and in Case none of the first ~~six~~ four persons whom the governor may name shall be agreeable to the Legislature for any of the said offices, that then the legislature proceed to appoint without waiting for his further nomination.

B. And this convention doth farther ordain that all other civil officers in this State not heretofore eligible by the people ~~of the Colony of New York~~ shall be appointed in the manner following, viz.:

The Governor for the time being shall name to the Legislature such persons as he may deem qualified for the same and the Legislature if they think proper may appoint them, if not the Governor shall continue to name others till he shall name such as may be agreeable to the Legislature. And in case none of the first four persons whom the Governor may

name should be agreeable to the Legislature for any of the said offices, that then the Legislature shall proceed to appoint without waiting for his further nomination.

After considerable discussion, Mr. Jay offered the following substitute :

“The General Assembly shall once in every year openly nominate and appoint one of the senators from each of the great districts 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 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 that the same senators shall not be eligible to the same council for two years successively.”

Later, on his motion, the speaker of the assembly was added as a member of the council. William Harper proposed to strike out the provision making the governor a member of the council, which would have left the sole power in the hands of the four senators. This was rejected by a vote of 12 to 27. Colonel De Witt's motion to add to the council one member of the assembly from each county was also rejected by the same vote. Mr. Wisner's motion to add one member of assembly to the council also met the same fate. On Robert Harper's motion the senators were made eligible for two successive years. On Mr. Jay's motion the section was amended by making it applicable to all civil officers whose appointment was not otherwise provided for by the Constitution, but later the word “civil” was stricken out. Robert Yates proposed a plan by which the senate and assembly would each nominate two persons, and from these four the gov-

ernor would appoint one to the offices to be filled, except that the assembly was to furnish the governor a list of persons qualified for appointment as magistrates in each county, from which list he was to make his selection. This proposition, and also one by Mr. Tredwell, that all appointments be made by act of the legislature, was rejected. Robert R. Livingston proposed to increase the governor's power as a member of the council by giving him a vote on all questions, with the further provision that "on an equal division his shall be considered as the casting voice." This was rejected by a vote of 15 to 21. Mr. Morris moved that the words "and consent" be stricken out, with the intent that the governor may appoint as he pleases against the advice of the council, and appeal to the people. This was rejected by thirty-two negative votes. Mr. Tredwell's proposition, that the council be selected from the assembly instead of the senate, was also rejected by a vote of 2 to 34. On the 19th of April, on motion of R. R. Livingston, the provision making the speaker of the assembly a member of the council was stricken out, leaving the council composed of the governor and four senators chosen by the assembly. Jay was not then present, and did not attend the Convention again until several days after the Constitution was adopted.

The method of appointing officers was one of the most important matters considered by the Convention, and the plan finally adopted had a very significant influence on the political history of the state prior to the adoption of the second Constitution. The governor, lieutenant governor, senators, and members of assembly had been made elective by provisions already adopted. Most of the local officers were then elective by statute, and the provisions of this proposed section embraced a large number of offices, state as well as local, and prospective as well as

those already in existence. The proposition shows that the time had not yet come for general popular elections, and it also shows the disinclination to vest the power of appointment in the governor. It was a curious mingling of executive and legislative functions, making the whole legislature practically an executive council. Mr. Platt's amendment to substitute the judges of the supreme court for the legislature was not less objectionable. We find an interesting commentary on the provision which led to the creation of a Council of Appointment, in the letter from Jay to Livingston and Morris, dated at Fishkill, April 29, 1777, nine days after the Constitution had been adopted, and before Jay returned to the Convention. In this letter Jay says that the plan of appointing officers by the governor and legislature was generally disapproved, that many other methods were devised by different members, that these and others suggested by himself were mentioned to the Convention, and that, while preferring the Platt amendment to the original clause, he thought a better method could be devised, and that he spent an evening with Livingston and Morris at their lodgings, in the course of which he, Jay, proposed the plan for the institution of the Council of Appointment, and that, after conversing on the subject, he, Livingston, and Morris agreed to bring it into the House the next day. It seems clear from this letter that Jay did not then know that the speaker had been eliminated from the council, for he refers to that provision as still a part of the section, remarking that it was adopted to "avoid the governor's having frequent opportunities of a casting vote." Jay's relations to this subject as Governor of the state twenty years afterwards, the trouble between himself and the other members of the council, resulting in the Convention of 1801, and the abolition of the council by the Conven-

tion of 1821, will be considered in subsequent chapters. The section is number 23 in the Constitution as adopted.

(Officers to be Commissioned by Governor; Judicial Tenure.) A. That all Judges of Courts in this State, whether of Law, Equity or Admiralty hold their Offices during their good behavior or until they shall respectively have attained the age of Sixty-five years [or until the legislature shall think it expedient to remove them for incapacity to discharge the same].

A & B. That all military [and militia] officers shall be appointed by the Governor during pleasure [by and with the advice of the Council of State].

That all officers so to be appointed be commissioned by the Governor.

On Mr. Jay's motion the words, "all Judges of Courts, . . . whether of Law, Equity, or Admiralty," were stricken out, and the words, "the chancellor, the judges of the supreme court, and the first judge of the county court in every county," substituted. On Mr. Tredwell's motion the provision giving the governor power of appointment of all military officers was stricken out. It will be observed that the draft fixed the age limit at sixty-five years, but this limit was reduced to sixty years by the section (24) as adopted, but the journal does not show the change.

(Judges Not to Hold Other Office.) A & B. That none of the said judges shall [~~other than judges~~] of ~~inferior courts in the counties~~ hold any other office in this State together and at the same time with that of Judge, other than that of Delegate to the General Congress and if elected to any other office it shall be their election in which to serve.

This section was modified in form, but apparently without debate. It became § 25.

(Sheriffs and Coroners.) A & B. That Sheriffs and Coroners be annually appointed provided that no person shall be eligible to either of the said offices for more than five years respectively [~~and that justices of the peace every three years. That all clerks of counties and courts be appointed every seven years. That the secretary of State be appointed every seven years~~].

The provision was added that the sheriff should hold no other office at the same time, and as thus modified the section was adopted and became § 26.

(County Treasurers; Town Officers.) A. That County treasurers, town clerks ~~of precincts or townships~~ assessors, supervisors, constables collectors be annually chosen, by Ballott by the Inhabitants of this State in such manner as the Legislature may direct.

That all other officers not hereinbefore named be appointed in such manner as the Legislature may direct.

Marg. note. "Commissioners & overseers of the highway, overseers of the poor, chamberlains of corporations, county treasurers, clerks of townships or highway supervisors, assessors, constables, collectors shall be elected or appointed in the manner heretofore accustomed until the legislature shall have prescribed a mode of such elections by ballot."

B. That County Treasurers, Town Clerks, Supervisors, Assessors, Constables and Collectors and all other officers heretofore eligible by the people shall continue to be appointed in the manner directed by the present or future acts of legislature.

This section, substantially from draft B, with some omissions and additions, became § 29.

(Delegates in Congress.) A & B. That delegates to represent this State in the general Congress of the American States be annually appointed by an act of the Legislature,

without the nomination of the Governor, which shall originate in the [council] senate but be liable as all other acts are to the amendment of the general assembly below [~~as well with respect to names as anything else~~].

The Convention rejected an amendment offered by Mr. Tredwell providing that the seat of a member of the legislature should become vacant on his election to Congress. The substitute proposed by Mr. Morris was adopted, providing that "the senate and assembly shall each openly nominate as many persons as shall be equal to the whole number of delegates to be appointed, after which nomination they shall meet together, and those persons named in both lists shall be delegates; and out of those persons whose names are not on both lists, one half shall be chosen by the joint ballot of the senators and members of assembly so met together as aforesaid." This provision became § 30.

(Chancellor and Judges may sit in Senate.) A. marg. note. "That the judges of the supreme court & chancellor of this State sit ~~in the council of this State~~ senate to advise and deliberate, but not to vote on any question whatever."

B. That the Judges of the Supreme Court and Chancellor of this State shall sit in the senate to advise ~~and deliberate~~ but not to vote on any question whatever.

Not adopted. This suggestion to make the judges advisory members of the senate apparently received no direct consideration by the Convention, but the principle of the suggestion was practically adopted in the provision for a Council of Revision composed of the governor, chancellor, and judges of the supreme court, whose powers will be considered in a note to the section on that subject.

(Court of Impeachments and Correction of Errors.) A (addendum) and B. And in order that all delinquents however exalted ~~in~~ their rank & station may be amenable to the Laws and prevented from screening themselves from Punishment under the sanction of Office and that the subject may be secured not only against corruption and the abuse of power but against the errors and mistakes of those who shall be entrusted with the dispensation of justice; This convention doth further ordain that a Court shall be instituted for the trial of Impeachments and the Correction of Errors under the Regulations which shall be established by the Legislature; and to consist of the senators, the Chancellor and the Judges of the Supreme Court, a majority of the Senators and of the Judges respectively with the chancellor being necessary to form a Quorum capable of proceeding on Business, except that when an impeachment shall be prosecuted against [~~either of the~~ senators] the Chancellor or either of the Judges of the Supreme Court he shall stand suspended from exercising his office until his acquittal and the other members shall constitute the Court; and in like manner when an appeal from a Decree in Equity shall be heard the Chancellor shall inform the Court of the reasons of his Decree; but shall not have a voice in the final sentence—And if the cause to be determined shall be brought up by writ of error on a question of Law on a judgment in the Supreme Court the Judges of that Court shall assign the Reasons of such their Judgment but shall not have a [have no] voice for its Affirmance or Reversal.

Draft B, omitting the preamble, was adopted with some modifications in form, and became § 32.

(Impeachment.) A (addendum) & B. And this convention doth further ordain that before the said Court for the Trial of Impeachments and the correction of Errors the Governor or other commander in chief [the lieutenant governor, the Senators] the chancellor, the Judges of the Supreme court [Counsellors of State] Secretary of State, Judges of Admiralty, [Master of the Rolls] Judges of Pro-

bate & all other judicial officers shall respectively be liable to be impeached by the general Assembly for Mal & Corrupt Conduct in their respective offices; three-fourth parts of the members agreeing to such Impeachment. That previous to the trial of every impeachment the members of the said court shall respectively be sworn truly and impartially to try and determine the charge in Question according to evidence; and that no Judgment or Sentence of the said Court shall be valid unless it shall be assented to by three-fourth parts of the members who assisted at the Trial; nor shall it extend farther than to removal from office and Disqualification to hold or enjoy any place of Honor, Trust or Profit under this State. But the party convicted shall nevertheless be afterwards subject to a farther trial in the Supreme Court by a jury of the Country and to such additional Punishment according to the nature of the Offense and the law of the land as by the Judgment of the said court shall be inflicted.

On General Scott's motion, the following was substituted for the first sentence: "That the power of impeaching all officers for mal and corrupt conduct in their respective offices be vested in the representatives of the people in general assembly; but that it shall always be necessary that two-third parts of the members present shall consent to and agree to such impeachment." The following was substituted for the last sentence: "But the party so convicted shall be, nevertheless, liable and subject to indictment, trial, judgment, and punishment according to the laws of the land."

After some other modifications, principally in form, the section was adopted and became 33.

While this subject was under consideration the following provision relating to counsel was adopted and became § 34:

"And it is further ordained, That in every trial on impeachment or indictment for crimes or misdemeanor the

party impeached or indicted shall be allowed counsel as in civil actions."

(Common Law Continued.) A (addendum) & B. And this Convention doth further ordain that the Common Law of England and so much of the Statute Law of England and Great Britain as have heretofore been adopted in practice in this State as well as all Acts of the former governors, councils & General Assemblies of the Colony of New York which were respectively in force in this State on the Day of

last shall until until altered or repealed by a future Legislature of this State continue to operate and be of force and effect unless where they are temporary in which case they shall expire at the times ~~respectively~~ limited for their Duration [~~or unless such parts of the said common, statute and provincial laws being excepted as the sovereignty and prerogatives and allegiance late heretofore exercised by the King of Great Britain and his ancestors or which are repugnant to the Declaration of Independence lately proclaimed in this State~~] such parts of the said common statute and provincial laws [respectively] being rejected and hereby [~~annulled~~] as concern [~~respects~~] the Allegiance [~~and~~] heretofore yielded to and the Sovereignty Government and Prerogatives claimed or exercised by the King of Great Britain and his [ancestors] predecessors. [Marg. note, "over this state and its inhabitants or which imply a power in the Parliament of England or Great Britain ~~to~~ restrain or regulate commerce manufacturers or internal policies of this State, or respect the Church of England or are incompatible with a free & equal Toleration of all Denominations of Christians without distinction or Preference"] or which are repugnant to the Rights and priviledges of a free & Independent ~~State~~ people or to the Constitution and frame of Government declared and established by this Convention, Saving to all bodies corporate & politic and to all private Persons the Lands, Tenements, hereditaments, Rights, Immunities and franchises derived from the King of Great Britain & his [Ancestor] predecessors before the [fourth] day of [July last].

It will be observed that the original proposed to adopt the common law of England. This was qualified by Robert Yates's amendment of the first clause making it read: "such parts of the common law." etc. The Convention added a provision validating the acts of the colonial congresses and the present Convention, and, on motion of Abraham Yates, the proceedings of the committee of safety were included in this confirmation. The foregoing provisions became § 35.

(Religious Toleration.) A. And whereas it becomes the benevolent principles of rational Liberty not only to expell civil Tyranny, but also to guard against that Spiritual oppression and Intolerance, wherewith the Bigotry and Ambition of weak and wicked priests and princes have scourged mankind.

This Convention in the name and by the Authority of the good people of this State do further ordain determine and declare that free Toleration be forever allowed in this State (marg. note, "in religious Profession and worship to all mankind") ~~to all denominations of Christians without preference or distinction and to all Jews, Turks and Infidels, other than to such Christians or others as shall hold and teach for true Doctrines principles incompatible with and repugnant to the peace, safety and well being of civil society in general or of this state in particular of and concerning which doctrines and principles the legislature of this State shall from time to time judge and determine and further that as the prevalence of Religion and Learning greatly contributes to the Happiness & Security of the people of every free State, the legislature of this State ought shall to afford them all proper encouragement.~~

B. That the free ~~exercise~~ Toleration of religious profession and worship be forever allowed within this State to all mankind.

This was a marked change from the policy concerning religious toleration which then prevailed in the colony.

In the Introduction I have quoted the rule declared by the Duke of York, in his appointment of Governor Andros, in 1674, granting full religious toleration, and have also quoted the paragraph on the same subject in the instructions to Governor Sloughter, in 1691, in which "Papists" were excepted from the liberty of conscience thereby guaranteed. This restrictive policy had been continued and was in force at the beginning of the Revolution. The instructions to Governor Tryon, the last colonial executive with general jurisdiction, bear date February 7, 1771. He continued in office three years after the first Constitution was framed,—till the latter part of March, 1780,—and the royal instructions to him were therefore in force when the Convention considered the foregoing proposition. Article 60 of the Tryon instructions is as follows:

"You are to permit a liberty of Conscience to all persons except Papists so they be contented & quiet with a peaceable enjoyment of the same not giving offense or scandal to the government."

It will be observed that this is substantially identical with the rule stated in the Sloughter instructions, in 1691, and that consequently this policy of limited religious toleration had prevailed for eighty-six years. It is therefore not surprising that a large number of delegates in the Convention favored a continuation of the restriction to which the people of the colony had so long been accustomed.

The instructions, following a long line of precedents, further provided for religious worship under the auspices of the established church by the requirement (article 61) that:

"You shall take especial Care that God Almighty be devoutly & duly served throughout your Government the Book of Common prayer as by Law established read each

Sunday & Holliday & the blessed Sacrament administered according to the rites of the Church of England."

A provision was also made for building and maintaining churches and parsonages, and for other details of ecclesiastical administration. The Bishop of London was given exclusive ecclesiastical jurisdiction in the colony, and his certificate was a necessary prerequisite to the appointment of any minister.

Thus, when the Convention began the consideration of a plan or frame of government for the new state, the established church was one of the institutions of the colony. It formed a most important part of the colonial Constitution, and, because of the union of church and state then existing, the church was as much under the fostering care of the government as any other department of colonial affairs. The governor had power to appoint ministers to local churches, and he was directed to procure the removal of any minister who might give scandal by his doctrine or manners. But the details of our ecclesiastical history do not belong here, and I only need add that an examination of the legislative records shows that ecclesiastical affairs frequently engaged the attention of the colonial legislature. The first constitutional convention determined on a separation of church and state, not only by adopting the policy of universal religious toleration, but also by adopting a provision excluding ministers from the right to hold civil offices, and (article 35) by expressly abrogating and rejecting all parts of the common law or statutes which "may be construed to establish and maintain any particular denomination of Christians or their ministers."

The debate on the section concerning religious toleration, and the propositions for its amendment, afford a striking illustration of the determination then manifest by many of the patriots to incorporate in the Constitu-

tion a provision that should absolutely insure religious freedom. John Jay, doubtless remembering the sufferings endured by his Huguenot ancestor, Pierre Jay, on the revocation of the Edict of Nantes, proposed to require all citizens to renounce the ecclesiastical as well as the political sovereignty of any foreign power. His opinions on this subject are shown not only by his proposed amendments to this section, but also by the amendments suggested to the section on naturalization. His purpose here is manifest from two propositions submitted by him when this section was under consideration. The first was as follows:

“Provided, nevertheless, that nothing in this clause contained shall be construed to extend the toleration of any sect or denomination of Christians or others, by whatever name distinguished, who inculcate and hold for true doctrines principles inconsistent with the safety of civil society of and concerning which the legislature of this state shall from time to time judge and determine.”

After considerable debate Mr. Jay withdrew this amendment. and offered the following:

“Except the professors of the religion of the Church of Rome, who ought not to hold lands in or be admitted to, a participation of the civil rights enjoyed by the members of this State, until such time as the said professors shall appear in the supreme court of this State, and there most solemnly swear, that they verily believe in their consciences, that no pope, priest or foreign authority on earth, hath power to absolve the subjects of this State from their allegiance to the same. And further that they renounce and believe to be false and wicked, the dangerous and damnable doctrine, that the pope or any earthly authority have the power to absolve men from sin described in and prohibited by the Holy Gospel of Jesus Christ; and particularly, that no

pope, priest or foreign authority on earth hath power to absolve them from the obligation of this oath."

This was debated at great length, and rejected by a vote of 10 to 19. The next day, Mr. Jay proposed the following addition after the word "mankind:"

"Provided, that the liberty hereby granted shall not be construed to encourage licentiousness or be used in such manner as to disturb or endanger the safety of the state."

Robert R. Livingston proposed the following addition as a substitute for the Jay amendment:

"Provided, that this toleration shall not extend to justify the professors of any religion in disturbing the peace or violating the laws of the state."

This was rejected, and Jay's amendment was adopted by a vote of 19 to 11. After further consideration Gouverneur Morris moved to amend the paragraph as follows: Between the words "be" and "construed" the word "so" be inserted, that the words "to encourage" be obliterated, and the words "as to excuse acts of" there substituted, and that after the word "licentiousness" the remainder of the paragraph be stricken out and the following words inserted, "or justify practices inconsistent with the peace or safety of this state,"—so that the whole paragraph may read thus: "Provided that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." This was adopted unanimously.

(Ministers Disqualified from Holding Office.) A & B.
And whereas the Ministers of the Gospel are by their Pro-
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fession dedicated to the service of God and the cure of souls, and ought not to be diverted from the great duties of their Function. Therefore this Convention doth ordain and determine that no Minister of the Gospel or Priest of any denomination whatever shall at any Time hereafter under any pretense or description whatever be eligible to or capable of holding any civil or military office within this State [of any kind whatever.]

Adopted in substance as presented, except that on General Scott's motion the words "or place" were added after "office." § 39.

(Militia.) A & B. And whereas it is of the utmost Importance to the Safety of every State that it should always be in a ~~state~~ condition of defense, and it is the duty of every man who enjoys the protection of any society to be prepared and willing to defend it, this Convention doth ordain and declare that the whole Militia of this State at all times hereafter (as well in peace as in war) shall be armed and disciplined and in readiness for Service. And that all such of the Inhabitants of this State as from scruples of Conscience may be averse to bearing arms, be therefrom excused by the Legislature & do pay to the State such sums of Money in Lieu of their personal Services, as the same may in the Judgment of the Legislature be worth, so as to put all the Members of this State on an equal Footing. And further that a proper Magazine of warlike stores proportionate to the number of Inhabitants be ~~from time to time and at all times~~ forever hereafter at the Expense of the State and by Acts of the Legislature established, maintained and Continued in every County in this State.

The paragraph was amended by limiting the exemption to Quakers only, and with this change was adopted and became § 40.

(Trial by Jury.) A & B. And this Convention doth further determine that Tryal by jury in all cases in which ~~they have~~ it hath been heretofore used in the Colony of New York shall be forever established & remain inviolate.

Marg. note to B. ~~"And that no Persons whatsoever within this State shall be liable to any Loss or Punishment from any Act of Attainder or other sentence of Condemnation where the Party hath not an opportunity of being heard in his defence. And no acts of attainder whatsoever shall be passed within this State."~~

Mr. Morris moved that the clause prohibiting acts of attainder be amended by adding the words "for crimes hereafter to be committed," and, on Mr. Jay's motion, the Convention agreed to the amendment in the following form,—“for crimes that may be committed after the termination of the present war; and such acts shall not work a corruption of blood.” This permitted acts of attainder until the close of the war. Later the clause was again modified, and adopted in the following form: “That no acts of attainder shall be passed by the legislature of this state, for crimes other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood.” Robert Harper offered a proviso to the jury clause, “that no jury shall hereafter be compellable to unanimity in their verdict.” This was rejected by a vote of 3 to 28. Mr. Adgate's motion authorizing a verdict by three fourths of a jury was rejected by the same vote. On Mr. Jay's motion the following clause was added to the section: “And further, that the legislature of this state shall at no time hereafter institute any new court or courts, but such as shall proceed according to the course of the common law.”

(Naturalization.) B. That every person and persons that shall hereafter come within this State and purchase lands

or Tenements within the same and before the Supreme Court shall take an oath of allegiance to the State shall be thereby naturalized and hold and enjoy all the rights and privileges of other the subjects of this State.

Draft A contained no provision on this subject.

Here was the full flower of state sovereignty before the state was organized and had a frame of government. The section as originally proposed required the naturalization of persons coming from other states, as well as from foreign countries. This was no comity, but an assertion of exclusiveness which happily was modified before the close of the discussion. The author of this section proposed to exclude from citizenship in New York persons residing in other states, unless they should become the owners of real property in the state, and take an oath of allegiance. Jefferson proposed a similar rule in his draft of a constitution for Virginia, June, 1776,—the earliest draft I have found for any state,—requiring a seven years' residence and an oath of allegiance, and made no discrimination between foreigners and residents of other states.

When the paragraph on naturalization was reached Mr. Jay moved to insert the following clause between the words "state" and "shall:" "And abjure and renounce all allegiance and subjection to all and every foreign King, prince, potentate, and state in all matters, ecclesiastical as well as civil." This amendment shows a clear purpose to exclude from the rights of citizenship any person who was unwilling to renounce his allegiance to any foreign power, ecclesiastical or civil. After refusing to strike out the words, "and subjection," proposed by Mr. Morris, the Convention adopted the Jay amendment by a vote of 26 to 9. Mr. Jay proposed the following addition to the section: "Provided, that nothing herein contained shall be construed to interfere with the connection heretofore

subsisting between the Dutch congregations in this state and the classes and synods in Holland;" which after some debate he moved to amend by striking out all after "construed to" and substituting the following: "Discontinue the innocent connection which the non-Episcopalian congregations in this state have heretofore maintained with their respective mother churches in Europe, or to interfere in any of the rights of the Episcopalian churches now in this state, except such as involve a foreign subjection." The Convention was evidently unwilling to introduce denominational matters into the Constitution, and the last amendment was rejected by a vote of 6 to 29. Mr. Jay then asked, and apparently obtained, leave to withdraw the first amendment on this subject, but it seems that the Convention afterwards voted on it and rejected it unanimously. An amendment proposed by Mr. Jay requiring applicants to "comply with such further regulations as the future legislatures of the state may from time to time make respecting the naturalization of foreigners" was rejected by a vote of 13 to 19. The discussion evidently gave the Convention a broader view of the subject, and Mr. Morris proposed to state the provision in the following short form: "That it shall be in the discretion of the legislature to naturalize all such persons and in such manner as they shall think proper," and, after adding the following clause offered by Mr. Jay, already adopted, "provided the persons so to be by them naturalized, shall take an oath of allegiance to this state and abjure and renounce all allegiance and subjection to all and every King, prince, potentate, and state in all matters, ecclesiastical as well as civil,"—the section was adopted. It is evident that the Convention was not satisfied with the section, and Mr. Morris moved to strike it out. The Convention declined to do this, but adopted unanimously, after considerable debate, an amendment offered by Mr.

Jay, applying the section to persons who, "being born in parts beyond sea and out of the United States of America, shall come to settle in and become subjects of this state," and the paragraph as thus amended was finally adopted by a vote of 20 to 15, and became § 42. The Jay amendment perfected the scheme by confining naturalization to foreigners without any attempt to exclude Americans from citizenship in this state.

While the subject of naturalization was under consideration, and after the Convention had evidently decided not to require applicants to become owners of real property, a committee was appointed, consisting of John Jay, James Duane, and Robert R. Livingston, "to report and prepare a paragraph for enabling the members of the other United American states to hold lands in this state." This shows the undeveloped condition of opinion among the statesmen of that period concerning the reciprocal relations between citizens of different states. The mere suggestion that the Constitution should contain regulations respecting the ownership of real property in this state by nonresident American citizens shows that there was apparently no thought of a permanent union of the states with a common and interchangeable citizenship. This committee made no report, and the Convention does not seem to have given the subject any further attention.

There is a striking parallel in many particulars, especially in relation to the independent attitude maintained by the states toward one another in the first stages of our separate history, to that which existed in ancient Greece, where, as Grote tells us in his "History of Greece," vol. 2, pp. 183, 184, Harper's edition, "in respect to political sovereignty, complete disunion was among their most cherished principles," and that, "sovereign authority within the city walls," was a settled maxim in the Greek mind. "The relation between one city and another was

an international relation, not a relation subsisting between members of a common political aggregate. Within a few miles from his own city walls, an Athenian found himself in the territory of another city, wherein he was nothing more than an alien,—where he could not acquire property in house or land, nor contract a legal marriage with any native woman, nor sue for legal protection against injury, except through the mediation of some friendly citizen. The right of intermarriage and of acquiring landed property was occasionally granted by a city to some individual nonfreeman, as matter of special favour, and sometimes (though very rarely) reciprocated, generally between two separate cities."

It will be remembered that the Articles of Confederation adopted by Congress November 15, 1777, and ratified by the New York legislature February 6, 1778, contained the provision that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled," and that by the articles the states formed a "league of friendship" for certain specified purposes; but there was a distinct advance toward national comity in the provision that the "free inhabitants" of each state, with certain exceptions, were "entitled to all privileges and immunities of free citizens in the several states," with the "right of ingress and regress" and should "enjoy therein all the privileges of trade and commerce," in like manner as the inhabitants thereof. The principle of this provision is included in the Federal Constitution (article 4, § 2, subd. 1) and also in the 14th Amendment.

The provision concerning naturalization included in the first Constitution was of brief duration. Ten years later the Federal Constitution, adopted in 1787, and which went into operation in 1789, vested in Congress the power

"to establish an uniform rule of naturalization," and by the enactment of the Federal Law in 1790 this provision of our Constitution became obsolete.

(Official Oath.) A & B. That every Oath of Office hereafter to be administered in this state shall among other Things impose an Obligation on the party taking it to do his duty as a good Citizen in maintaining the Independency [and union of the United States of America] of this State.

This was not adopted, nor any provision requiring an official oath. Mr. Jay in his letter to Livingston and Morris, referred to in the note on the Council of Appointment, expressed regret that a provision had not been adopted that all persons holding offices under the government should swear allegiance to it, and renounce all allegiance and subjection to foreign Kings, princes, and states in all matters, ecclesiastical as well as civil.

April 19th, Mr. Abraham Yates, from the committee appointed to report a plan for organizing a form of government, by direction of that committee, moved, and was seconded by Mr. Morris, that the following paragraph be inserted in the plan of government :

"And be it further ordained, That the register and clerks in chancery be appointed by the chancellor; the clerks of the supreme court by the judges of said court, the clerks of the court of probate by the judge of the said court; and the register and marshal of the court of admiralty by the judge of admiralty, the said marshal, registers and clerks to continue in office during the pleasure of those by whom they are to be appointed as aforesaid."

Mr. Jay was not present when this paragraph was adopted, and in his letter to Livingston and Morris protested against it as an unwise change of the plan of ap-

pointment of officers which had been adopted before he was called away from the Convention.

On motion of Robert R. Livingston, seconded by Mr. Morris, the Convention adopted two additional paragraphs, one relating to the admission of attorneys, which in the final form is a part of § 27, and another relating to the duration of offices, which is § 28. Mr. Jay in his letter to Livingston and Morris characterizes the section providing for the admission of attorneys as "the most whimsical, crude, and indigested thing I have met with." He thought that attorneys should be admitted by the supreme court only, and that they should not be obliged to procure a license from every local court in which they had occasion to practice.

Abolition of slavery.—Mr. Morris moved that the following paragraph be added to the plan of government :

"And whereas a regard to the rights of human nature and the principles of our holy religion, loudly call upon us to dispense the blessings of freedom to all mankind; and in as much as it would at present be productive of great dangers to liberate the slaves within this state; it is, therefore, most earnestly recommended to the future legislature of the state of New York to take the most effectual measures consistent with the public safety, and the private property of individuals, for abolishing domestic slavery within the same, so that in future ages every human being who breathes the air of this state shall enjoy the privileges of a freeman."

The part of the proposition without the preamble was adopted by a vote of 24 to 8. Consideration of the preamble was postponed. The next day Mr. Morris proposed a new preamble as follows: "Inasmuch as it would be highly inexpedient to proceed to the liberating of slaves within this state, in the present situation thereof." This was adopted by a vote of 24 to 12. Mr. Robert R.

Livingston then moved the previous question on the preamble and section, and the previous question was carried by a vote of 31 to 5. There does not seem to have been another vote on the section and preamble, but, according to the journal, the vote on the previous question was the end of the subject at this time. Mr. Jay supported Mr. Morris in this plan to provide for the abolition of slavery, and in his letter of April 29, already cited, he regrets that a provision on this subject was not adopted. He hoped to make New York the pioneer in the movement for the abolition of slavery.

Indian contracts.—Mr. Jay offered the following additional paragraph:

“Whereas the right of pre-emption to all Indian lands within this state appertains to the good people thereof; and whereas it is of great importance to the safety of this state that peace and amity with the Indians within the same be at all times supported and maintained; and whereas the frauds too often practiced towards the said Indians in contracts for their lands have for divers instances been productive of dangerous discontents and animosities. Be it ordained, That no purchase or contracts for the sale of lands made since the 14th day of October in the year of our Lord, 1775, or which may hereafter be made with or of the said Indians, within the limits of this state, shall be binding on the said Indians or deemed valid unless made under the authority and with the consent of the legislature of this state.”

This was adopted omitting the first clause of the preamble relating to the right of pre-emption of Indian lands.

Council of Revision.—While the second section relative to the governor's veto power was under consideration, Robert R. Livingston presented the following plan for a Council of Revision:

“And whereas laws inconsistent with the spirit of this constitution or with the public good may be hastily and unadvisedly passed, be it ordained that the governor for the time being, the chancellor and the judges of the supreme court or any two of them, together with the governor shall be and hereby are constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time when the legislature shall be convened; for which nevertheless they shall not receive any salary or consideration under any pretense whatever, and that all bills which have passed the senate and assembly shall before they become laws be presented to the said council for their revisal and consideration and if upon such revision and consideration it should appear improper to the said council or a majority of them that the said bill shall become a law of this state, that they return the same together with their objections to the same in writing to the senate, who shall enter the objections sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration two thirds of the senators present shall, notwithstanding the said objections, agree to pass the same it shall together with the objections be sent down to the general assembly, where it shall also be reconsidered, and if approved by two thirds of the members present shall be a law. And in order to prevent any unnecessary delay:

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

It will be observed that a vetoed bill was to be returned to the senate in all cases. On Mr. Hobart's motion the provision was amended by requiring a disapproved bill

to be sent to the house in which it originated. Mr. Hobart's amendment also changed the rule in the original section by which a vetoed bill could be repassed by a vote of two thirds of the members of each house "present," so that it must have been passed by two thirds of the house to which it was returned, and by two thirds of the members present in the other house, requiring the assent of two thirds of all the members, instead of those present. In other respects the paragraph was approved as presented by Mr. Livingston, and became § 3 of the Constitution finally adopted.

(Militia Officers.) ~~That all military or militia officers hold their commissions during the will & pleasure of the legislature.~~

This appears in A, erased, but is not in B.

CONSTITUTION ADOPTED.

The Constitution was considered and discussed from day to day until April 20th, when the whole instrument was reviewed, and, after several minor corrections and some important ones, it was read and adopted by a vote of 32 to 1; the only dissenting vote was cast by Peter R. Livingston, of Albany. The journal shows that during the discussion of the Constitution less than one third of the entire Convention was in attendance. We are doubtless justified in assuming that the other members were elsewhere engaged in the performance of patriotic duties incident to the exigencies of the times, or, for other good and sufficient reasons, were prevented from attending the Convention. Mr. Jay had been called away by his mother's death, which occurred on the 17th, and was not present when the Constitution was adopted. General Ten Broeck, president of the Convention, and Mr. Duane were

also absent. Vice President Pierre Van Cortlandt was "detained by adverse weather on the opposite side of the river." General Leonard Gansevoort of Albany was acting as president *pro tem*. It seems that the secretaries of the Convention used all their influence to prevent the final question being met that evening, for the reason that the president and vice president were both absent, and for the further reason that they wished to engross and prepare a copy for signature, but their objections were unavailing, and the Constitution was adopted, including the amendments agreed to during the day, and without being engrossed. The draft as thus agreed to was signed by Leonard Gansevoort, president *pro tem*., but the secretaries, "indulging some feeling on the occasion, did not countersign the draft, and the Constitution as finally adopted did not receive their attestation." The following are the names of the men who voted to adopt the new Constitution and thus institute an independent state government in New York:

Albany.—Leonard Gansevoort, president *pro tem*., John Ten Broeck, Jacob Cuyler, Abraham Yates, John James Bleecker.

Charlotte.—John Williams, Alexander Webster.

Cumberland.—Simon Stephens.

Dutchess.—Jonathan Landon, Robert R. Livingston, Gilbert Livingston.

New York.—John Morin Scott, Evert Bancker, Peter P. Van Zandt, Daniel Dunscomb, Robert Harper, James Beekman, Anthony Rutgers.

Orange.—Henry Wisner, Jeremiah Clarke, William Allison.

Suffolk.—William Smith, Thomas Tredwell, Matthias Burnet Miller, John Sloss Hobart.

Tryon.—William Harper.

Ulster.—Christopher Tappen.

Westchester.—Gouverneur Morris, Gilbert Drake, Lewis Graham, Ebenezer Lockwood.

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.

Forty-five years later, 1822, Mr. Jay felt compelled to reply to a newspaper criticism charging him with the responsibility for the action of the Convention in adopting the Constitution on Sunday, stating that he was called away by his mother's death on the 17th and was absent several days. His letter to Livingston and Morris, of April 29th, already referred to, shows that if he had been present he would have opposed the adoption of the Constitution, possibly not because it was Sunday, but because he deemed it incomplete, and wished to offer additional amendments. This Convention frequently met on Sunday, and it was not the first of the early conventions to meet on that day. The exigencies of the times demanded prompt and continuous attention, and the delegates seemed to appreciate the fact that war is a rude leveler of days, as well as of men and institutions.

The Convention, immediately after adopting the Constitution, ordered that it be published at the court house in Kingston on the following Tuesday, and that the chairman of the Kingston committee be requested to notify the inhabitants of Kingston thereof. On that day, Tuesday, April 22, 1777, the new Constitution was read at Kingston by Robert Benson, one of the secretaries of the Convention, from a platform erected on the end of a hogs-

head, Vice President Pierre Van Cortlandt presiding. Thus was launched the first Constitution of New York.

Professor John Alexander Jameson, in his "Constitutional Conventions," says that this Constitution "was at that time generally regarded as the most excellent of all the American Constitutions." John Adams said that he believed it would do very well. Jay wrote to Gansevoort: "Our Constitution is universally approved, even in New England, where few New York productions have credit." Mr. Jay was chosen first chief justice of the new state, and at the opening of the first term of the supreme court under the authority of the Constitution, held at Kingston September 9, 1777, in the charge to the grand jury he described the new Constitution as "excellent," and said that it had given general satisfaction at home, and been not only approved, but applauded, abroad. John Austin Stevens said that "it is asserted to have been essentially the model of the national government under which we live."

The draft of the first Constitution, attested by Leonard Gansevoort, president *pro tem.*, the 27th and 28th sections of which and a part of the preamble are wanting, was deposited in the office of the secretary of state on the 30th of August, 1821. It came to the secretary's office from John McKesson, a nephew of John McKesson, one of the secretaries of the Convention, who retained possession of the Convention documents and records until his death.

GOVERNMENT ESTABLISHED.

But this Constitution could not itself set a new government in motion, and further action was necessary either by the Convention or the people, to provide public officers and machinery for the new state. The Convention, on the same day that the Constitution was adopted, April 20,

1777, appointed a committee consisting of Robert R. Livingston, John Morin Scott, Gouverneur Morris, Abraham Yates, John Jay, and John Sloss Hobart, "to prepare and report a plan for organizing and establishing the government agreed to by this Convention." While this plan was under consideration by the committee the Convention decided to choose certain state and local officers. This was an assumption by the Convention of authority which it apparently did not possess, for by the Constitution which had just been adopted provision was made for the selection of these officers, either by appointment by the Council of Appointment, or by the governor, or by election by the people. This action shows the revolutionary and somewhat irregular methods adopted to set the new government in motion. If the provisions of the Constitution had been followed strictly, the Convention would have provided for the election of the governor, lieutenant governor, and the legislature; the legislature would have provided a Council of Appointment, and the officers would then have been chosen under constitutional sanction.

Instead of this, some forty men, about one third of the Convention, determined to choose the principal state officers and certain local officers in advance of the governor and legislature; and they also determined to select the senators and members of assembly from the southern part of the state, which was then in possession of the British, and where no election could then be held under the new Constitution. These proceedings are a very striking instance of the difficulties confronting the New York patriots in their efforts to establish an independent government; but, however irregular the proceedings of the Convention may have been when judged by principles applicable to an orderly constitutional government in time of peace, it must not be forgotten that New York was then

the scene of active military operations, that many members of the Convention were in the field, earnestly engaged in the great struggle, and that those who found it practicable to attend the Convention could not be expected to adhere to the technical rules now deemed so essential in the administration of constitutional government.

The Third Provincial Congress, by the resolutions adopted May 31, 1776, recommending a new election of deputies authorized 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," had evidently intended to provide for the election of a congress with full power to organize such a government; but it should be noted that when this election was recommended, and when it was held, American independence had not been declared, and that the resolutions providing for the election stated that the government so to be instituted by the new Provincial Congress was "to continue in force till a future peace with Great Britain shall render the same unnecessary." If peace had resulted without independence, the government so established by the deputies would have been of a temporary character, unless continued by the terms of peace.

But when the deputies, elected under these resolutions, and with this authority, assembled to form the Fourth Provincial Congress, independence had been declared, and the relations of the colony to the home government had been dissolved. The new congress was, therefore, confronted by a problem which did not exist when it was elected, and, instead of instituting a temporary government for the colony, it was obliged to institute a new government for the new state.

The new Provincial Congress construed its powers to be broad enough for the emergency, and that it had authority, not only to institute a government to meet present condi-

tions, but that it also had authority to institute a permanent government for the state. This authority being conceded, it followed as a corollary that the Convention might not only construct the framework of a government, which appears in the written Constitution, but that it also might create or continue offices, and select needed officers to perform the functions of government till the routine of elections and appointments had become established under constitutional and legislative authority. It seems like a great stretch of authority for the Convention to select senators and members of assembly to represent particular districts and counties simply because the people, owing to the presence of the enemy, were unable to hold elections. There was no element of popular choice in this transaction. The Convention appreciated this fact, and admitted the temporary character of the selection by providing that the people themselves at the earliest opportunity might select their own representatives, who should at once take the place of those chosen by the Convention. The propriety of this proceeding does not seem to have been questioned at the time, and the result justifies the wisdom and prudence of the Convention. It may be noted, as showing the acquiescence of the people in this action, that one of the senators, Pierre Van Cortlandt, appointed by the Convention to represent the southern district, was chosen the first president of the new senate.

On the 8th of May the Convention adopted the following

ORDINANCE.

"WHEREAS, Until such time as the Constitution and Government of this state shall be fully organized, it is necessary that some persons be vested with power to provide for the safety of the same:

"Therefore resolved, That John Morin Scott, Robert

R. Livingston, Christopher Tappen, Abraham Yates, Jun. Gouverneur Morris, Zephaniah Platt, John Jay, Charles De Witt, Robert Harper, Jacob Cuyler, Thomas Tredwell, Pierre Van Cortlandt, Matthew Cantine, John Sloss Hobart, and Jonathan G. Tompkins, or the major part of them, be, and they hereby are appointed a Council of Safety, and invested with all the powers necessary for the safety and preservation of the State, until a meeting of the Legislature: Provided that the executive powers of the State shall be vested in the Governor, as soon as he shall be chosen and admitted into Office; previous to which admission, such Governor shall appear before the said Council, and take the oath of allegiance, and also the following oath of office, to be taken by the Governors and Lieutenant Governors of this state, to wit,

“I by the suffrage of the Freeholders of the State of New York, according to the laws and Constitution of the said State, elected to serve the good people thereof, as their do here, solemnly, in the presence of that almighty and eternal God, before whom I shall one day answer for my conduct, covenant and promise to and with the good people of the State of New York, that I will in all things, to the best of my knowledge and ability, faithfully perform the trust, so as aforesaid reposed in me, by executing the laws, and maintaining the peace, freedom, honour, and independence of the said State, in conformity to the powers unto me delegated by the Constitution; and I pray God so to preserve and help me, when in my extremest necessity I shall invoke his holy name, as I do keep this my sacred oath and declaration.’

“AND WHEREAS, The appointment of officers in this State is by the Constitution thereof vested in the Governor, by and with the advice and consent of a Council of

Appointment, which doth not and cannot exist until after an election of Representatives in Senate and Assembly.

"AND WHEREAS, Many of the said officers are necessary, not only for the immediate execution of the laws of this State, and the distribution of justice, but also for the holding of such Elections as aforesaid.

"Therefore resolved, That the following persons be, and they hereby are appointed within this State, by authority of the same, to wit, That Robert R. Livingston, be Chancellor, John Jay, Chief Justice, Robert Yates and John Sloss Hobart, Puisne Judges, and Egbert Benson, Attorney General of this State. That Volkert P. Douw, be First Judge, and Jacob C. Ten Eyck, Abraham Ten Broeck. Henry Bleecker, Walter Livingston, and John H. Ten Eyck, the other Judges for the County of Albany; and that Henry J. Wendell, be Sheriff, and Leonard Gansevoort, Clerk of the said County. That Ephraim Paine, be First Judge, and Zephaniah Platt, and Anthony Hoffman, the other Judges, for the County of Dutchess; and that Melancton Smith, be Sheriff, and Henry Livingston, Clerk of the said County. That Lewis Morris, be First Judge, Stephen Ward, Joseph Strang, and Jonathan G. Tompkins, the other Judges, for the County of West-Chester; and John Thomas, be Sheriff, and John Bartow, Clerk of the said County. That Levi Pawling, be First Judge, and Dirck Wynkoop, jun. the other Judge, for the County of Ulster; and that Egbert Dumond, be Sheriff, and George Clinton, Clerk of the said County. That _____, be First Judge, and _____, the other Judges, of the County of Tryon; and that Anthony Van Veghton, be Sheriff, and _____, Clerk of the said County. That _____, be First Judge, _____, the other Judges, of the County of Orange; and that Jesse Woodhull, be Sheriff, and _____, Clerk of the said County. That William Duer, be First Judge,

John Williams and William Marsh, the other Judges, for the County of Charlotte; and that Edward Savage, be Sheriff, and Ebenezer Clarke, Clerk of the said County. That be First Judge, the other Judges, of the County of Cumberland; and that Paul Spooner, be Sheriff, and Clerk of the said County. And that , be the First Judge, and the other Judges, for the County of Gloucester; and that Nathaniel Merril, be Sheriff, and Clerk of the said County.

[The blanks for inserting the names of judges and clerks of the counties of Tryon and Orange were, at the request of the deputies from those counties, not filled up; the said deputies engaging to be answerable to their constituents for the same; and the blanks for judges and clerks of the counties of Cumberland and Gloucester were not filled up for want of a representation of, and sufficient information from, the said counties.]

“And Further Resolved, That each and every of the persons herein before appointed, do, before the Council of Safety aforesaid, or such persons as shall be by them appointed, take and subscribe the following oath of allegiance, to wit,

“ I do solemnly swear and declare, in the presence of Almighty God, that I will bear true faith and allegiance to the State of New York, as a good subject of the said State; and will do my duty as such a subject ought to do.’

“And Further, That every of the judicial officers above mentioned, do before he take upon him the exercise of his office, make the following oath, in manner above mentioned,

“ I do solemnly swear and declare, in the presence of Almighty God, that I will, to the best of my knowledge and abilities, execute the office of within the State of New York, according to the Laws and

Constitution of the said State, in defense of the freedom and independence thereof, and for the maintenance of liberty, and the distribution of justice among the subjects of the said State, without fear, favour, partiality, affection or hope of reward.'

"And also that every of the Sheriffs herein before named, do, before he exercise his said office, take in like manner, the following oath, to wit:

"I Sheriff of the County of do solemnly swear and declare in the presence of Almighty God, that I will in all things, to the best of my knowledge and ability, do my duty as Sheriff of the said county according to the Laws and Constitution of this State of New York for the furtherance of justice, and in support of the rights and liberties of the said State, and of the subjects thereof.'

"And that every of the Clerks herein before named, do in like manner, take the following oath, to wit,

"I Clerk of do solemnly swear and declare, in the presence of Almighty God, that I will justly and honestly keep the records and papers by virtue of my said office of Clerk committed unto me, and in all things, to the best of my knowledge and understanding, faithfully perform the duty of my said office of Clerk, without favour or partiality.'

"AND WHEREAS, It will be proper that all officers within this State, be, as soon as possible, appointed, in the mode for that purpose prescribed by the Constitution:

"*Therefore Resolved*, That all and singular the officers herein before appointed, shall respectively hold their offices, according to the tenure of such offices respectively specified in the said Constitution, if respectively approved of by the Council for the appointment of officers, at their first session; at which session, such of the said officers as shall be approved of by the said Council, as aforesaid,

shall receive their commissions in proper form. It is nevertheless provided, That every of the persons herein before named, who held the like office with that so as aforesaid conferred upon him, under authority derived from the King of Great Britain, during good behaviour, shall continue to hold the said office, so long as he shall well and faithfully perform the duties of such office.

“AND WHEREAS, No permanent provision could, with propriety, be made in the Constitution of this State, for the mode of holding Elections within the same, such provisions being properly within the power of the legislature, and depending, from time to time, upon the situation and circumstances of the State :

“AND WHEREAS, It is necessary to point out some mode, by which Elections for a Governor, Lieutenant-Governor, and Members of the Legislature may be held within this State :

“Therefore Resolved, That the Sheriffs of the several counties, hereinbefore mentioned, upon public notice for that purpose, by them given, at least ten days before the day of Election, do direct that Elections be held for Governor, Lieutenant-Governor and Senators, in each county, by the freeholders thereof, qualified as is by the Constitution prescribed, and for Members of Assembly, by the people at large, at the following places, to wit,

“In the county of Albany, at the City-Hall in the city of Albany,—at the house of William White, in Schenectady,—at the house of George Man, in Schohary,—at the house of Lambert Van Valckenburgh, at Cocksackie Flatts,—at the house of Cornelius Miller, at Claverack,—at the house of Solomon Demming, in King’s district,—at the house of Isaac Becker, in Tamhanick,—and at the house of Abraham Bloodgood, at Stillwater.

“In the county of Ulster, at the Court-House in the town of Kingston,—at the house of Ann Du Bois, in New

Paltz,—at the house of Sarah Hill, in Hanover precinct,—at the house of Martin Wygant, in the precinct of Newburgh.

“In the county of Orange, at the Court-House in Goshen,—at or near the Presbyterian Church, in Warwick,—at the house of John Brewster, in the precinct of Cornwall,—at the Court-House at the New-City, in the precinct of Kakiat,—at the house of Paulus Vandervoort, in Haverstraw,—and at the house of Joseph Maybee, in the precinct of Tappan.

“In the county of Westchester, at the house of Elijah Hunter, in Bedford,—and at the house of Captain Abraham Thiel, in the Manor of Cortlandt.

“In the county of Dutchess, at the house of the Widow of Simon Westfall, deceased, in Rhinebeck precinct,—at the house of John Stoutenburgh, in Charlotte precinct,—at the house of Captain Jonathan Dennis, in Beekman's precinct,—at or near New Hackensack church, in Rumbout precinct,—and at Matthew Patterson's, in Fredericksburgh precinct.

“In the county of Tryon, at the house of Jonathan Veder, in Mohawk district—at the house of John Dunn, in Canajohary district,—at the Church, in Stone Arabia, in Palatine district,—at the house of Frederick Bellinger, in the German Flatts district,—at Smith's Hall in Old England district,—and at the house of Alexander Harper in the town-ship of Harpersfield.

“In the county of Cumberland, at the house of Seth Smith, in Brattleborough,—at the house of Luke Knoulton, in New-Fain,—at the Court-House in Westminster,—at the house of Tarbell, in Chester,—at the Town-House in Windsor,—and at the house of Colonel Marsh, in Hertford.

“In the county of Charlotte, at the new Presbyterian Church, in New-Perth—at the house of Anthony Hoff-

nagle, in Kingsbury,—at the house of Nathaniel Spring, in Granville,—and at some convenient place in each of the Towns of Manchester, Danby, and Castle-Town.

“And in the county of Gloucester, at such places as the Sheriff of the said County, by the advice of the County Committee shall appoint, for the convenience of the Electors within the same.

“And that the Sheriffs of every county, shall order the elections to be held in each place above-mentioned, in his county, on the same day, under the direction of two reputable Freeholders; one to be appointed by the County Committee, the other by the Sheriff to attend at each of the places, where the Elections are, as aforesaid, directed to be held in every county, who shall jointly superintend the said Elections, and return to the Sheriff of the county in which such Elections are held, true poll lists of the Elections in the said several places, for Governor, Lieutenant-Governor, Senators and Representatives in Assembly; which lists the Sheriff shall transmit under his oath of office, to the Council of Safety, as far as the same shall relate to Governor, Lieutenant-Governor and Senators, and shall cast up the greatest number of votes for the Representatives in Assembly, and make return of the names of such of them as are duly elected, in the manner that has heretofore been usual and customary; and the Council of Safety shall, upon receipt of the poll lists of the Election of Governor, Lieutenant-Governor and Senators, examine the same, and declare who is the Governor, who the Lieutenant-Governor, and who the Senators so chosen, and shall administer to the said Governor and Lieutenant-Governor, the oath of allegiance and of office. The said Elections within the several counties to be so held, as that the persons thereby chosen may be assembled at Kingston, in the county of Ulster, or such other place as the said Council of Safety shall appoint, on the first

day of July next; Provided that if by any unforeseen accident, such Elections cannot be so held, then the said Council shall order Election at such other time or times, as shall, in their opinion, be most conducive to the general interest of the State.

“And it is Further Resolved, That such Freeholders as have fled from the southern parts of this state, and are now actually resident in any of the other counties of this State, shall be entitled to vote within such counties, for Governor and Lieutenant-Governor as if they had actually possessed Freeholds within the same. And that in case an Election in any county should not be held, by reason of the death or resignation of the Sheriff, or for any other cause, that the Council of Safety, or the Governor, in case he shall be sworn into his office, issue orders for an Election for Representatives in Assembly, in such county, and appoint a returning officer to hold the same. And where no County Committee shall be in being, or such Committee shall neglect to appoint returning officers for the places above named in such county, that the person for that purpose appointed by the Sheriff shall alone hold the Election, and make return to the Sheriff, in like manner, as is above directed.

“AND WHEREAS, It is impracticable for the inhabitants of the southern district of this State, to choose Senators to represent them in the Senate thereof, or for the counties of the said district, Westchester excepted, to elect Representatives in Assembly; and it is reasonable and right to give to the said district and counties, a proportional share in the legislation of the whole State, as far as is possible in its present circumstances; therefore *Resolved,* That Lewis Morris, Pierre Van Cortlandt, John Morin Scott, Jonathan Lawrence, William Floyd, William Smith of Suffolk, Isaac Roosevelt, Doctor John Jones, and Philip Livingston, be and they hereby are ap-

pointed Senators for the southern district of this State; and in case of vacancy, such vacancy to be filled up by the choice of the Assembly. And that Abraham Brasher, Daniel Dunscomb, Evert Bancker, Peter P. Van Zandt, Robert Harpur, Abraham P. Lott, Jacobus Van Zandt, Henry Rutgers, jun., and Frederick Jay, be, and they hereby are appointed Representatives in Assembly of the city and county of New York; Philip Edsall, Daniel Lawrence, Benjamin Coe, and Benjamin Birdsall, of the county of Queens; Burnet Miller, David Gelston, Ezra L'Hommedieu, Thomas Tredwell, and Thomas Wickes, of the county of Suffolk; William Boerum and Henry Williams, of the county of Kings; and Joshua Mercereau and Abraham Jones of the county of Richmond; and in case of vacancy, such vacancy to be filled up by the choice of the Senate, Provided always, that none of the said Senators or Representatives in Assembly so appointed, or hereafter to be appointed as aforesaid, shall continue longer in office than until the Electors they represent shall respectively be in a capacity of electing.

“By Order of Convention.

“Abraham Ten Broeck, President.

“Attest. John McKesson, Sec'ry.”

CONVENTION ADJOURNS; COUNCIL OF SAFETY.

The Convention continued its sessions until the 13th of May, 1777, when it was dissolved. Its last act was to direct the Council of Safety to meet at the same place, Kingston, on the next day,—the 14th. The Council of Safety organized on the 14th of May by the unanimous election of Pierre Van Cortlandt president, and Robert Benson and John McKesson, secretaries. They had served as secretaries of the Provincial Convention, and were afterwards chosen respectively clerks of the senate

and assembly. On the 19th of May, 1777, the Council of Safety adopted a resolution requiring the sheriffs to give notice of an election for governor, lieutenant governor, senators, and members of assembly. The date of the election was not fixed in the resolution, but each sheriff was required to give the longest notice possible, and to proceed without further warrant or authority. By the ordinance of the 8th of May it was directed that the elections be held at a time which would enable the legislature to meet on the 1st of July at Kingston, or at such other place as the Council of Safety might designate.

The ordinance required at least ten days' notice of the election, but did not require the election to be held in all the counties on the same day. The elections were held in the month of June, but the legislature did not meet on the 1st of July. The returns of the elections for governor, lieutenant governor, and senators, were canvassed by the Council of Safety on the 9th of July, at Kingston. This canvass showed that George Clinton was elected both governor and lieutenant governor.

On the same day the council addressed a letter to him congratulating him on his election to the office of governor and lieutenant governor, and requesting him to attend at Kingston at his earliest convenience and take the oath of the office which he accepts, and resign the other, so that a new election may be held to fill the vacancy.

General Clinton replied to this letter from Fort Montgomery on the 11th, accepting the office of governor. He expressed the opinion that his acceptance of the office of governor made it unnecessary to resign the office of lieutenant governor, but, for the purpose of removing any doubt on this question, he tendered a formal resignation of the office of lieutenant governor. He also said that, in view of the expected approach of the enemy, it would be

impracticable for him to leave his post "until the enemy's designs are more certainly known."

On the 21st of July the Council of Safety adopted a resolution in which General Clinton was most earnestly requested to appear before the council to take the oath of office, and enter upon the discharge of the important duties of the office of governor.

On the 30th of July, 1777, General Clinton appeared before the council and took the oath of allegiance, and also the oath of office, which oaths were administered to him by Pierre Van Cortlandt, president of the council.

A proclamation was issued by the council on the same day, in and by which the council proclaimed and declared "the said George Clinton, Esq., Governor, General, and Commander in Chief of all the Militia, and Admiral of the Navy of this state, to whom the good people of this state are to pay due obedience according to the laws and Constitution thereof."

LEGISLATURE ORGANIZED.

On the 16th of July the Council of Safety adopted a resolution convening the legislature at Kingston, Ulster county, on the 1st day of August, and requesting the county committees to notify their representatives in senate and assembly accordingly. The legislature did not meet on the 1st day of August. On the 6th of August, Governor Clinton issued a proclamation proroguing the legislature until the 20th day of August, and, by another proclamation dated August 18, he prorogued the legislature again until the 1st day of September. On the last-named day several members of each house met at Kingston, but the number was not sufficient to proceed to business, and they adjourned from day to day until a sufficient number appeared.

The constitutional convention had held its sessions in the court house, but, when the legislature convened, that building was occupied by the supreme court with Chief Justice John Jay presiding. The senate met at the house of Abraham Van Gaasbeck, and the assembly at the public house of Evert Bogardus. The legislature of 1887, by chapter 134, provided for the purchase of the Van Gaasbeck house. It is now owned by the state, and is known as the "senate house."

In the senate a quorum appeared on the 9th, and the senate was organized by the election of Pierre Van Cortlandt, of Westchester county, president, and Robert Benson, clerk. The first senate was composed of the following members:

From the southern district.—Lewis Morris (p. c.); Pierre Van Cortlandt* (p. c.); John Morin Scott* (p. c.); Jonathan Lawrence* (p. c.); William Floyd;* William Smith of Suffolk* (p. c.); Isaac Roosevelt (p. c.); Doctor John Jones;* Philip Livingston* (p. c.).

From the middle district.—Levi Pawling* (p. c.); Henry Wisner* (p. c.); Jesse Woodhull;* Zephaniah Platt* (p. c.); Jonathan Landon* (p. c.); Arthur Parkes* (p. c.).

From the eastern district.—Alexander Webster* (p. c.); William Duer (p. c.); John Williams (p. c.).

From the western district.—Abraham Yates, Jun.* (p. c.); Rinier Mynderse; Dirck W. Ten Broeck;* Isaac Paris (p. c.); Anthony Van Schaick;* Jellis Funda.

Those marked with a star were present at the organization of the senate. Those marked (p. c.) were members of the Provincial Convention. It thus appears that seventeen members of the first senate were members of the convention which framed the Constitution.

A quorum of members of assembly did not appear until

the 10th; on that day thirty-six members appeared, and the assembly was organized by the election of Walter Livingston, of Albany, speaker, and John McKesson, clerk. The following is the list of members of the first assembly. Those marked with a star were present at the organization. Those marked (p. c.), twenty-three, were members of the Provincial Convention.

From the city and county of New York.—Abraham Barsher* (p. c.); Daniel Dunscomb* (p. c.); Evert Bancker* (p. c.); Jacobus Van Zandt (p. c.); Henry Rutgers, Jun.; Frederick Jay; Peter P. Van Zandt* (p. c.); Robert Harper* (p. c.); Abraham P. Lott (p. c.).

From the city and county of Albany.—Jacob Cuyler (p. c.); John Tayler* (p. c.); Robert Van Rensselaer (p. c.); Walter Livingston;* William B. Whiting;* Peter Vrooman; John Cuyler, Jun.;; James Gordon; Stephen F. Schuyler; Killian Van Rensselaer.*

From the county of Suffolk.—Burnet Miller (p. c.); David Gelston (p. c.); Ezra L'Hommedieu* (p. c.); Thomas Tredwell* (p. c.); Thomas Wickes.*

From Ulster county.—Johannis G. Hardenburgh;* John Cantine; Johannis Snyder; Cornelius C. Schoonmaker;* Henry Wisner, Jun.* (p. c.); Matthew Rea* (p. c.).

From Queens county.—Philip Edsall; Daniel Lawrence; Benjamin Coe; Benjamin Birdsall.*

From Kings county.—William Boerum; Henry Williams.*

From Richmond county.—Joshua Mercereau; Abraham Jones.

From Westchester county.—Gouverneur Morris* (p. c.); Zebediah Mills* (p. c.); Robert Graham;* Thaddeus Crane;* Israel Honeywell, Jun.; Samuel Drake.*

From Orange county.—John Hathorn;* Jeremiah Clarke* (p. c.); Tunis Kuyper;* Roeluff Van Houten.*

From Dutchess county.—Dirck Brinkerhoff;* Anthony Hoffman* (p. c.); Gilbert Livingston* (p. c.); Jacobus Swartout;* Andrew Moorhouse;* John Schenck (p. c.); Egbert Benson.*

From Tryon county.—Michael Edie; Samuel Clyde; Abraham Van Horne;* Jacob Snell; Johannis Veeder (p. c.); Jacob G. Klock.

From Charlotte county.—Ebenezer Russell; Ebenezer Clarke; John Rowen; John Barns.

There were no returns from the counties of Gloucester and Cumberland.

An incident illustrating the survival of royal custom occurred at the opening session. When the assembly was organized it appointed a committee of two members to inform the Governor "that the House are ready to proceed to business, and wait His Excellency's *commands*." After waiting on the Governor, the committee reported that he was pleased to inform them "that he would send for the House immediately." In the afternoon of the same day the Governor's private secretary appeared in the assembly and announced that "His Excellency requires the immediate attendance of the House in the court room." The assembly accordingly attended at the court room, and, on returning, the speaker again took the chair and announced, in the quaint formality of the time, "that His Excellency had been pleased to make a speech to the House, and to present him with a copy thereof," which was read and entered on the journal. This form of entry was followed, substantially, until the legislative session of 1823, when the Governor sent a message to the legislature, as required by the new Constitution, instead of delivering a speech at the opening of the session in the presence of the two houses. The senate journal shows similar proceedings, except that the Governor "requests,"

instead of "requires," its immediate attendance in the court room.

THE HADDEN CASE.

An incident illustrating the difficulty attending the new government, and which at the same time shows great solicitude for personal rights, arose the 1st of October, 1777, when Thomas Hadden, confined in the Ulster county jail, presented to Chief Justice John Jay and Associate Justices Robert Yates and John Sloss Hobart, a petition for a writ of habeas corpus, which was denied by the judges on the ground that, by the ordinance of the 8th of May, the officers appointed by the Convention were to be approved by the Council of Appointment at its first session; that the council had held a session, but had failed to approve or disapprove the appointment of the judges, and that for that reason the judges had no authority to act and issue the writ. On the 2d of October, Hadden presented to the assembly a petition setting forth these facts, reciting, also, that he had made frequent applications to the late Convention and Council of Safety for his release, which were unavailing because of "their constant attention to objects of greater and more general importance;" that his application to the judges for a writ had been refused for the reasons stated; that thereby he had been "deprived of one of the most valuable privileges of a free subject;" and that "the channels of justice are stopped up;" and he therefore applied to the assembly as the "grand inquest of this state," and as the "guardians of the people," "to assert and vindicate their rights and privileges." The assembly immediately ordered its clerk to serve a copy of the petition on the judges, and direct that they attend the house that day at 4 o'clock in the afternoon. They attended accordingly, and, in reply to a question by the speaker in compliance with an order of

the house, said that the facts stated by Hadden were true, and, on being asked to assign reasons for refusing the writ of habeas corpus, submitted a written statement in which they expressed the unanimous opinion that, by reason of the failure of the Council of Appointment to approve their selection as judges, they had no authority to issue the writ. Thereupon the assembly adopted a resolution offered by Gouverneur Morris, declaring that the reasons assigned by the judges "are satisfactory," and the Council of Appointment was requested "to approve of the several officers appointed by an ordinance of the late Convention for organizing and establishing the government, agreed to by the said Convention, or to appoint others in their stead, to the end that the Governor may be enabled to issue commissions to such officers as they may so approve, or appoint."

On the 17th of October the council appointed Robert R. Livingston chancellor, John Jay chief justice, and Robert Yates and John Sloss Hobart associate justices.

Thus closed an incident which illustrates the extreme caution of the founders of the state in beginning the administration of a government intended to represent a just appreciation of the rights of the individual, and to be wholly free from oppression and tyranny. The Bill of Rights had guaranteed the right to the writ of habeas corpus to every Englishman, and by the Constitution this right had become the inheritance of every citizen of New York. It could not be withheld, except for very cogent reasons. It is worth noting that only three weeks after the organization of the first assembly it was called on to institute an inquiry into the conduct of the judges of the supreme court. The assembly entertained Hadden's petition, and "ordered" the judges to attend the house for the purpose of examining the matter. The Constitution had clothed the assembly with the power of impeachment,

and the summons to the judges, based on Hadden's petition, was the initial step which might have resulted in an impeachment if it had appeared that the judges refused the writ from improper motives, or for unjustifiable reasons. Gouverneur Morris, ever ready in an emergency, here, again, showed his tact and good sense by offering a resolution which, after full debate, was adopted with only four dissenting votes, declaring that the reasons assigned by the judges for refusing to issue the writ "are satisfactory."

This incident is worthy of more than a passing notice. The men charged with the administration of public affairs were trying to set the new state machinery in motion. After some delay the legislature had assembled, and had received its first formal communication from the Governor. The judicial branch of the government had also begun the performance of its duties; but, when the legislature convened and was organized on the 10th of September, the executive department was still incomplete, for, by the Constitution, a Council of Appointment was to be established with power to appoint or confirm nearly all public officers. Soon after the legislature convened the assembly elected four senators to act with the Governor in the Council of Appointment. By the ordinance of the 8th of May, 1777, the selection of the judges by the Convention was only temporary, and they were permitted to act only until a meeting of the Council of Appointment. That council met on the 16th of September, but neglected to act on the judicial appointments. Hence, by a strict construction, the authority of the judges terminated on that day, and they could not lawfully grant a writ of habeas corpus. Hadden appealed to the assembly, not for the purpose of preferring charges against the judges, but with the view of inducing action which would clothe the supreme court with complete judicial authority. The

assembly acted promptly and clearly within its jurisdiction. The judges were required to appear before the assembly and explain their reasons for refusing to grant the highest writ available for a citizen,—the writ of habeas corpus. They responded to the call of the assembly, not as defendants under accusation, but as members of a co-ordinate branch of the government, to explain why they had declined to exercise judicial power in that case. The incident is probably without a parallel in this state. In these modern days the assembly, while possessing jurisdiction to do so, would probably not call before it in this manner a justice of the supreme court whose official conduct had been made the subject of inquiry, but in those initial days of greater simplicity such a proceeding offered the easiest solution of a problem which might have become vexatious if technical rules of procedure had been applied to it. The judges appeared, and in a dignified statement presented the reasons for their refusal to grant the writ. It was a scene for an artist. We may readily picture the assembly in the old court house at Kingston where the first Constitution had been made, where the first supreme court had been held by Chief Justice John Jay himself, where the first legislature had convened, where the first governor had delivered his first speech to the legislature, and where the first Council of Appointment had been selected, listening to the reply by the judges who had been the honored colleagues of many of them in the late Convention and committees and Council of Safety, and especially to the chief justice, who had borne such a conspicuous part in public affairs during the last two years. There stood the judges ready to give a respectful answer to a respectful request from a branch of the government numbering among its members twenty-three of their associates in the late Convention. Chief Justice Jay bore himself here with his accustomed

dignity and prudence, firmly asserting the correctness of his position, and declining to exercise a doubtful judicial authority. We shall see him again twenty-three years later, when, after having served as the first chief justice of the United States, having performed distinguished diplomatic service for the nation, and having returned to be chosen governor of the state, he once more asserts a great constitutional principle, and denies the right of the senatorial members of the Council of Appointment to equal authority with himself in the selection of public officers.

This legislature continued in session until October 7, 1777, when, in consequence of the capture of Fort Montgomery by the British, it was obliged to discontinue its sessions.

The following extract from the senate journal, January 5, 1778, tells its own story, and shows the agitated condition of the state at that time:

"About Noon on Tuesday, the 7 Day of October last, News came by Express of the Reduction of Fort Montgomery, in the Highlands, and its Dependencies by the enemy: and although this senate thereafter adjourned until Wednesday Morning, the 8 of October last, yet so many Members of the Honorable the House of Assembly absented themselves on military Service, and for the necessary Care of their Families, in Consequence of that Event, that there were not a sufficient Number of them left at Kingston to form a House for Business; which rendered the Meeting of the Senate according to adjournment, useless; and therefore the Senate ceased to attend on the public Business, until His Excellency the Governor thought proper to convene the legislature of this state, by his proclamation."

The Council of Safety, appointed by the Provincial Convention, was authorized to act only until a meeting of

the legislature; therefore, when the legislature met and was fully organized on the 10th of September, 1777, the powers of this council ceased. At its last meeting held on that day it adopted a resolution requesting the Governor and chancellor to devise and procure a great seal for the state.

NEW COUNCIL OF SAFETY.

On the 7th of October, the members of the senate and assembly convened, not as a legislature, but to form a convention to provide for the safety of the state. Pierre Van Cortlandt was chosen president. On the same day this Convention appointed a new Council of Safety, composed of the following members: William Floyd, John Morin Scott, Abraham Yates, Johannes Snyder, Egbert Benson, Robert Harper, Peter Pra Van Zandt, Levi Pawling, Daniel Dunscomb, Evert Bancker, Alexander Webster, William B. Whiting, and Jonathan Landon.

This council was authorized to act when the Convention was not in session, and was vested with "the like power and authorities which were given to the late Council of Safety;" and each senator, member of assembly, and delegate in Congress was entitled to sit and vote in this council. The governor or president of the senate, when present, was required to preside at the council, and was given a casting vote.

On the same day the Convention transmitted to Governor Clinton a copy of the resolution organizing the Convention and creating the Council of Safety, with the following letter:

Kingston, October 7, 1777.

Sir:—

By the enclosed resolution, your Excellency will perceive what steps the legislature have taken to provide for

the safety of the state in the present emergency. The impossibility of keeping the several members in attendance on so critical an occasion must apologize for the measure. We hope soon to meet you again in our former capacity as members of the senate and assembly ; in the interim you will be pleased to make application to the Council of Safety for such matters and things as may to you appear from time to time necessary.

Here, again, we see the difficulties that confronted the patriots. They could not even carry on a constitutional government in a constitutional way, but found it necessary to resort to an irregular and unconstitutional convention composed of the same men as the legislature ; and by the creation of the Council of Safety the powers of the state were delegated to a possible seven men. The excuse given for this action was that it was impossible, or impracticable, to keep a quorum of the members of the legislature together.

This new Council of Safety was given large legislative and administrative powers. It was more revolutionary than the first council, for that council was an instrument of government created when there was no settled form of government, and as a necessary expedient to preserve order and administer affairs until the new government could be set in motion. But when the new Council of Safety was created the state government had been organized. There was a governor, a legislature, and a judiciary already performing the functions assigned to them under the Constitution and the laws. The legislature, as such, did not create the Council of Safety. It might have passed a law vesting in such a council needed administrative powers for the emergency. But the exigencies were very pressing, and the occasion was very sudden. The British were already making rapid progress in an attempt to conquer

the Hudson river country, and the patriots could not wait for the slow formalities of legislation. It is also worth noting, in this connection, that the men in actual control of state affairs had served through several Provincial Congresses, and some of them were in the old Council of Safety. They quite naturally, therefore, turned to that expedient in this time of need.

But "necessity knows no law." It must be admitted that the right of self-preservation is superior to any statute or constitution; and, in a great emergency like that which the patriots were then compelled to face, with the southern part of the state in control of the enemy, with this enemy making rapid progress toward the north, with their own lives in danger, and their families and firesides subject to attack, the technicalities of a paper constitution could not prevent the use of any available means to protect the state, resist invasion, and preserve the lives and property of the people.

The new Provincial Convention, acting either directly or through a Council of Safety, was a legitimate exercise of original sovereignty, and a war measure amply justified by the circumstances. The men who resorted to this temporary method of conducting public affairs fully appreciated its irregularity. This is manifest from the letter sent by them to Governor Clinton. And the Council of Safety evidently shrank from their unwelcome task, for, on the 21st of November, 1777, the council appointed a committee to confer with the Governor "on the expediency of putting an end to the sessions of this council, either by calling the legislature of this state, or a convention thereof."

On the 27th the committee reported that they had conferred with Governor Clinton at New Windsor on the subject of convening the legislature; that he had informed them that, on account of the exigencies of the

war (he then being in charge of military operations in the Highlands), he could not attend to public business further distant from New Windsor than Poughkeepsie; that he thought it most expedient to put an end to the session of the Council of Safety by calling a meeting of the legislature very early in the month of January at Poughkeepsie if accommodations could be procured there; and that the committee had ascertained that the "principal inhabitants" of Poughkeepsie had agreed to accommodate the members of the legislature with board.

The Council of Safety thereupon adopted a resolution recommending that the Governor, "by his proclamation, convene the legislature at Poughkeepsie as early in the month of January as possible. On the 15th of December, 1777, Governor Clinton issued a proclamation convening the legislature in session at Poughkeepsie on the 5th of January, 1778. Several members of the legislature met at Poughkeepsie accordingly, but no quorum was present until the 15th.

The capture of Fort Montgomery by the British early in October practically opened the way for the enemy to proceed up the river. The British improved the opportunity, and sent an expedition which destroyed Kingston, then the third town in population in the state, on the 16th of October. Before this time the Council of Safety had found it unsafe to continue to meet there. The journal shows meetings at different places in Ulster county until the 17th of December, when the council, then in session at Hurley, adjourned to met at Poughkeepsie on the 20th. The council met at Poughkeepsie on the 22d of December, where its sessions were continued from time to time until January 7, 1778, when, according to the journal, the council "adjourned until 3 o'clock this afternoon;" but there is no record of their meeting again. In the afternoon of that day the Provincial Convention met.

This concluded and superseded the Council of Safety. The Convention held its last session on January 14, 1778. On the 15th of January the legislature resumed its sessions, and constitutional government was again in full operation.

COUNCIL'S PROCEEDINGS VALIDATED.

The last Provincial Convention and Council of Safety had assumed and exercised large administrative, and even legislative, powers. These powers had been exercised in behalf of the state and in the public interest; and, while this Convention and Council of Safety were irregular and unconstitutional bodies, their acts could not be wholly ignored, and clearly could not be repudiated by the legislature, whose members had created and given them whatever vitality they possessed. The legislature, therefore, at its first session in 1778 thought it proper to enact legislation validating the proceedings of the Convention and Council of Safety.

In February the legislature passed a bill relating to the exportation of certain food products, in which an embargo laid by the last Council of Safety was recognized and confirmed. This bill was vetoed by the Council of Revision, on objections prepared by Chief Justice John Jay, on the ground that the Council of Safety was unconstitutional, that it had no valid existence, and that the legislature could not ratify its acts. Chief Justice Jay says, in the course of his memorandum, that the bill is inconsistent with the spirit of the Constitution of this state, because it recognizes "the late supposed Council of Safety as a legislative body, when in fact all legislative power is to be exercised by the immediate representatives of the people, in senate and assembly, in the modes prescribed by the Constitution." The chief justice argues the matter at some length, suggesting that before the organization of

the state government the people were under the necessity of being governed by conventions and committees of safety created by the people themselves, but that such conventions and committees could not be continued under the state government, and be given the power and authority vested in the legislature.

Governor Clinton and Chancellor Livingston concurred in these objections; but the bill, with slight modifications, was passed over the veto. This shows that the members of the legislature who, though not in their legislative capacity, had created the Council of Safety, intended to defend it and its work. This intention is manifest in another bill passed on the 4th of April, 1778, ratifying and confirming generally the acts of the Council of Safety, and providing for indemnity for those who had acted under its authority.

The following preamble to this bill is a legislative expression of the emergency under which the council was created:

“Whereas, the legislature of this state, at their late sessions at Kingston were prevented from proceeding on business, by reason that many of their members (officers in the militia) were called into actual service on the irruption of the enemy into this state, in which conjuncture the members of the senate and assembly then present did form themselves into a convention and appointed a Council of Safety out of their number, with like powers as former conventions and Councils of Safety of this state did heretofore exercise, and to continue so long as the necessities of the state should require; which appointment of the said convention and Council of Safety at that time was absolutely necessary, and the orders, recommendations, and resolutions by them from time to time made have been found greatly beneficial to this state. And whereas, doubts have arisen in the minds of some

of the good people of this state, concerning the powers of the said convention and Council of Safety, notwithstanding the absolute necessity of such appointment, there being no provision made for that purpose in the Constitution of this state."

Then follows the formal act ratifying the proceedings of the council.

This bill was presented to the Council of Revision on the 4th of April. The council, before considering the bill, sent a communication to the legislature, asking for the orders and resolutions of the Council of Safety which would be confirmed by the pending bill. The assembly, on receipt of this communication, directed its clerk to attend before the Council of Revision with the minutes and proceedings of the Council of Safety; but the records do not show that any further action was taken by the Council of Revision or by the legislature. The bill appears as chapter 37 of the Laws of 1778, and it became a law by operation of the clause in § 3 of the Constitution, providing that a bill shall become a law if not acted on by the Council of Revision within ten days.

ANOTHER COUNCIL RECOMMENDED; BILL VETOED.

This subject was again under consideration by the legislature in the fall of 1780. A joint committee was appointed by the legislature to "take into consideration the present critical situation of the country, and to determine the measures necessary to be pursued for the public safety." This committee reported a bill "for the appointment of a council to assist in the administration of the government during the recess of the legislature." The bill was not entered on the journals of the legislature nor of the Council of Revision, and I have not been able to find a copy of it. It was vetoed by the Council

of Revision on the ground that it vested in the proposed council legislative powers which, under the Constitution, are vested in senate and assembly only, and cannot by them be delegated to others; because the bill subjects the governor to the control of the council, and also "because the said bill is not only repugnant to the spirit and letter of the Constitution, but, should the same become a law, would, in the opinion of this council, tend to embarrass government and destroy its present energy." On the 9th of October, 1780, a vote was taken in the assembly on the passage of the bill over the veto, but it did not receive the necessary two thirds.

The legislature was regularly organized in September, 1777, but it passed no laws at that session; and it is a fact worth noting that from the 3d of April, 1775, when the last act of the last Colonial Assembly was passed, to February 6, 1778, when the first act of the state legislature was passed, a period of nearly three years, the colony and state were governed by conventions and committees. With the legislature which convened at Poughkeepsie January 15, 1778, began the regular administration of constitutional government, and the only suggestion of a change of purpose, or attempted delegation of power, was contained in the bill of October, 1780, creating a new Council of Safety, but which, on more mature consideration, the legislature decided not to enact into a law.

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 Appointment, 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 legis-

lation. 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 im-

portant 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,
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the Gansevoorts, the Schuylers, the Van Cortlandts, the Van Rensselaers, the Roosevelts, the Spencers, the Landings, 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 estab-

lished, the statute law was frequently revised, counties, cities, towns, and villages were created, internal administration adequate for the needs of the time was provided for the different branches of state and local government; and under this Constitution was begun the development of a plan for the construction of the great canals, which have since occupied such a large place in public affairs. Further observations on the first Constitution will be found at the end of the chapter on the Constitution of 1821 which superseded the original instrument. I have there quoted the opinions of Chancellor Kent, Governor De Witt Clinton, and Governor Yates concerning the value, scope, and character of the first Constitution.

CHAPTER III.

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.

In the chapter on the first Constitution, I have referred to a letter written by John Jay to Robert R. Livingston and Gouverneur Morris, dated at Fishkill, April 29, 1777, nine days after the Constitution was adopted, from which it appears that the original draft of § 22, afterwards § 23, provided for appointment of officers by the legislature, on the nomination of the governor, and that this provision was generally disapproved by the Convention. The original form of the section has been given in the previous chapter. Several plans were proposed and discussed by members out of session, and finally the section as it stands was prepared by Mr. Jay, proposed by him in convention, and adopted. Having written the section, his opinion must have great weight in determining its proper construction; and he always claimed that it gave the governor the exclusive right of nomination. It may be well to note here that while the section, as proposed by Mr. Jay, was under consideration by the Convention, an amendment was offered by William Harper, providing for the appointment of four senators, to compose a council of appointment, "which council shall appoint all the said officers." This amendment did not give the governor any authority in the council, and he could not nominate or appoint any officer; that power was to be vested solely in the council.

It will be seen by the construction given to § 23 by the Convention of 1801 that the senators in the council

The records of the council do not show who made nominations, but it seems that Governor Clinton, up to 1794, exercised the sole power of nomination, "although doubts had arisen previously as to this power." The appointments are evidenced by a resolution entered on the minutes "that _____ be and he hereby is appointed" (naming the office). The commissions were signed by the Governor, and recited, among other things, that, by virtue of statute or other authority, "we have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint." One of these commissions, issued in February, 1779, contains the following attestation: "Witness our trusty and well-beloved George Clinton, Esq., Governor of our said state. General and Commander in Chief of all the militia, and Admiral of the navy of the same, by and with the advice and consent of the Council of Appointment," followed by the date and signature; and this was afterwards the

usual form. The form of the commission would indicate a nomination by the Governor and confirmation by the council; and this, as already stated, seems to have been the usual practice, although the records do not show the fact of a nomination by the Governor. The form of statutes creating offices during the early state history should not be overlooked, for they show a legislative construction of the constitutional provision. Thus, in 1779, the Governor was authorized by statute, "by and with the advice and consent of the Council of Appointment, to nominate and appoint" a state clothier. Many other offices were created during the next twenty-five years, with a like provision relative to appointment and confirmation; but the practice of the council does not seem to have been changed in consequence of these special acts, nor does it appear that the Governor in fact actually nominated an officer, and that his nomination was confirmed by the council. I think, without exception, the commissions during the existence of the council recited that the appointments were made "by and with the advice and consent of the Council of Appointment," although, by the declaration of the Convention of 1801, any member of the council might make a nomination. It will be observed that the early statutes providing for appointment of an officer by the governor and council used the form followed in modern statutes which provide for the appointment by the governor and senate; but in these later days the senate would hardly claim a concurrent right of nomination.

On the 29th of January, 1794, Egbert Benson was appointed puisne judge of the supreme court on the nomination of the council, and against the protest of the Governor, who claimed the exclusive right to make all nominations. John Jay was elected governor in the spring of 1795, while he was abroad as an envoy of the

United States. He reached New York on his return, May 28th; he resigned the office of chief justice of the United States the 29th of June, 1795, and on the 1st of July took the oath of office as governor of New York. In his speech to the legislature at the opening of the session, January, 1796, he made the following reference to the subject of appointments: "There is an article in the Constitution, which, by admitting of two different constructions, has given rise to opposite opinions, and may give occasion to disagreeable contests and embarrassments. The article I allude to is the one which ordains that the person administering the government for the time being shall be president of the Council of Appointment, and have a casting voice, but no other vote; and, with the advice and consent of the said council, shall appoint all the officers which the Constitution directs to be appointed. Whether this does, by just construction, assign to him the exclusive right of nomination, is a question which, though not of recent date, still remains to be definitely settled. Circumstanced as I am in relation to this question, I think it proper to state it, and to submit to your consideration the expediency of determining it by a declaratory act." He did not mention the subject again in his communications to the legislature until February 26, 1801, when the relations between the Governor and the majority of the council had become so strained that the business of the council was practically at a standstill. This condition grew out of incidents that occurred on the 11th and 24th of February. On the 11th the Governor nominated eight candidates for the office of sheriff of Dutchess county, but they were rejected by the council. On the 24th the Governor proposed that all nominations be entered on the minutes of the council. This proposition was rejected by a majority of the council, on the grounds that it had not been

the custom to enter the nominations on the minutes, that such entry would unnecessarily "swell the minutes," that the law did not require such entry, "and because the council do not admit, but deny, that the right of nomination exists in the Governor exclusively, which His Excellency claims and insists upon."

The council was composed at this time of DeWitt Clinton, Ambrose Spencer, Robert Roseboom, and John Sanders.

The issue was further intensified at the same meeting when Mr. Clinton nominated a candidate for the office of sheriff of Orange county. The minutes state that Governor Jay, "claiming the exclusive right of nomination, observed that it would be proper for him to consider what ought to be his conduct relative" to the nomination made by Mr. Clinton. He declined to present the nomination to the council, which soon adjourned, and did not meet again while Mr. Jay was governor.

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.

On the 27th of February the assembly adopted a preamble referring to the Governor's message of the pre-

vious day, and the questions presented by it, which was followed by a resolution declaring "as the sense of this house, that the legislature have no authority to interpose between the Executive and the members of the Council of Appointment, touching the right of nomination, or to pass a declaratory act, defining the powers of the said council, or prescribing the manner in which the same shall be exercised."

On the 7th of March the senate adopted a concurrent resolution for a joint committee of the two houses to inquire and report what had been the practice of the Council of Appointment concerning nominations; but the assembly did not concur in this resolution.

On the 18th of March a communication relating to this subject was sent to the assembly by a majority of the Council of Appointment. It was signed by DeWitt Clinton, Ambrose Spencer, and Robert Roseboom.

Mr. Clinton, then a young man, had recently entered public life, and was at the beginning of a career which proved alike honorable to himself and to the state. At this time he was very persistent in pressing the claims of the council to a concurrent right of nomination; but he afterwards had abundant reason to change his views, when, as governor, the council was frequently opposed to him politically, and he was obliged to issue commissions to his political opponents. Mr. Spencer was serving his second term in the senate, and was soon afterwards appointed attorney general. A little later he was appointed associate justice, and afterwards chief justice, of the supreme court.

In this communication these members of the council stated at length their views on the conflicting claims of the Governor and council to the right of nomination. They denied the Governor's exclusive right of nomination, and asserted that not only by the Constitution, but

by the practice of the council, the council had a concurrent right of nomination, and that appointments must be made by the council as a whole, including the Governor, who had only a casting voice. It also appeared from this communication that there were political differences between the Governor and the Council of Appointment; that he nominated to office members of his own party, whose nominations had been rejected by the council, and had refused to consider nominations made by members of the council.

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.

On the same day the senate adopted a preamble referring to the differences between the Governor and council, reciting "that the legislature cannot now adopt or concur in any measure to produce a seasonable and legal decision on the right of nomination; and that the right has been uniformly claimed and generally exercised as well by the late as the present Governor." Then follows a concurrent resolution suggesting "that it would be proper for the members of the Council of Appointment to signify to His Excellency, the Governor, their willingness to waive the aforesaid question relative to the right of nomination, and to proceed in the business of the council in the manner heretofore generally practised, until a legal decision can be had on that question." While this resolution was pending, DeWitt Clinton offered as a substitute a preamble reciting among other things, "that great and extensive injuries may result to the community from these differences, whereby the house

of assembly may deem it their duty to interfere in the capacity of the grand inquest of the state, and to institute an impeachment against the delinquent or delinquents before the court for the trial of impeachments," and that the legislature, by passing a law for a convention, had adopted the only measure in their power to correct the evil. This preamble was followed by a resolution to the effect that in view of the possible presentation of the matter to the court for the trial of impeachments, of which the senators were members, they could not now properly express an opinion on either side of the controversy. Mr. Clinton's resolution was rejected. He then offered another resolution to the effect that it would be proper for the Governor to convene the council, and to signify to them his willingness so to accommodate with them respecting the right of nomination as to prevent a further interruption of appointments until a constitutional decision could be had on that question. This resolution was also rejected.

The assembly declined to concur in the senate resolution, but on the 8th adopted another resolution reiterating the views expressed by it on the 27th of February, with the following significant preamble:

"WHEREAS, It appears to this House from two several messages of His Excellency, the Governor, and from a communication of a majority of the members of the Council of Appointment, that the said council have not been convened since the 24th of February last for the performance of the duties committed to them by the Constitution; and that a controversy has arisen between His Excellency and the council respecting the right of nomination, which has created a new and unprecedented crisis in our public affairs; that notwithstanding speculative differences may hitherto have existed between the former governor and former councils on this subject,

yet, that in practice, the business of appointments was never suspended; and that the present is the first council, under the present Governor's administration, who ever experienced any embarrassments in the execution of their official duties:

"AND WHEREAS, By the Constitution and laws of this state, at fixed periods certain appointments are enjoined and required to be made, yet the judges and justices of several counties, the mayors of the four cities, eight sheriffs, the auctioneers of this city, and a number of other officers, have not been appointed at the times prescribed by the said Constitution and laws:

"AND WHEREAS, A high responsibility must rest on His Excellency or the council, and such injurious consequences may result as will induce the next house of assembly to prefer an impeachment against the delinquent or delinquents; and whereas, the senate principally compose the court for the trial of impeachments; and whereas, the legislature have, by passing a law calling a convention, made the only provision in their power for the correction of this evil: therefore, *Resolved*, That this House do persist in their said resolution."

It appears from Hammond's Political History of New York (vol. 1, 157) and also from Pellew's Life of John Jay (p. 298) that, while the issue with the council was pending, Governor Jay requested the opinion of the chancellor and judges of the supreme court concerning the construction of § 23, "which they unanimously declined giving, on the ground that the expression of an opinion by them was not within the scope of their official duties, but entirely extrajudicial."

It has already been noted that the assembly expressed the opinion that the legislature had no power to determine the construction of § 23 by a declaratory act, and the senate seems to have taken the same view. It does

not appear that any effort was made to procure a solution of the problem by the other method suggested by Governor Jay, namely, a judicial decision. The legislature adopted an entirely different course, and provided for a convention to determine the proper construction of the disputed section.

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.

In addition to the question relating to the construction of § 23, the act conferred on the Convention power to consider that part of the Constitution "respecting the number of senators and members of assembly, and to reduce and limit the number as the Convention may deem proper."

The senate was originally composed of twenty-four members, and the assembly of seventy members, and provision was made for an increase in each branch at stated periods, until the maximum should be reached, which was fixed at one hundred senators and three hundred members of assembly. The increase in membership had apparently been more rapid than was at first anticipated. Governor Jay, in his speech to the legislature at the opening of the session, which began November 4, 1800, called attention to this increase, and recommended a 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.

The delegates to the Convention of 1801 were required to meet in the courthouse in the city of Albany on the second Tuesday of October. They met accordingly on October 13. The following is the list of delegates by counties :

Albany.—John V. Henry, Daniel Hale, Leonard Gansevoort, Johan Jost Dietz, Peter West, S. Van Rensselaer, Josiah Ogden Hoffman, Abraham Van Ingen.

Cayuga.—Silas Halsey.

Chenango.—Stephen Hoxie, John W. Buckley.

Clinton and Essex.—Thomas Tredwell.

Columbia.—Alexander Coffin, Benjamin Birdsall, Moses Younglove, Thomas Trafford, James I. Van Alen, Stephen Hogeboom.

Delaware.—Roswell Hotchkis, Elias Osborn.

Dutchess.—Peter Heusted, Jonathan Akin, J. Van Benthuyzen, T. W. Van Wyck, Edmond Parlee, Isaac Bloom, Ithamer Weed, Joseph Thorn, Smith Thompson, Caleb Hazen.

Greene.—Marton G. Schuneman, Stephen Simmons.

Herkimer.—Evans Wherry, M. B. Tallmadge, George Rosecrantz.

Kings.—John Hicks.

Montgomery.—Thomas Sammons, Nathaniel Campbell, Peter Waggoner, Jun., Caleb Woodworth, Jonathan Hallett, John Herkimer.

New York.—James Nicholson, William Edgar, Solomon Townsend, George Clinton, Jun., Archibald Kerly, Joshua Barker, Maturin Livingston, John Mills, Peter H. Wendover, William Van Ness, Nicholas DePeyster, Daniel D. Tompkins, John Bingham.

Oneida.—James Dean, Bezaleel Fisk, Henry Huntington.

Onondaga.—Moses Carpenter.

Ontario and Steuben.—Moses Atwater, John Knox.

Orange.—Aaron Burr, Peter Townsend, Arthur Parks, James Clinton, John Steward.

Otsego.—David Shaw, James Moore, Daniel Hawks, Luther Rich.

Queens.—John Schenck, John W. Seaman, DeWitt Clinton, James Rayner.

Rensselaer.—Cornelius Lansing, Jacob Yates, Jonathan Rouse, John Ryan, Wm. W. Reynolds, Jonathan Niles.

Richmond.—Joseph Perine.

Rockland.—Peter Taulman.

Saratoga.—John Thompson, Samuel Lewis, Adam Comstock, D. L. Van Antwerp, Beriah Palmer.

Suffolk.—William Floyd, Joshua Smith, Jun., Ezra L'Hommedieu, Samuel L'Hommedieu.

Tioga.—John Patterson.

Ulster.—Abraham Schoonmaker, Anning Smith, John Cantine, Lucas Elmendorf.

Washington.—Edward Savage, Solomon King, Solomon Smith, John Vernor, Thomas Lyon, John Gale.

Westchester.—Jonathan G. Tompkins, Pierre Van Cortlandt, Jun., Israel Honeywell, Ebenezer White, Thomas Ferris.

Aaron Burr, then Vice President of the United States, was a delegate, and was chosen president of the Convention. DeWitt Clinton, a member of the Council of

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Appointment, was also a delegate. Daniel D. Tompkins began his public career as a delegate to this Convention. Smith Thompson, afterwards a justice of the supreme court of the state and of the United States, was also a delegate.

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 ex-

plained 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 coöperation 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.