

## CHAPTER IV.

### The Second Constitution, 1821.

The evolution of our Constitution has brought it to a condition where amendments are comparatively easy. The rule requiring a vote by the people once every twenty years, or oftener, as the legislature may provide, to determine whether a convention shall be called to revise the Constitution, affords frequent opportunities for considering the Constitution as a whole; while, by another provision, the legislature may, at any time, submit to the people specific propositions for amendment, without considering the whole instrument. This provision furnishes an easy method of altering the Constitution to meet new conditions; indeed, the method is rather too easy, for it affords opportunity for frequent attempted changes in the fundamental law; and if the Constitution, for any reason, happens to be unsatisfactory to a given class of people, and they find that they cannot do all that they think they wish to do, under the existing Constitution, they immediately seek to amend it, as if it were a statute, not possessing permanent character. The ease with which we may now propose amendments is in marked contrast to the difficulties surrounding the subject of constitutional changes during the first forty-five years of our history.

It has already been noted that the first Constitution contained no provision for its own amendment. The legislature could not, as it may now do, submit to the people propositions for specific amendments, nor could

it direct that a convention be held to consider amendments, or a general revision. It could only recommend a convention; and even this it could not do without first submitting the question to the people, if the convention were to be given general power to revise the entire Constitution.

A brief sketch of the various attempts to amend the first Constitution will show how reluctant the people were to call conventions, or engage in a general revision of the Constitution. The Convention of 1801 probably would not have been called at that time had it not been for the trouble over the Council of Appointment, for there was no other subject on which there had been any serious demand for a change in the Constitution. True, the Governor had recommended a convention for the purpose of limiting the number of members of the legislature, but at that time the number had not, in either branch, reached one half the limit fixed by the Constitution. The mistake in construing the provision of the first Constitution relative to the powers of the Council of Appointment, which mistake seems to have been due largely to partisan ambition, led to a convention which fixed this mistaken construction for twenty-one years, resulting in constant and growing annoyance to the good people who wished to administer the government on correct principles, free from the corrupting influence of partisan intrigue.

The breach between Governor Jay and the Council of Appointment occurred near the close of his second term, and on the accession of his successor, General George Clinton, the council resumed its sessions, in August, 1801, and they continued without further interruption.

#### CONSTITUTIONAL REFORMS PROPOSED.

There was evidently some dissatisfaction with the

Constitution, and considerable agitation and discussion of proposed changes. This dissatisfaction does not seem to have made itself felt in the legislature until the session of 1811. That session gave considerable attention to the subject. A bill was passed by the assembly, recommending a convention to consider the subjects of the property qualifications of voters, the Council of Appointment, the election of sheriffs, and the appointment of clerks by the court of common pleas. While the bill was under consideration propositions were made to give the convention power to consider the subjects of eligibility to the legislature, elections of justices of the peace, requiring members of the Council of Appointment to take an oath that they would not remove an officer except for cause, prohibiting the appointment of any member of the legislature to any other civil office during his term, providing for the creation of senate districts equal in number to the senators to be elected, and for electing one senator from each district; but the assembly declined to include any of these in the subjects to be committed to the convention. This bill apparently received some consideration from the senate, but was not passed.

It appears from the senate journal that on the 2d of March, 1811, a convention of delegates from the several towns of Ontario county was held at Canandaigua, on the subject of the qualifications of voters, and that the convention sent a petition to the legislature, which was presented by John C. Spencer and others, praying for a convention to consider the propriety of amending the Constitution by removing the property qualification of voters. A similar petition was presented by some of the inhabitants of Rensselaer county. These petitions and the action of the assembly show that there was a growing movement in favor of general suffrage.

The subject of amending the Constitution was not

taken up by the legislature again until 1818. In March of that year a joint committee of the senate and assembly was appointed to "examine and report what alterations, if any, it is expedient should be made in the Constitution of this state." A few days later the assembly members of the committee reported that the committee was equally divided on the question "as to the expediency of calling a convention at all." At this session two bills were introduced, but not passed; one providing for a convention to consider the subject of elective franchise, and the other to consider the subject of appointment of officers.

The legislature, in January, 1819, appointed another joint committee to consider the question of revising the Constitution, and to report subjects for the consideration of a convention.

On the 8th of February, 1819, Erastus Root offered a resolution instructing the joint committee "to prepare and bring in a bill to provide for the calling of a convention with full power to revise, alter, and modify the whole or any part of the Constitution of this state." Mr. Root's resolution was considered in committee of the whole February 17, and after considerable discussion was rejected by a vote of 51 to 56.

The subject of a convention was not considered by the assembly further at that session. The senate took no action, except to appoint members of the joint committee. This committee made no report.

#### CONVENTION PROPOSED.

Governor DeWitt Clinton gave the subject of revising the Constitution considerable attention in his annual speech to the legislature at the opening of its session, January 4, 1820. His remarks concerning the Council of Appointment and the partisan struggles incident to

this piece of constitutional machinery are quite significant, in view of the activity manifested by him twenty years earlier in procuring a construction of the Constitution, which made possible the condition now so forcibly deprecated by him.

Concerning constitutional revision, the Governor said: "The Constitution of this state was formed nearly forty-three years ago. And considering the circumstances under which it was established, in the midst of war and commotion, and without the benefits of much experience in representative government, it is not a little surprising that it is so free from imperfection. Attempts have been made at various times to call conventions to introduce alterations, which have only succeeded in a single instance, probably from an apprehension that an innovating spirit might predominate, and destroy, instead of consolidating, this temple of freedom and safety. Parties are the natural offspring of republican government. Wherever freedom exists, it will be manifested in differences of opinion with respect to the best mode of promoting the public welfare. And when these contentions spread over society, they form parties; and mingling sometimes with private views and local interests, degenerate into faction, which seeks its gratification in violation of morality, and at the expense of the general good. And such is the proneness of human nature to cherish the spirit of contention, that we often see the continuance of parties after the cessation of the producing causes. While this state has made rapid and signal advances in prosperity, it has been more obnoxious to the excitement of party than any member of the Federal Union. Even during the gloomy periods of the Revolution, this spirit was exhibited in a variety of shapes, and since that time it has scarcely ever ceased to agitate society. After giving full weight to the operation of

other assignable causes, we are forced to conclude that there is a radical defect in the Constitution of our government; that it either wants some essential check against the progress of party, or that it contains in its arrangements the elements of discord and excitement. The assembly, which is the most numerous branch of the legislature, and which is annually chosen, elects every year, from the senate, four persons, who, together with the governor, constitute a Council of Appointment. The offices in the gift of this council are remunerated by salaries or fees to the amount of a million of dollars annually. Combinations will be formed to obtain the control of this enormous patronage. And they will attempt to influence, in the first place, the elections of the people, by dictating under the forms and discipline of party; secondly, the selection of the appointing power; and thirdly, the operations of that institution. And when no leading measures of the government have been impeached, and no important differences of opinion pretended, endeavors are not unusual to cherish the spirit of discord by conjuring up the shades of departed controversy, by appealing to the vindictive feelings of disappointment, or exciting the cravings of ambition and cupidity. With this principle of irritation in our Constitution, the hydra of faction will be in constant operation, endeavoring to make its way to power, sometimes by open denunciation, at others by secret intrigue, and always by artful approaches. The responsibility of public officers is essential to the due performance of their trust, and is demanded by the properties of delegated power, and the best interests of the community. The council, as constituted, is almost destitute of this essential requisite. The political tranquillity of the state demands a different arrangement of the appointing power. And I have no hesitation in recommending a convention for this and such other pur-

poses as may be imperatively required by the public welfare. And I do this under a full persuasion that the powers of the convention cannot transcend the objects committed to their cognizance by the concurrent act of the legislature and people,—that the landmarks of security to liberty, property, religion, and life, will be inviolably preserved and more firmly established; and that the measure which will be adopted will have a benign influence in preserving the harmony of the community, and elevating the reputation of the state.”

The senate proposed a joint committee to consider that part of the Governor’s speech relative to a constitutional convention. The assembly did not concur, but referred the subject to a select committee. On the 18th of January the assembly committee reported :

“That upon deliberate examination of this subject, they are unanimously of opinion, that a radical defect must somewhere exist in the Constitution of our state.

“Your committee, on this occasion, cannot forbear to remark that, whilst they witness in our sister states generally a disposition to embrace the opportunity presented in the present favorable state of our affairs as a nation, of introducing such wise and salutary measures of improvement as the times seem peculiarly favorable for carrying into effect, in this state, unfortunately, though a like disposition is ardently appreciated by a great part of the community, our energies are almost rendered nugatory by our division into distinct and contentious political parties, on subjects the most trivial and unimportant.

“Your committee are decidedly of opinion that this evil is attributable, in a great measure, to the defects in our state Constitution, the most prominent of which is that part that relates to and directs the manner of appointment to office. Your committee deem it unnecessary

here to attempt a particular statement of the evils resulting from this part of our Constitution. The number of which the Council of Appointment consists renders it at once impossible for that body to possess the requisite information on the various points upon which it becomes their duty to decide; hence, their continual liability to be imposed upon and deceived by misrepresentations which it is out of their power to detect. This evil would be more tolerable if limited in its operations to the county or sections of the state in which an improper appointment might be made. Unfortunately, it is not the case; your committee might here enumerate various instances (which they forbear to do) in which the appointment of a county officer has been made the general electioneering topic, and has gone the round of almost every public journal in your state. Other points, though of seemingly less importance, do, in the opinion of your committee, strongly demand the interposition of a convention of the people of this state, amongst which are the following, to wit: That part that relates to the Council of Revision, and that which determines the qualifications of voters at elections. In the opinion of your committee, the right of judging of the constitutionality and expediency of bills which have passed the senate and assembly is better disposed of by most of our sister states. Experience has clearly demonstrated that this power may be safely vested in the hands of your chief magistrate; and though your committee have not before them an instance in which any very serious evil has resulted from the manner in which this power is at present disposed of, they are aware that a case may, and very probably will, occur, should that power be continued in the hands of your present Council of Revision, in which differences of opinion between that and the other branches of our government may produce incalculable injury to our state, which the



voice of the people would be unable to remedy. Your committee are therefore of opinion that the body in which this power is vested ought, at stated periods, to be answerable to the people for a faithful and judicious exercise of it.

“On that part of our Constitution which relates to the qualification of voters at elections, your committee have to remark that, although its provisions, when applied to the state of New York, may be salutary and necessary, it excludes from a participation in the choice of the principal officers of our government, that part of our population on which, in case of war, you are dependent for protection, *viz.*, the most efficient part of the militia of our state, most of whom are as deeply interested in the good government thereof, both on account of their families and attachment to the principles of our government, as any other portion of our population.

“They therefore recommend the calling of a convention for the purposes above stated, and with such further powers as this legislature may deem proper to recommend; and your committee are of opinion that the electors, in choosing delegates to such convention, will be governed by a strict regard to such recommendation.

“They have prepared a bill accordingly, and directed their chairman to ask leave to present the same.”

The assembly, at this session, considered a bill for a convention to amend the Constitution relative to the Council of Revision, Council of Appointment, qualification of voters for governor, senators, members of assembly, and the division of the state into senatorial districts, also to consider the propriety of inserting in the Constitution a provision that no law respecting the compensation of members of the legislature shall take effect until after the expiration of the legislative year in which such law may be passed, and to provide the manner of making future amendments. But the bill was not passed.

On the 17th of February, 1820, while the bill was under consideration by the committee of the whole of the assembly, a motion was made to amend the bill by providing for a submission to the people of three propositions: "1st. In favor of a general convention. 2d. In favor of a limited convention, to be limited by the legislature. 3d. Against any convention." This proposition was adopted in the committee of the whole by a vote of 61 to 51, but when the report of the committee came before the assembly, leave to sit again was refused. This ended the matter for that session.

We note in these suggestions, and also in some of those made in previous years, germs of propositions that later became a part of the Constitution. It had already become apparent that members of the legislature ought not to fix their own compensation, and that they ought not to receive appointments to other civil offices. We shall have occasion to note the action taken by the Convention of 1821 on these subjects, and the reasons for the restraints imposed by the new Constitution.

Governor Clinton, in his speech at the opening of the next session of the legislature, November 7, 1820, again referring to the Council of Appointment, and to the necessity of a constitutional convention to consider this and other subjects, said:

"If the ingenuity of man had been exercised to organize the appointing power in such way as to produce continual intrigue and commotion in the state, none could have been devised with more effect than the present arrangement. We have seen its pernicious influence in the constant commotions which agitate us; and we can never expect that the community will be tranquil, or that the state will maintain its due weight in the confederacy, until a radical remedy is applied. Under this impression,

I have heretofore proposed the calling of a convention. The Constitution contains no provisions for its amendment. In 1801, the legislature submitted two specific points to a convention of delegates, chosen by the people, which met and agreed to certain amendments. Attempts have been made at various times to follow up this precedent, which have been unsuccessful, not only on account of a collision of opinion about the general policy of the measure, but also respecting the objects to be proposed to the convention. These difficulties may be properly surmounted, either by submitting the subject of amendments generally to a convention, and thereby avoiding controversy about the purposes for which it is called, or by submitting the question to the people in the first instance, to determine whether one ought to be convened; and in either case, to provide for the ratification by the people in their primary assemblies, of the proceedings of the convention. This double check will be admirably calculated to carry into effect the sovereign authority of the people; to guard against dangerous interpolations in our fundamental charter; to check a spirit of pernicious innovation, and empirical prescription, and to allay the apprehensions of some of our best and wisest fellow-citizens, who, already satisfied with the signal prosperity and high destinies of the state, are unwilling, for the sake of some improvements, to encounter the risk of changing materially the features of the Constitution, which, in its general conformation, is admirably calculated to promote the happiness, to elevate the prosperity, and to protect the freedom of the community."

#### CONVENTION BILL; CHANCELLOR KENT'S VETO.

On the 10th of November Michael Ulshoeffter introduced a bill for a convention, which was passed by the legislature on the 20th. This bill was similar to the con-

vention act of 1801. It *recommended* a convention, and provided for the election of delegates, equal in number to the members of assembly, from the several cities and counties. The delegates so chosen were to compose a convention for the "purpose of considering the Constitution of this state and making such alteration in the same as they may deem proper, and to provide the manner of making future amendments thereto." The bill did not provide for ascertaining the sense of the people on the question of holding a convention, but the amended Constitution was to be submitted to the people for their approval. This bill was vetoed on the same day by the Council of Revision, on objections reported by Chancellor Kent. The judicial members of the council were equally divided on this veto, Chancellor Kent and Chief Justice Ambrose Spencer voting for it, Associate Justices Yates and Woodworth voting against it. Governor DeWitt Clinton gave the casting vote in favor of the veto.

The bill was vetoed on two grounds: first, that it contained no provision for ascertaining the sense of the people on the question of holding a convention; and second, that it provided for submitting the amended Constitution to the people as a whole, and did not give them any opportunity to discriminate as to their approval or disapproval of its different parts.

On the first ground of objection, Chancellor Kent says:

"There can be no doubt of the great and fundamental truth, that all free governments are founded on the authority of the people, and that they have at all times an indefeasible right to alter and reform the same as to their wisdom shall seem meet. The Constitution is the will of the people, expressed in their original charter, and intended for the permanent protection and happiness of them and their posterity, and it is perfectly consonant to

the republican theory, and to the declared sense and practice of this country, that it cannot be altered or changed in any degree without the expression of the same original will. It is worthy, therefore, of great consideration, and may well be doubted whether it belongs to the ordinary legislature—chosen only to make laws in pursuance of the provisions of the existing Constitution—to call a convention, in the first instance, to revise, alter, and perhaps remodel the whole fabric of the government, and before they have received a legitimate and full expression of the will of the people that such changes should be made. The difficulty of acceding to such a measure of reform, without the previous approbation of the constituents of the government, presses with peculiar force and with painful anxiety upon the Council of Revision, which was instituted for the express purpose of guarding the Constitution against the passage of laws ‘inconsistent with its spirit.’

“The Constitution of this state has been in operation upwards of forty years, and we have but one precedent on this subject, and that is the case of the Convention of 1801. But it is to be observed that the Convention of that year was called for two specific objects only, and with no other power or authority whatsoever. One of those objects was merely to determine the true construction of one of its articles, and was not intended to alter or amend it; and the other was to reduce and limit the number of the senators and members of assembly. The last was the single alteration proposed, and perhaps even with respect to that point it would have been more advisable that the previous sense of the people should have been taken. But there is no analogy between this single and cautious case, and the measure recommended by the present bill, which is not confined to any specific object of alteration or revisal, but submits the whole constitu-

tional charter, with all its powers and provisions, however venerable they may have become by time, and valuable by experience, to unlimited revisal. The council have no evidence before them, nor does any legitimate and authentic evidence exist, that the people of this state think it either wise or expedient that the entire Constitution should be revised and probed, and perhaps disturbed to its foundation.

“The council, therefore, think it the most wise and safe course, and most accordant with the performance of the great trust committed to the representative powers under the Constitution, that the question of a general revision of it should be submitted to the people, in the first instance, to determine whether a convention ought to be convened.”

The next day, the 21st, the objections of the Council of Revision were referred to a special committee of the assembly, composed of Michael Ulshoeffter, Samuel M. Hopkins, Howland Fish, William Thompson, Erastus Root.

January 9, 1821, this committee made a long report, defending the bill, taking issue with the Council of Revision on its objections, giving the history of the agitation for a convention, and making some observations on current political affairs, indulging in some feeling concerning the fate of the bill.

In view of the personnel of the Council of Revision, the observations of the committee concerning the action of the council show a quite remarkable freedom of criticism of high public officials, containing also a tinge of jealousy almost petulant, especially when coming from one branch of the government, and directed toward another of equal constitutional dignity. It will be recalled that Governor Clinton and Chief Justice Spencer, now members of the Council of Revision, were two members

of the Council of Appointment twenty years earlier, when the breach occurred between the Governor and the council resulting in the Convention of 1801, and that they were then opposed to the Governor's claim of the exclusive right of nomination of officers. Fortune had brought them to a still higher position in public affairs, for one had become the head of the executive branch of the government, and the other had become the head of the supreme court; while James Kent, who, in 1801, was an associate justice of the supreme court, had now become chancellor, and the recognized head of the judicial system of the state. It is, therefore, somewhat curious to note the observation of the committee that "the opinion of the council, independent of its constitutional effect, has *heretofore* been much respected. But on this occasion it has perhaps been less estimated, owing to the division of opinion existing among the members of the council, as well as the serious doubts entertained whether the objections of the majority are at all well founded, and a question, moreover, whether the council possess the constitutional power arbitrarily to object to the passage of bills, upon mere opinion, vaguely expressed, respecting their propriety or expediency." Continuing, the committee say that "it may well be doubted whether the Council of Revision was ever intended as a legislative branch of the government, or in effect to exercise the powers of legislation. Such a construction cannot fairly be given to the Constitution."

The section in the first Constitution on the Council of Revision clearly gave that council the right to veto bills. Under it a bill could not become a law until it had been presented to the council, and if it should appear "improper" to the council that the bill should become a law, they were required to return the same, together with their objections thereto in writing, to the house in which the

bill originated; and the bill could not, after such objections, become a law unless passed by a two-thirds vote. Yet this committee say that "it cannot be believed that this article ought to receive so liberal a construction as to give the council legislative powers, or to authorize them to object to any bill upon questions not of plain constitutional doubt, or of substantial and paramount consideration of public good." The committee further suggest that the logical result of the authority claimed and exercised by the Council of Revision would be to make it in effect a third branch of the legislature; and, by interposing objections, could compel the legislature to pass all bills by two-thirds vote; and the committee concluded its observations on this subject by suggesting that when a convention is assembled it remains to be solemnly determined whether such an exercise of power is in conformity to the letter or spirit of our charter; and whether a council (all of whom, except the Executive, are independent of the people) should be allowed any longer to enforce so dangerous an authority. The committee then argued the question at considerable length, contending that the bill was proper and constitutional, and ought to be passed, notwithstanding the objections of the Council of Revision. On the 15th of January, 1821, the assembly reconsidered the convention bill, but it did not receive the required two-thirds vote.

#### CONVENTION ACT PASSED.

On the 13th of March, 1821, an act was passed (chapter 90) recommending a convention of the people of this state, and the question of holding a convention was to be submitted to the people on the last Tuesday of April. It was further provided that if the majority of the votes cast were in favor of a convention "it shall and may be lawful, and it is hereby recommended to the



citizens of this state, on the 3d Tuesday of June next" to elect the same number of delegates as the number of members of assembly. It was further provided that the delegates so chosen meet in convention in Albany on the last Tuesday in August, 1821. The statute provided for an election of delegates to compose a convention "for the purpose of considering the Constitution of this state, and making such alterations in the same as they may deem proper; and to provide the manner of making future amendments thereto." The statute provided for the submission of the amended Constitution to the decision of the citizens of this state, such amendments to be submitted either as a whole or in parts, and that the said convention shall prescribe the time and manner of holding an election for such purposes.

### THE CONVENTION.

At last, after forty-five years, the representatives of the people of New York once more assembled, with the direct authority to reconsider, revise, and reconstruct their fundamental charter. Not since that eventful 9th of July, 1776, had a convention with similar powers assembled in this state. The few attempts to call constitutional conventions show some dissatisfaction with the Constitution, but the failure of these attempts also shows how jealously the people guarded their institutions. The generation that framed the first Constitution, and constructed the first state government, had done its work and had laid down its responsibilities, leaving a priceless legacy to its successors. But after forty-five years of experience and growth and development it had become apparent to the leaders in public affairs that the state needed a Constitution more suited to modern conditions, and with limitations which the authors of the first Con-

stitution did not deem necessary, or which had become necessary, in the course of the state's development.

It is a fact worth noting that John Jay, the principal author of the first Constitution, was still living when the Convention of 1821 was held. He had retired from active life, and had been in poor health many years. John Adams, referring to this convention, wrote to him May 13, 1821: "I hope you will be a member of the convention in New York (for the revision of the Constitution). It will want some such heart-of-oak pillar to support the temple." But the condition of Mr. Jay's health prevented his accepting this trust. It would have been a most fitting culmination of a great career if John Jay could have been a member of this Convention, and could have assisted in re-shaping its constitutional policy on the exalted model which, with such wise statesmanship, he had constructed for an earlier generation; but, while he could not attend in person, he was represented by his son, Peter A. Jay, and by a nephew, Peter Jay Munro.

The following is the list of delegates by counties:

Albany.—Stephen Van Rensselaer, James Kent, Ambrose Spencer, Abraham Van Vechten.

Allegany and Steuben.—Timothy Hurd, James M'Call, Broome.—Charles Pumpelly.

Cattaraugus and Erie.—Augustus Porter, Samuel Russell.

Cayuga.—David Brinkerhoff, Rowland Day, Augustus F. Ferris.

Chenango.—Thomas Humphrey, Jarvis K. Pike, Nathan Taylor.

Clinton and Franklin.—Nathan Carver.

Columbia.—William Van Ness, Elisha Williams, Jacob R. Van Rensselaer, Francis Sylvester.

Cortland.—Samuel Nelson.

Delaware.—Erastus Root, Robert Clarke.

Dutchess.—James Tallmadge, Jr., Peter R. Livingston,

Abraham H. Schenck, Elisha Barlow, Isaac Hunting.

Essex.—Reuben Sanford.

Genesee.—David Burroughs, John Z. Ross, Elizur Webster.

Greene.—Jehiel Tuttle, Alpheus Webster.

Herkimer.—Richard Van Horne, Sanders Lansing, Sherman Wooster.

Jefferson.—Egbert Ten Eyck, Hiram Steele.

Kings.—John Lefferts.

Lewis.—Ela Collins.

Livingston.—James Rosebrugh.

Madison.—Barak Beckwith, John Knowles, Edward Rogers.

Monroe.—John Bowman.

Montgomery.—Philip Rhineland, Jr., Howard Fish, Jacob Hees, William I. Dodge, Alexander Sheldon.

New York.—Nathan Sanford, Peter Sharpe, Peter Stagg, Peter H. Wendover, William Paulding, Jr., Ogden Edwards, Jacobus Dyckman, Henry Wheaton, James Fairlie, John L. Lawrence, Jacob Radcliff.

Oneida.—Jonas Platt, Henry Huntington, Ezekiel Bacon, Nathan Williams, Samuel S. Breese.

Onondaga.—Victory Birdseye, Parly E. Howe, Amari Case, Asa Eastwood.

Ontario.—Philetus Swift, John Price, Micah Brooks, Joshua Van Fleet, David Sutherland.

Orange.—John Duer, Benjamin Woodward, John Hallock, Jr., Peter Milikin.

Otsego.—Martin Van Buren, Joseph Clyde, David Tripp, Ransom Hunt, William Park.

Putnam.—Joel Frost.

Queens.—Rufus King, Elbert H. Jones, Nathaniel Seaman.

Rensselaer.—James L. Hogeboom, John W. Woods, David Buel, Jr., John Reeve, Jirah Baker.

Richmond.—Daniel D. Tompkins.

Rockland.—Samuel G. Verbryck.

Saratoga.—Salmon Child, John Cramer, Samuel Young, Jeremy Rockwell.

Schenectady.—John Sanders, Henry Yates, Jr.

Schoharie.—Jacob Sutherland, Olney Briggs, Asa Starkweather.

Seneca.—Robert S. Rose, Jonas Seeley.

St. Lawrence.—Jason Fenton.

Suffolk.—Ebenezer Sage, Usher H. Moore, Joshua Smith.

Tioga.—Matthew Carpenter.

Tompkins.—Richard Smith, Richard Townley.

Ulster and Sullivan.—Henry Jansen, James Hunter, Jonathan Dubois, Daniel Clark.

Washington and Warren.—Nathaniel Pitcher, Melancton Wheeler, Alexander Livingston, William Townsend, John Richards.

Westchester.—Peter A. Jay, Jonathan Ward, Peter Jay Munro.

This Convention was composed of many of the most distinguished men of the state.

Daniel D. Tompkins, then Vice President of the United States, represented the county of Richmond, and was chosen president of the Convention. He had made his first appearance in public life twenty years earlier, in the Convention of 1801, and since that time he had been a justice of the state supreme court, ten years governor, covering the period of the War of 1812, and he closed his public career in New York with this convention.

Chancellor Kent was also there, bringing to the Convention the wisdom and experience accumulated through a long service at the bar, in the legislature, in the supreme court, court of chancery, and in the Council of Revision,

and bestowing on the work of the Convention the same thoughtful care, and expressing his opinions with the same elegant felicity which marked his judgments from the bench, and which so conspicuously characterizes his great commentaries on American law. It is a curious illustration of the irony of events that a mere accident should have placed in our first Constitution a provision abridging judicial service at the age of sixty years. By reason of this age limitation Chancellor Kent was on the eve of retirement when this Convention was held; but that enforced retirement of a great jurist, in full possession of his powers, gave to the world the greatest work yet produced on American law.

Martin Van Buren was also a member of this Convention. He had already served seven years as state senator, and had just been elected to the United States Senate. Later he was governor, secretary of state, minister to Great Britain, Vice President, and President of the United States. The record of the Convention shows that he took an active part in its deliberations.

Ambrose Spencer had already served in both branches of the legislature, and had been a member of the Council of Appointment, attorney general, associate justice of the supreme court, chief justice, and after his retirement from the bench resumed the practice of law at Albany, where he was chosen mayor, and member of Congress.

William Van Ness was also a member of this Convention. He had already served in the assembly, and was at this time a justice of the supreme court, which position he held for fourteen years. He went out of office on the last day of December, 1822, by virtue of a provision of the new Constitution.

Samuel Nelson, then a young man of twenty-eight, was also a member of this Convention. He had entered public life the preceding year as presidential elector, and

he was destined to fill a large place in the judicial history of the state and nation. He was appointed circuit judge in 1823, associate justice of the supreme court in 1831, chief justice in 1837, and in 1845 was appointed associate justice of the Supreme Court of the United States, which position he held until October, 1872. He was appointed in 1871, by President Grant, a member of the Joint High Commission to arbitrate the Alabama claims on the part of the United States. He was also a member of the Constitutional Convention of 1846.

Peter Jay Munro, chairman of the judiciary committee of the Convention, was a nephew of John Jay, and one of the leading lawyers of New York.

Erastus Root occupied a very high position in the Convention, and exerted a deep influence in shaping the results of its deliberations. He had already served many years in the legislature and in Congress. At the time of the Convention he was lieutenant governor, and for many years was major general of the state militia. He was one of the chief figures in the political history of the state during the first half of the last century.

Nathan Sanford had already served the state in senate and assembly several years; for thirteen years had been United States District Attorney, and had just closed a term in the United States Senate. He was appointed chancellor in 1823, on the retirement of Chancellor Kent.

Jonas Platt, then a justice of the supreme court, was also a member of the Convention. He had been a member of the assembly, state senate, and of Congress. He went out of office when the new Constitution took effect.

Henry Wheaton, then under forty, who had already achieved prominence at the bar in Rhode Island and in New York, who later became a legal scholar of wide attainments, and a high authority on international law, honored the state by his services in this Convention. He

had already served as division judge advocate of the Army, and also for four years as justice of the marine court of the city of New York. At the time of the Convention he was reporter of the Supreme Court of the United States, and in that capacity gave to the world a series of reports which a noted German author termed "the golden book of American law," covering one of the most important periods in our national judicial history. In 1825 the legislature appointed a commission composed of Mr. Wheaton, John Duer, and Benjamin F. Butler, to revise the statutes of the state. Their work appears as the body of law known as the Revised Statutes of 1830, which were adopted at different times during the preceding three years. Mr. Wheaton served with this commission until April, 1827, when he was appointed *chargé d'affaires* of the United States at Denmark, being the first American representative to that country. In 1835 he was appointed minister to Prussia, and held the office until 1846. Soon after his retirement, he was appointed lecturer on international law in Harvard College, of which institution he was a graduate. He was the author of several important legal works, most important of which is "The Elements of International Law."

Rufus King had already served his country as a delegate from Massachusetts to the Continental Congress, 1784-1786, as United States senator from New York, 1789-1796, and minister to Great Britain, 1796-1803. He was again elected United States senator in 1813, re-elected in 1819, and held that office at the time of the Convention. In 1825 he was again appointed minister to Great Britain. Though sixty years of age, and probably one of the oldest members of the Convention, he took an active interest in all its deliberations, speaking on nearly all the important questions under consideration.

Peter A. Jay, a son of John Jay, represented West-

chester county in the Convention. He had served, in 1816, as member of assembly, and, at the time of the Convention, was recorder of the city of New York. He was evidently dissatisfied with the work of the Convention, for he voted against the Constitution, and his letters to his father, written while the Convention was in session, and soon afterwards, show that he felt that the new Constitution had gone too far in the direction of general suffrage.

John Duer was a prominent member of the Convention. Soon after the new Constitution took effect he was appointed a member of a commission to revise the statutes. The results of this commission's work appear in the Revised Statutes of 1830, which have ever since been regarded as a model of general statute law. After the completion of this work he became an associate judge of the superior court of the city of New York, and in 1857 was made the chief justice of the court.

Ogden Edwards had already served many years as surrogate of the county of New York, and also as a member of the legislature. Under the new Constitution he was appointed a circuit judge of the supreme court, and held the office till 1841, when his term was abridged by the age limit in the Constitution.

Many other men who afterwards held responsible positions and achieved distinction in state and local history were members of this Convention, and assisted in framing the second Constitution.

The Convention met on the 28th of August, 1821, and closed its labors on the 10th of November. It considered the entire first Constitution, abrogating many of its provisions, modifying others, and continuing a few without change. Many new provisions were incorporated in the second Constitution, and it became, in many respects, a new charter. Committees were appointed to consider the



various parts of the Constitution, the new provisions were thoroughly discussed, and often debated at great length. The Convention seemed to be pervaded with a sincere desire to make a constitution which should express in outline the policy of the state concerning public affairs and administration, so far as that policy needed to be enlarged or limited by the fundamental law.

There were several storm-centers in the Convention, and on many subjects wide and irreconcilable differences of opinion. The debates also show occasional evidence of considerable feeling. Several state departments, which received the attention of the Convention, were directly represented in that body, notably the Council of Revision and the judiciary, and the attacks and defense in the discussion of these subjects sometimes provoked very sharp debate. On many of the most important propositions the Convention was almost equally divided, and quite frequently constitutional changes were made by a majority of only two or three votes.

#### THE SECOND CONSTITUTION.

The Constitution of 1821 might perhaps, with more accuracy, be called the Constitution of 1822, because, while it was framed in 1821, it was submitted to the people in 1822, and all of its provisions took effect in that year. This Constitution, with notes, appears in full in the Introduction. By grouping its provisions according to general subjects, and comparing them with the provisions of the first Constitution, it will be noted that we have here substantially a new Constitution. It may be well first to ascertain what became of the first Constitution. The preamble, including the resolutions of the Continental Congress and the Provincial Convention, and also the Declaration of Independence, were, of course, omitted. The conservatism of the Convention is shown

by the fact that out of forty-two sections in the first Constitution, all except nine are continued, either without change, or with modifications made necessary for the purpose of enlarging their scope. These nine sections are: 1 (Source of Authority), 3 (Council of Revision), 5 (First Census), 6 (Experiments as to the Method of Voting), 8 (Electors' Oath of Allegiance), 22 (Appointment of State Treasurer), 23 (Council of Appointment), 30 (Election of Delegates in Congress), 42 (Naturalization).

A brief analysis of the second Constitution shows the results of development which the Convention thought it necessary to express in the fundamental law.

#### THE LEGISLATURE.

This was continued substantially as under the first Constitution,—namely, to be composed of a senate of thirty-two members elected for a term of four years, and whose members must be freeholders; and an assembly of one hundred and twenty-eight members, chosen annually. It will be remembered that the first Constitution, as amended in 1801, fixed the number of senators at thirty-two and the number of members of assembly at one hundred, with a possible increase to one hundred and fifty. The second Constitution did not provide for any increase. The first Constitution divided the state into four senate districts, while the second Constitution provided for eight districts. There was a strong movement in the Convention in favor of individual districts; that is, as many districts as there were senators to be elected, giving each district one senator. Other numbers were proposed, but the number eight was finally agreed on as a compromise, and a provision made for classifying the senators so that one fourth of the number should be elected each year. This gave an opportunity

for sending new men to the senate, at the same time keeping a majority of experienced members. Under the first Constitution only freeholders could vote for senators; under the second Constitution senators were put on the same plane as other officers in this respect, but the freehold qualification of a senator was preserved.

A census was required to be taken once in ten years, instead of in seven, as under the first Constitution, and the senate districts were to be altered after each census.

A significant change was made in the basis of representation. Under the first Constitution senators and members of assembly were apportioned on the basis of the number of electors; while under the second Constitution the apportionment was based on the number of inhabitants, excluding "aliens, paupers, and persons of color, not taxed."

The second Constitution provided specifically that a bill might originate in either house, and was subject to amendment by the other. The peculiar provision of the first Constitution requiring the houses to meet together in conference in case of disagreement was omitted.

The compensation of the members of the legislature was limited to \$3 per day, with a provision that no increase in compensation should take effect during the year in which it was made. Members of the legislature were also prohibited from receiving any civil appointment from the governor and senate, or from the legislature during the term for which they were elected. Members of Congress and persons holding judicial or military offices under the United States were made ineligible to seats in the legislature. Each bill passed by the legislature was to be presented to the governor for his consideration before it could become a law. The veto power, previously vested in the Council of Revision, was transferred to the governor, and the provisions of the first Constitu-

tion were continued requiring certain subsequent action by the legislature on the veto of a bill, and also the effect of a failure by the governor to return a bill within ten days. The beginning of the political year was changed from the 1st of July to the 1st of January, and the legislature was required to meet on the 1st Tuesday of January.

#### SUFFRAGE.

The right of suffrage, under the first Constitution, was based on property. Voters for governor, lieutenant governor, and senators were required to be freeholders, owning property worth 100 pounds (\$250) over and above all debts charged thereon. Voters for members of assembly were required to own a freehold estate worth 20 pounds (\$50), or to be lessees of real property worth 40 shillings (\$5), and to have been rated and paid taxes in the state.

The governor, lieutenant governor, senators, and members of assembly were the only state officers elective under the first Constitution. This Constitution did not prescribe the qualifications of voters at town meetings, but by chapter 16, Laws of 1787, it was provided that "every male person, being a citizen of this state, who shall be above the age of twenty-one years, and shall have resided in any town, precinct, or district, six months next preceding such town, precinct, or district meeting, and paid taxes within the same, or shall be possessed of a freehold, or shall have rented a tenement of the yearly value of forty shillings, for the term of one year, within the same, shall have a right to vote at such meeting, and no other person."

These property qualifications were a practical illustration of John Jay's maxim that "those who own the country ought to govern it." The fallacy of this maxim became apparent to the next generation, who appreciated

the fact that ownership, in a broad sense, does not consist merely in holding the technical title to property, and that those who helped to produce, improve, and preserve property are fairly entitled to a voice in determining the structure of the government, and in choosing the officers who shall administer it.

But the Convention of 1821, while making some advance, did not completely abrogate the restrictions of the right of suffrage. It remained for the people a little later, by special amendment, to sweep away all these barriers against the full exercise of the right of suffrage by every white male citizen.

A view of the right of suffrage expressed in the Convention by Judge Platt is worth noting at this point. He said that the "elective privilege was neither a right nor a franchise, but was, more properly speaking, an office. A citizen had no more right to claim the privilege of voting than of being elected. The office of voting must be considered in the light of a public trust, and the electors were public functionaries, who had certain duties to perform for the benefit of the whole community." Chief Justice Spencer concurred in this view.

Suffrage has been defined as a "vote or a participation in government, and specifically, the privilege of voting under a representative government, upon the choice of officers, and upon the adoption or rejection of fundamental laws." According to Judge Platt's view, the right of suffrage is not a natural right, but is a right granted by the state to those who are deemed best qualified to use it for the public weal. Those who organize a new society may determine who shall participate in its administration, and the manner in which this right shall be exercised. The right of choosing public officers is a qualified right, and often relative in its application. There is no such thing as universal suffrage, because in no society do

all persons possess the right to vote, the classes depending on the qualifications deemed essential to the exercise of the privilege. Under our American system the power to choose public officers may fairly be called a delegated power,—delegated either to all the male citizens over twenty-one years of age who have resided for a prescribed period in the locality where the power is to be exercised, or delegated to the legislature, or to the governor, or to the judges, or to various municipal boards, like boards of supervisors, common councils, boards of trustees, and boards of education. In all these cases the object of the exercise of the power is to select some person for a public office. This office is a public trust, and the power to fill it is a public trust, whether exercised by the governor, the legislature, a municipal board, the voters in a given locality, or by all the voters in the state.

In some cases the power to select the officer is vested in one person; in other cases in a number of persons, like the members of municipal boards, or the legislature; and in still other cases by a larger number of persons not themselves holding distinct public offices, but as qualified voters, exercising this power of choice. Logically, the character of the power is the same, whether exercised by a number of persons called voters, acting in their original capacity, or by other persons called officers, chosen to perform certain functions, and acting in a representative capacity.

We have already noted, in considering the creation of the original state government, that the first Constitution was actually adopted and put in operation by thirty-three men, members of a convention composed of more than three times that number, and charged with the duty of framing a new government for the colony. This small body of men exercised the power of imposing on the people of the state the limitations on the exercise of the

function of government contained in the Constitution, determining what officers should be chosen by the people, and prescribing the qualifications of the persons who were deemed fit to exercise the privilege of selecting the only state officers whose selection was committed to their choice,—namely, the governor, lieutenant governor, senators, and members of assembly,—and they, or their appointees, chose the other state officers and many local officers. The restriction on the exercise of the privilege of voting, by limiting it either to owners or lessees of real property, was a clear expression of the opinion entertained by the framers of the first Constitution, that the right to vote was not a natural right, and that it should be exercised by those persons only who possessed an interest in property sufficient to afford a presumption that they would exercise the privilege for the welfare of the state.

Several prominent members of the Convention of 1821 were in favor of continuing these limitations. While the subject of the election of senators was under discussion, on a motion by Chief Justice Spencer that the senators should continue to be elected by freeholders, Chancellor Kent made a speech in favor of the motion, arguing with his usual force and clearness against the proposed extension which would place the election of senators on the same basis as the election of members of assembly. His remarks show that he still adhered to the principles taught by the framers of our government, and they also show the extreme conservatism of his opinions concerning the elective privilege.

Chancellor Kent said: "I cannot but think that the considerate men who have studied the history of republics, or are read in lessons of experience, must look with concern upon our apparent disposition to vibrate from a well-balanced government to the extremes of the demo-

cratic doctrines. . . . We are engaged in the bold and hazardous experiment of remodeling the Constitution. . . . The senate has hitherto been elected by the farmers of the state,—by the free and independent lords of the soil, worth at least \$250 in freehold estate, over and above all debts charged thereon. The governor has been chosen by the same electors, and we have hitherto elected citizens of elevated rank and character. Our assembly has been chosen by freeholders, possessing a freehold of the value of \$50, or by persons renting a tenement of the yearly value of \$5, and who have been rated and actually paid taxes to the state. By the report before us, we propose to annihilate, at one stroke, all those property distinctions, and to bow before the idol of universal suffrage. That extreme democratic principle, when applied to the legislative and executive departments of government, has been regarded with terror by the wise men of every age, because in every European republic, ancient and modern, in which it has been tried, it has terminated disastrously, and been productive of corruption, injustice, violence, and tyranny. And dare we flatter ourselves that we are a peculiar people, who can run the career of history, exempted from the passions which have disturbed and corrupted the rest of mankind? If we are like other races of men, with similar follies and vices, then I greatly fear that our posterity will have reason to deplore, in sackcloth and ashes, the delusion of the day.

“I shall feel grateful if we may be permitted to retain the stability and security of a senate, bottomed on the freehold property of the state. Such a body, so constituted, may prove a sheet anchor amidst the future factions and storms of the Republic. The great leading and governing interest of this state is, at present, the agricultural; and what madness would it be to commit



that interest to the winds! That great body of the people are now the owners and actual cultivators of the soil. With that wholesome population we always expect to find moderation, frugality, order, honesty, and a due sense of independence, liberty, and justice. It is impossible that any people can lose their liberties by internal fraud or violence so long as the country is parceled out among freeholders of moderate possessions, and those freeholders have a sure and efficient control in the affairs of the government. Their habits, sympathies, and employments necessarily inspire them with a correct spirit of freedom and justice; they are the safest guardians of property and the laws. We certainly cannot too highly appreciate the value of the agricultural interest: it is the foundation of national wealth and power. . . .

“I wish to preserve our senate as the representative of the landed interest. I wish those who have an interest in the soil to retain the exclusive possession of a branch in the legislature, as a stronghold in which they may find safety through all the vicissitudes which the state may be destined, in the course of Providence, to experience. I wish them to be always enabled to say that their freeholds cannot be taxed without their consent. The men of no property, together with the crowds of dependents connected with great manufacturing and commercial establishments, and the motley and undefinable population of crowded ports, may, perhaps, at some future day, under skilful management, predominate in the assembly; and yet we should be perfectly safe if no laws could pass without the free consent of the owners of the soil. That security we at present enjoy; and it is that security that I wish to retain.

“The apprehended danger from the experiment of universal suffrage applied to the whole legislative department is no dream of the imagination. It is too mighty

an excitement for the moral constitution of men to endure. The tendency of universal suffrage is to jeopardize the rights of property and the principles of liberty. There is a constant tendency in human society, and the history of every age proves it,—there is a tendency in the poor to covet and to share the plunder of the rich; in the debtor to relax or avoid the obligation of contracts; in the majority to tyrannize over the minority, and trample down their rights; in the indolent and the profligate, to cast the whole burthens of society upon the industrious and virtuous; and *there is a tendency in ambitious and wicked men to inflame these combustible materials.* It requires a vigilant government, and a firm administration of justice, to counteract that tendency. Thou shalt not covet, thou shalt not steal, are divine injunctions, induced by this miserable depravity of our nature. Who can undertake to calculate with any precision, how many millions of people this great state will contain in the course of this and the next century? and who can estimate the future extent and magnitude of our commercial ports? The disproportion between the men of property and the men of no property will be in every society in a ratio to its commerce, wealth, and population. We are no longer to remain plain and simple republics of farmers, like the New England colonists, or the Dutch settlements on the Hudson. We are fast becoming a great nation, with great commerce, manufactures, population, wealth, luxuries, and with the vices and miseries that they engender.

“The growth of the city of New York is enough to startle and awaken those who are pursuing the *ignis fatuus* of universal suffrage. In 1773 it had 21,000 souls; in 1801 it had 60,000 souls; in 1806 it had 76,000 souls; in 1820 it had 123,000 souls. [In 1900, 3,437,202. C. Z. L.]

“It is rapidly swelling into the unwieldy population,

and with the burdensome pauperism, of a European metropolis. New York is destined to become the future London of America; and in less than a century, that city, with the operation of universal suffrage, and under skilful direction, will govern this state.

“The notion that every man that works a day on the road, or serves an idle hour in the militia, is entitled as of right to an equal participation in the whole power of the government, is most unreasonable, and has no foundation in justice. . . .

“Society is an association for the protection of property as well as of life, and the individual who contributes only one cent to the common stock, ought not to have the same power and influence in directing the property concerns of the partnership as he who contributes his thousands. He will not have the same inducements to care, and diligence, and fidelity. His inducements and his temptation would be to divide the whole capital upon the principles of an agrarian law. . . .

“Liberty, rightly understood, is an inestimable blessing; but liberty without wisdom, and without justice, is no better than wild and savage licentiousness. The danger which we have hereafter to apprehend is not the want, but the abuse, of liberty. We have to apprehend the oppression of the minorities, and a disposition to encroach on private right,—to disturb chartered privileges, and to weaken, degrade, and overawe the administration of justice; we have to apprehend the establishment of unequal, and consequently, unjust, systems of taxation, and all the mischief of a crude and mutable legislation. A stable senate, exempted from the influence of universal suffrage, will powerfully check these dangerous propensities; and such a check becomes the more necessary, since this Convention has already determined to withdraw the

watchful eye of the judicial department from the passage of laws. . . .

“We are destined to become a great manufacturing as well as commercial state. We have already numerous and prosperous factories of one kind or another, and one master capitalist with his one hundred apprentices and journeymen and agents and dependents will bear down at the polls an equal number of farmers of small estates in his vicinity, who cannot safely unite for their common defense. Large manufacturing and mechanical establishments can act in an instant with the unity and efficacy of disciplined troops. It is against such combinations, among others, that I think we ought to give to the freeholders, or those who have interest in land, one branch of the legislature for their asylum and comfort. Universal suffrage once granted, is granted forever, and never can be recalled. There is no retrograde step in the rear of democracy. However mischievous the precedent may be in its consequences, or however fatal in its effects, universal suffrage can never be recalled or checked, but by the strength of the bayonet. We stand, therefore, this moment, on the brink of fate; on the very edge of the precipice. If we let go our present hold on the senate, we commit our proudest hopes and our most precious interests to the waves. . . .

“It ought further to be observed, that the senate is a court of justice in the last resort. It is the last depository of public and private rights; of civil and criminal justice. This gives the subject an awful consideration, and wonderfully increases the importance of securing that house from the inroads of universal suffrage. Our country freeholders are exclusively our jurors in the administration of justice, and there is equal reason that none but those who have an interest in the soil should have any concern in the composition of that court. As long as the

senate is safe, justice is safe, property is safe, and our liberties are safe. But when the wisdom, the integrity, and the independence of that court is lost, we may be certain that the freedom and happiness of the state are fled forever.

“I hope, sir, we shall not carry desolation through all the departments of the fabric erected by our fathers. I hope we shall not put forward to the world such a new Constitution as will meet with the scorn of the wise, and the tears of the patriot.”

Erastus Root, replying to Chancellor Kent, urged that the senate should not be “elected by different persons, so as to possess genius and feelings hostile to each other;” that the senate and assembly should not be composed of heterogeneous materials and distinct elements. He said it was admitted that “the senate, although elected by freeholders, has not possessed a superiority, in any respect, over the other branch of the legislature. The balance of the different branches of the government has been a theme of warm admiration. It has been likened to a beautiful pyramid, of which the king was the apex, the people the base, and the aristocracy in the center,—that is, between the head and the tail. I am not disposed to carry my admiration so far as to place the people’s governor at the top, the people’s legislature at the bottom, and the aristocratic senate, between two fires, in the middle. However pleasant the theory may be, it is incompatible with the genius of our government. These powerful checks may be necessary between different families, possessing adverse interests, but can never be salutary among brothers of the same family, whose interests are similar.”

P. R. Livingston was opposed to continuing the limitation as to voters for senators. He said that the people wanted the extension of suffrage, that “74,000 witnesses

testified last spring that they wanted it. Meetings and resolutions, public prints, and conversation have united to require it." He said the landed interest itself had demanded this extension. "It is said that wealth builds our churches, establishes our schools, endows our colleges, and erects our hospitals." But he said these institutions have not been raised without the hand of labor. "It is the same hand that has leveled the sturdy oak, the lofty pine, and towering hemlock, and subdued your forests to a garden. It is not the fact, in this country, that money controls labor; but labor controls money."

Governor Tompkins said that "property, when compared with our other essential rights, is insignificant and trifling. 'Life, liberty, and *the pursuit of happiness*'—not of property—are set forth in the Declaration of Independence as cardinal objects. Property is not even named. It is not to be disguised that we are about to become a naval power. The late war (1812) bore triumphant testimony to the fact that we are under no necessity of maintaining a standing army. The militia is sufficient to repel incursions of the savages, to suppress insurrection, or to repel an invading foe. Give them something, then, to fight for. How was the late war sustained? Who filled the ranks of your armies? Not the priesthood, not the men of wealth, not the speculators: the former were preaching sedition, and the latter decrying the credit of the government, to fatten on its spoil. And yet the very men who were led on to battle, had no vote to give for their commander in chief. . . .

"We have yielded to property as much as it deserves. It remains, also, that we should look to the protection of him who has personal security and personal liberty at stake. It is the citizen soldier who demands the boon, and he rightfully demands it. It is a privilege inestimable to him, and 'only formidable to tyrants.'"

Mr. Buel called attention to the Constitutions of other states, pointing out that in four only, including New York, was the exclusive right of voting confined to landholders; and that a large majority of statesmen and patriots of the country "sanctioned and established as a maxim the opinion that there is no danger in confiding the most extensive right of suffrage to the intelligent population of these United States."

Martin Van Buren was in favor of the extension of the right of suffrage, and made a long speech against Chief Justice Spencer's motion. He spoke of the "sombre and frightful picture" which had been drawn by Chancellor Kent, and the "alarming consequences," which it was supposed would flow from the proposed extension. He quoted from a modern writer the observation that "Constitutions are the work of time, not the invention of ingenuity; that to frame a complete system of government, depending on habits of reverence and experience, was an attempt as absurd as to build a tree, or manufacture an opinion." Mr. Van Buren reviewed the argument on both sides in an elaborate historical and philosophical exposition of the principles involved, and urged the rejection of the amendment to permit freeholders only to vote for senators. Judge Van Ness favored the retention of the freehold qualification of voters for senators, suggesting that this class included, in fact, nine tenths of the people, and that the provision requiring this qualification would be an inducement for men to become freeholders so that they could thereby become voters.

The debate continued three days, and at its close Chief Justice Spencer's motion was defeated by a vote of 19 to 100. This settled conclusively, in the Convention, the question of the extension of the right of suffrage.

Four days after this vote was taken, Peter Jay Munro, a nephew of John Jay, offered a resolution that "the right

of suffrage for all elective officers be vested in all the resident male citizens of the state, of the age of twenty-one years," who have acquired a legal settlement in any city or town. This resolution was referred to a select committee, but apparently the Convention was not ready for this broad extension of the right of suffrage. The committee to whom this resolution was referred reported a more restricted rule, which in substance was approved by the Convention, but the people, five years later, adopted Mr. Munro's plan, requiring for white voters only citizenship and a prescribed length of residence.

#### RESTRICTING THE COLORED VOTE.

The American nation is not likely soon to outgrow the effect of African slavery on its institutions; social conditions, statutes, commercial relations, and constitutional provisions are familiar incidents of conditions produced by the coming of the black man to America. It is almost literally true that he came with the white settlers, and he has from the first been an interesting and sometimes an extremely perplexing concomitant of our American civilization. The problem of the negro in America is not yet settled. His status in our social and political order is still uncertain, notwithstanding all our efforts, by statutes and constitutions, to define his position. We cannot read the negro out of our history; he is an inseparable part of it, and it is impossible intelligently to consider our institutions and omit this element of influence in shaping our political system. While the direct effect of slavery was most seriously felt in the Southern states, New York was not too far north to become the home of the slave through the colonial period and for fifty years of our state history. The subject is especially pertinent here, for the Convention of 1821 introduced into the Constitution a rule of exclusion or of discrimination in relation to suffrage, which



placed colored voters in a different class from that of their white neighbors. We shall have occasion hereafter to show that this discrimination continued until abrogated by the Fifteenth Amendment to the Federal Constitution, which took effect in 1870, and that it remained a part of our state Constitution until the 1st of January, 1875, when it was superseded by the amendments of 1874.

The history of slavery in New York does not belong in this work, but a few incidents concerning it may properly be given for the purpose of explaining conditions which seem to have influenced the Convention in adopting a rule which was intended to exclude the majority of colored men from the right to vote. The Dutch settlers of New Netherland were not originally slave holders. This appears from a communication from the Assembly of XIX. to the States General in October, 1629, eight years after the incorporation of the Dutch West India Company, in which it was said that the Dutch could not successfully compete with the Spanish and Portuguese in colonizing the tropical parts of America, for the reason that the Dutch had no slaves and were not "used to the employment of them." But the West India Company evidently intended to overcome this difficulty, for in the "Freedoms and Exemptions" proposed the same year for the purpose of encouraging the settlement of New Netherland the Company agreed to supply "the colonists with as many blacks as they conveniently can" and so long as the Company might deem proper. This policy was renewed in the "Freedoms and Exemptions" of 1640. So the "Board of Accounts," in a report to the Assembly of XIX., in 1644, suggested that it would not be unwise to allow the introduction into New Netherland of negroes from Brazil, "which negroes would accomplish more work for their masters, and at a less expense, than farm servants." The policy of importing negroes was also encour-

aged in a communication from the Assembly of XIX. to the Director and council in New Netherland in 1646, and again by resolutions of the States General in 1648.

Thus the Dutch, a nation of freemen who had achieved their political freedom after almost unparalleled sacrifices, adopted, for the sake of commercial success, a social policy evidently repugnant to them. To what extent the early colonists availed themselves of the encouragement to introduce negro slavery does not appear. Some of them do not seem to have taken kindly to this policy, for in the remonstrance from the colony which was sent to the States General in 1649, complaint is made, among other things, that while certain slaves had been manumitted, their children were continued in bondage, "contrary to all public law, that any one born of a free Christian mother should, notwithstanding, be a slave and obliged so to remain." The West India Company, replying to this complaint, said that the "Company's negroes taken from the Spaniards, being all slaves, were, on account of their long services, manumitted on condition that their children serve the Company whenever it pleased," and that only three of such children were then in service, one of whom was in the family of Governor Stuyvesant. This partial emancipation had no appreciable effect on the slave policy, which was firmly fastened on the colony, and was further encouraged from time to time by the home government.

That the new policy had taken root is manifest from a petition presented by the magistrates of Gravesend to the Directors of the Company in Amsterdam, in September, 1651, in which the magistrates requested the Directors to purchase for that settlement "negroes or blacks," for which the magistrates would pay whatever price the Company might charge. Incidentally it may be noted that in the summer of 1664, not long before the Dutch surren-

dered the colony to the English, a ship containing some three hundred negroes came into New York bay, that about two hundred and fifty were sold in this colony, and the remainder were taken to colonies farther south.

The English found slavery an established institution in the colony, but it was not new to English colonial experience. Slavery was continued and encouraged in New York, and the records of that period show large importations of slaves. There was, however, an evidently sincere attempt to mitigate the condition of these unfortunate creatures, for we find, in the royal instructions to Governor Dongan in 1686, a direction to him to find out, with the assistance of the council, "the best means to facilitate and encourage the Conversion of negroes & Indians to the Christian Religion." These instructions were often repeated to subsequent governors. "Man's inhumanity to man" was forcibly illustrated by the refusal of the assembly, in 1699, to pass a bill urged by Governor Bellomont for the purpose of facilitating the conversion of slaves, who reported that the bill "would not go downe with the assembly; they having a notion that the Negroes being converted to Christianity would emancipate them from their slavery, and loose them from their service, for they have no other servants in this country but negroes." The same Governor, in a communication to the Lords of Trade, April 17, 1699, advised the importation of negroes from Guinea, to be used in the manufacture of naval stores, saying that they could be imported at an expense of about ten pounds (\$25) New York money, and could be maintained for nine pence a day. To what extent this suggestion influenced the subsequent slave trade I do not know, but, according to the colonial records, 2,395 negro slaves were imported during twenty-five years, from 1701 to 1726 inclusive. According to the census of 1703 there were 1,301 slaves in the counties of New York, Kings,

Richmond, Orange, and Westchester. The general census of 1723 showed 6,171 negroes and slaves in the colony. The last colonial census, 1771, showed 19,883 blacks, and Governor Tryon, in 1774, estimated that there were then 21,149 blacks.

New York was not considered a very good slave market. Governor (Lord) Cornbury, in a report in 1708, said that ships engaged in the slave trade seldom came to New York, "but rather go to Virginia and Maryland, where they find a much better market for their negroes than they can do here." Several statutes passed during the colonial period imposed duties on the importation of negroes, and sought to regulate the treatment and conduct of slaves, including rigorous fugitive slave laws.

In the chapter on the first Constitution I have quoted the preamble and resolution proposed in the Convention of 1776-77 by Gouverneur Morris, intended to provide for the gradual abolition of slavery. The preamble recited that the blessings of freedom ought to be dispensed to all mankind, but that the immediate abolition of slavery was deemed inexpedient. The legislature was therefore urged to take measures as soon as practicable for the abolition of slavery, "so that in future ages every human being who breathes the air of this state shall enjoy the privileges of a freeman." The preamble and the resolution were each separately adopted by a large majority. The resolution did not embody an essential constitutional principle, and was only a recommendation to the legislature. After further consideration the Convention decided to omit the provision from the Constitution, but the effect of it remained as a declaration of the policy which ought to be adopted and pursued in the state in relation to slavery. I have also, in that chapter, noted the fact that John Jay supported the Morris resolution, hoping that New York would be the pioneer state in the abolition of

slavery. The Constitution as finally adopted was silent on this subject, and it is noteworthy, in view of the action of the Convention of 1821, that the first Convention made no discrimination among voters on account of color. Negroes who possessed the other qualifications were permitted to vote on the same terms as whites; indeed, the classification of races was not even suggested in the first Constitution. The statesmen who framed the first Constitution, and who, by adopting the Morris resolution, declared their attitude toward slavery, continued in control of public affairs many years.

The policy of the Morris resolution was practically adopted by the legislature in 1785, by an act which prohibited the sale in this state of any negro or other person imported or brought into the state from any other part of the United States, or from any other place or country, and such a person so sold contrary to the statute was thereupon declared to be free. The same statute provided for the manumission of slaves, either by certificate or by will. According to an act passed in 1798 it seems that the Quakers had manumitted their slaves, but, in some cases, not in strict conformity with the statute. This act ratified all such manumissions. The abolition movement was evidently growing, for in March of the next year an act was passed declaring that every child born in this state of a slave after the 4th of July, 1799, should be free; yet not quite free, for the statute made such a child the servant of its mother's proprietor until twenty-eight years of age if a male, and twenty-five years if a female, and subject to the provisions of law relating to persons bound to service by overseers of the poor. The act of 1801 restricted the importation or exportation of slaves except under specified conditions, amounting practically to a positive prohibition. The act of 1817 required masters of servants who became such under the act of

1799 and subsequent statutes declaring the status of children of slaves to provide for the education of such servants by teaching them, among other things, to read the Holy Scriptures before they became eighteen years of age, and in default, such a servant, on arriving at that age, was entitled to his freedom. The act of 1817 was another step toward the ultimate abolition of slavery, for it expressly declared that "every negro, mulatto, or mustee within this state, born before the 4th day of July, 1799, shall, from and after the 4th day of July, 1827, be free." The 4th of July, 1827, thus became New York's emancipation day. This principle was confirmed by that part of the revised statutes, including this subject, which was passed December 3, 1827, and signed by Governor De Witt Clinton on the same day, which expressly declared that "every person born within this state, whether white or colored, is free; every person who shall hereafter be born within this state, shall be free; and every person brought into this state as a slave, except as authorized by this title, shall be free." Thus ended slavery in New York, after an existence of two centuries.

Opposition to slavery, which had been so clearly expressed by the Morris resolution in the Convention of 1777, continued to increase, and was evidenced not only by the New York act of 1817 providing for the abolition of slavery, but also by the action of other states, and by most earnest discussion in Congress. New York was not oblivious to national anti-slavery agitation, but by executive and legislative utterances sustained the policy of restricting slavery, which found expression in the Missouri Compromise of 1820. The anti-slavery line between the North and South was already being closely drawn, and the proposed admission of Missouri into the Union as a slave state culminated in the declaration of a far-reaching policy in relation to the extension of slavery.

Governor De Witt Clinton referred to the subject in his annual speech to the legislature in January, 1820, in which, after considering some general aspects of national affairs, he said he considered "the interdiction of the extension of slavery a paramount consideration. Morally and politically speaking, slavery is an evil of the first magnitude; and whatever may be the consequences, it is our duty to prohibit its progress in all cases where such prohibition is allowed by the Constitution. No evil can result from its inhibition more pernicious than its toleration; and I earnestly recommend the expression of your sense on this occasion as equally due to the character of the state and the prosperity of the empire." The assembly appointed a select committee to consider this part of the Governor's speech. The committee reported the following preamble and resolution, which were adopted by both houses:

"Whereas, the inhibiting the further extension of slavery in these United States is a subject of deep concern among the people of this state; and whereas we consider slavery an evil much to be deplored, and that every constitutional barrier should be interposed to prevent its further extension; and that the Constitution of the United States clearly gives Congress the right to require, in all new states not comprised within the boundaries of these United States, the prohibition of slavery as a condition of its admission into the Union:" New York senators and representatives were therefore asked to "oppose the admission as a state into the Union any territory not comprised as aforesaid, without making the prohibition of slavery therein an indispensable condition of admission."

This was in January, 1820. On the 6th of March following, Congress passed an act providing for the admission of Missouri as a state, and which act expressly pro-

hibited slavery in that part of the Louisiana purchase north of thirty-six degrees and thirty minutes north latitude not included in Missouri. The first Constitution of Missouri contained a clause requiring the legislature to pass laws preventing free negroes and mulattoes from becoming residents of the state. Congress objected to this provision and declined to admit the state, except upon the condition that no law should ever be passed by the legislature to enforce the free negro clause in the state Constitution. The legislature was required to assent to this condition by a public act, to be communicated to the President, who was thereupon authorized to issue a proclamation declaring Missouri admitted to the Union. An act was accordingly passed which was deemed sufficient by President Monroe, and a proclamation was issued by him on the 10th of August, 1821. This was only eighteen days before the meeting of the New York Constitutional Convention. Four important steps had been taken in relation to slavery: three in New York,—namely, the act of 1785, prohibiting the sale of persons as slaves in New York, the act of 1799, giving freedom to the children of slaves, and the act of 1817, providing for the ultimate abolition of slavery in this state in 1827,—and one by Congress, prohibiting slavery in the northern part of the Louisiana purchase. These were some of the positive public acts which were fresh in the minds of statesmen who composed the Convention, but the discussion went far beyond the results actually accomplished, and the anti-slavery sentiment was rapidly growing. New York had taken the last practicable step for the abolition of slavery, but slavery still existed, and only a few months after the legislature passed the concurrent resolution already quoted, a Federal census was taken which showed that in New York there were then, 1820, 10,089 slaves, besides 29,278 free blacks, and 701 indented servants, which



probably included the free children of slave parents, under the act of 1799. It thus appeared that New York had a colored population amounting to 39,367, not including indented servants, some of whom were probably children of slaves.

In the Convention of 1821 the committee on suffrage proposed a provision limiting the elective franchise to white male citizens. Peter A. Jay, a son of John Jay, moved to strike out the word "white." This precipitated a long debate in which the elements of the right of suffrage were considered from a philosophical and also from a practical standpoint. It was admitted that the provision was new in our Constitution. Mr. Ross, explaining the committee's report, said blacks were excluded "because they are seldom, if ever, required to share in the common burthens or defense of the state." He said they were "incapable of exercising that privilege with any sort of discretion, prudence, or independence. They have no just conceptions of civil liberty. They know not how to appreciate it, and are consequently indifferent to its preservation." He said the exclusion invaded no inherent right, and had nothing to do with the question of slavery. He said the question was one of expediency only. Mr. Jay vigorously protested against the proposed exclusion, urging that colored men already possessed this right, that they were natives of the same country, and derived from our institutions the same privileges, as white persons. He said the whole number of colored persons was less than one fortieth of the whole population, and that there was no necessity for the exclusion as a public measure. He said that in the city of New York not more than one tenth of the inhabitants were colored and of this tenth only a few were entitled to vote. General Root said the blacks could not be called on for military service, and they have "no anchorage in your country which the government is

willing to trust." He said it was impossible to remodel the Constitution without changing the relative rights of citizens. Mr. R. Clarke said that in the War of the Revolution colored men helped to fight our battles on land and sea, and in the War of 1812 they contributed to some of the most splendid victories.

Mr. Young said when the first Constitution was framed there were "few or no free blacks in the state. The present state of things was not contemplated, and hence no provision was made against it." Chancellor Kent supported Mr. Jay's motion. He said he did not come to the Convention to disfranchise any person or to take away any person's rights. He said it deserved consideration whether the proposed exclusion would not be a violation of the provision in the Federal Constitution that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Col. Young quoted from the opinion of the chancellor, then chief justice, in *Livingston v. Van Ingen*, 9 Johns. 577, where it was said that the clause meant "only that citizens of other states shall have equal rights with our own citizens, and not that they shall have different or greater rights." Mr. Radcliff thought this provision applied only to civil, and not to political, rights. Rufus King thought the provision extended to all rights. He said if the children of the white men are citizens, so are the children of the black men, "and they may, in time, raise up a progeny which will be disastrous to the other races of this country."

Chief Justice Spencer made the following statement of the principles which ought to guide a constitutional convention in framing the fundamental law: "In proceeding to amend the Constitution, this Convention has an unquestionable right to protect and guard the rights of the majority of the community, although it may seemingly invade the rights of others. The community has a right

to secure its own happiness and prosperity, and we are authorized to adopt all means that shall conduce to that end. If we find existing in this community any particular class of people who cannot, with propriety and safety, exercise and enjoy certain privileges, we have a right to abridge them by placing them in the hands of the majority." Referring to the blacks, the Chief Justice said that, whatever our faults or the faults of our ancestors concerning them, "we have the unquestionable right, if we think the exercise of this privilege of voting by them will contravene the public good,—we have a right to say they shall not enjoy it."

The Chief Justice said that the clause in the Federal Constitution relating to privileges and immunities of citizens referred only to personal rights. "A citizen had no more right to claim to be an elector than to be elected." General Tallmadge said that at a contested election in the city of New York in the spring of 1821 only one hundred and sixty-three colored persons voted. Mr. Livingston said that when the first Constitution was framed a free negro in this state was a phenomenon. Practically all negroes were then slaves. Their condition had been ameliorated by statute and otherwise, and provision had been made for their emancipation, but he thought they were not qualified to become electors, and ought not to be clothed with that privilege. He said that out of about fifty colored petitioners who had presented a petition for a continuance of the elective franchise, more than twenty could not even write their names. He said that at the recent election in New York city more than five hundred colored persons applied for admission as voters.

After a prolonged debate Mr. Jay's motion to strike out the word "white" was carried by a vote of 63 to 59. We find on the affirmative side the names of many leaders of the Convention, including Jay, Kent, King, Munroe,

Nelson, Platt, Van Buren, Van Ness, Wheaton, and Yates. After considering other sections of the suffrage article, the whole subject, on motion of Mr. Edwards, was referred to a new committee of thirteen. This committee brought in a report prescribing the general qualifications of voters, with a proviso that "no male citizen, other than white, shall be subject to taxation, or entitled to vote at any election, unless, in addition to the qualifications of age and residence last above mentioned, he shall be seized and possessed, in his own right, of a freehold estate of the value of \$250, over and above all debts and incumbrances charged thereon, and shall have been, within the year next preceding the election, assessed, and shall have actually paid, a tax to the state or county."

This presented a new view of the subject. Under the original report of the standing committee a colored person was denied the right of suffrage without regard to property or other qualifications. The Convention, by a narrow majority, had voted to strike the word "white" from the first report, with the result that all persons, without regard to color, would have been entitled to vote if possessing the required qualifications. The new report admitted colored citizens to the right of suffrage upon a property test which was not applied to white voters, and as an apparent compensation for the denial of suffrage, colored persons were not to be subject to taxation unless they were also qualified to vote. Mr. Briggs thought the property qualification ought not to be imposed on blacks any more than on whites. Chancellor Kent said he was in favor of the proviso. He said it was true that the blacks were, in some respects, a degraded portion of the community, but he was unwilling to see them disfranchised and the door eternally barred against them. The proviso would not cut them off from all hope, and might, in some degree, alleviate the wrongs we had done them.

It would have a tendency to make them industrious and frugal, with the prospect of participating in the right of suffrage. Mr. Van Buren also supported the proviso. The proviso was adopted by a vote of 72 to 31, but Chancellor Kent evidently changed his mind, for he voted against it, as did also Chief Justice Spencer, Mr. Jay, Mr. Root, Mr. Munro, Judge Platt, Mr. Wheaton, and several others who had voted against the original report.

When the section was under consideration again, Judge Platt moved to expunge the proviso, and delivered a speech which I think embodies the ablest presentation of the subject during the debate on suffrage. He said the "obligations of justice are eternal and indispensable." The proviso embodied a principle to which he could not give his consent. He admitted that most of the free negroes in this state were unfit to be intrusted with the right of suffrage. He said he would exclude the great mass of them, "but not by this unjust and odious discrimination of color." He said there was no necessity for this principle of exclusion. "Let us," he said, "attain this object of exclusion by fixing such an uniform standard of qualification as would not only exclude the great body of freemen of color, but also a large portion of ignorant and depraved white men, who are as unfit to exercise the power of voting as the men of color." He said that by this proviso "all freemen of African parentage are to be constitutionally degraded, no matter how virtuous or intelligent." The proviso added "mockery to injustice." "During the last forty years we have brought up this foreign race from the house of bondage; we have led them nearly through the wilderness, and shown them the promised land. Shall we now drive them back again into Egypt?" Looking into the future, Judge Platt said: "If I do not deceive myself, those who shall live fifty years hence will view this proviso in the same light as we

now view the law of our New England fathers, which punished with death all who were guilty of being Quakers; or the law of our fathers in the Colonial Assembly of New York, which offered bounties to encourage the slave trade." In less than fifty years after this utterance slavery had disappeared, and all discriminations in the elective franchise, based on color, had been abolished. Thirty-three delegates voted to strike out the proviso, but the majority of the Convention adhered to the property test for colored voters, and it was included in the Constitution.

Under the second Constitution a qualified voter must have been:—

A resident of the state for one year.

A resident for six months in the town or county where he might offer his vote.

He must have paid a tax within one year on his real or personal property, unless he was exempt from taxation.

Or must have performed military duty within the year in the state militia, unless he was entitled to a fireman's exemption.

Or, having been a resident of the state three years, and of the town or county one year, must have been assessed for highway labor, and must have performed such labor, or have commuted therefor.

These qualifications had substantially been prescribed by the convention act of 1821 for voters on the question of holding a convention and on the approval of the Constitution to be proposed by the convention. The Convention, therefore, adopted, in substance, a suffrage policy which had already been declared by the legislature.

A colored voter must have been a resident of the state three years, and for one year seized or possessed of a freehold estate worth \$250, over and above all debts charged

thereon, and on which estate he had paid a tax. Colored persons were exempt from direct taxation on property valued at less than \$250.

A qualified voter was entitled to vote in the town or ward where he resided, and not elsewhere, for all elective officers. This abolished all distinctions under the first Constitution between different classes of voters, and placed all voters for all officers in one class.

The legislature was authorized to pass laws excluding from the right of suffrage persons convicted of infamous crimes. The legislature was also required to enact registration laws.

The Constitution also provided for election by ballot, except for certain minor offices. Under the first Constitution, the governor and lieutenant governor were to be elected by ballot, and the senators and members of assembly were to be elected *viva voce*.

The first Constitution authorized the legislature "as soon as may be after the close of the present war between the United States of America and Great Britain," to cause all elections of senators and members of assembly to be by ballot; and if this method should prove unsatisfactory, the legislature was authorized to restore voting *viva voce*. By the first election law, passed March 27, 1778, a qualified voter for senator or member of assembly was required to "deliver his vote *viva voce* and with an audible voice," in the hearing of the inspectors, one of whom was required to repeat the vote to the clerks, who were required to enter it in the poll lists. A person voting for governor and lieutenant governor was required to vote by ballot, using a "paper ticket," which was required to be "so folded, rolled up, tied, or otherwise closed, as to conceal the writing;" and this ticket was required to be delivered to the inspectors, and by them put into a box prepared for that purpose.

It will be observed that under this statute only voters for governor and lieutenant governor possessed the privilege of secrecy in voting, and that persons voting for senators and members of assembly were required to state their choice openly.

In 1787, the war having closed, the legislature, acting under the authority conferred by the Constitution, changed the method of voting for senators and members of assembly, and required all voting to be by ballot, following substantially the "paper ticket" provisions of the act of 1778. This secured secret voting for all state officers then elective; and the Constitution of 1821 made this provision permanent.

#### THE EXECUTIVE.

Under the first Constitution the governor was required to be a freeholder, and he was chosen for the term of three years. Under the second Constitution the freehold qualification was continued, and in addition the governor was required to be a native citizen of the United States, thirty years of age, and five years a resident of the state. The term was reduced to two years. There was considerable difference of opinion in the Convention concerning the term, but with a general agreement that the term of three years should be reduced. The principal reason for the reduction of the term was the larger authority conferred on the governor by the new Constitution. There was a strong movement in favor of a one year term, but the majority thought this too short, because not giving the governor sufficient opportunity to formulate policies, and become familiar with public affairs. Provision was made for an election by the legislature in case of a tie in the popular vote.

The governor's power to prorogue the legislature, conferred by the first Constitution, was not continued, but he



was to have the same right to convene the legislature "on extraordinary occasions." The general powers conferred on the governor were substantially the same, except that his pardoning power was extended to cases of murder; under the first Constitution the power to pardon in murder cases was vested in the legislature. The power to pardon in cases of treason was still excluded from his jurisdiction, and continued in the legislature. While the pardoning power was under discussion, Judge Platt remarked that "the dispensation of mercy is an appropriate duty of the Executive alone, who superintends the execution of the law. A popular assembly is not a fit tribunal to determine in such cases." Mr. Sheldon, in reply, said the governor ought not to have the pardoning power in cases of murder; "in all such cases the culprit should die by the voice of the people." Governor Tompkins proposed to except impeachment cases from the governor's pardoning power. Chief Justice Spencer observed that impeachment does not imply a conviction of a crime in the legal sense; and that the officer after removal is indictable if the offense is criminal. But it was agreed that the Constitution should be explicit, and the Tompkins amendment was adopted.

Provision was also made, as in the first Constitution, for the election of the lieutenant governor with the same qualifications and for the same term as the governor. The provision authorizing the lieutenant governor and the president of the senate to act as governor in special emergencies was continued substantially as in the first Constitution.

A new provision was included in the second Constitution, requiring the governor to be paid a stated compensation, which should neither be increased nor diminished during his term.

The further evolution of this subject will be noted later,

resulting in a provision fixing the governor's compensation in the Constitution itself.

Under the first Constitution it was the duty of the governor "to inform the legislature of the condition of the state, so far as may respect his department; to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity." As a substitute for this provision the second Constitution provided that the governor "shall communicate to the legislature at every session the condition of the state; and recommend such matters to them as he shall judge expedient." Under the first Constitution it was the custom of the governor to open each session of the legislature by a speech delivered in the presence of both houses, assembled together for this purpose. The motion to change the practice by requiring the governor to communicate by message, instead of by a speech, was made by Peter R. Livingston, and in support of his motion he made the following interesting statement: "The latter mode has been productive of great inconvenience and expense. I had the curiosity once to look over the journals, and I ascertained that it cost \$70,000 to the state during ten to fifteen years, in debate about the reply to a governor's speech. This speech is a relic of monarchy, founded in the love of pomp and splendor and show. Besides, when the two houses are of different political character, one approves, the other condemns, the speech; and in 1814 the assembly spent eleven days in discussing the propriety of an answer to the governor's speech, yet we all know that neither a speech nor an answer is legislation. In the general government, until Mr. Jefferson's accession, a speech was delivered by the President and an answer was read; but Mr. Jefferson cut up the practice by the roots by sending a message. Besides, for the sake of the harmony due to the proceedings of the two houses,

when of different political character, it is best to have a message. We have seen, and might see again, a governor on his own carpet, obliged to listen to sentiments which must be odious to him; obliged to submit in quiet to a flagellation, as bitter as political hostility could make it. To be sure, the governor has the last word, and he sends back a reply more bitter, if possible, than the answer; but all this is injudicious and improper, and will be done away by adopting the proposition I have the honor to make."

#### OFFICERS.

Many changes were made by the second Constitution in the manner of choosing public officers. It has already been noted that nearly 15,000 officers were appointed by the Council of Appointment, and that great abuses had grown up in connection with the exercise of this power by that council. An opinion had long been growing in the state in favor of extending the right of the people to elect officers, and in opposition to the policy of requiring local officers to receive their appointments from Albany. Some changes in this direction were made by the Convention.

#### ELECTIVE OFFICERS.

The governor, lieutenant governor, and members of the legislature. These had been elective under the first Constitution.

Sheriffs, clerks of counties, including the register of New York, and coroners. These were appointive under the first Constitution.

All other officers who had previously been elective.

#### APPOINTIVE OFFICERS.

Secretary of state, comptroller, treasurer, attorney general, surveyor general, commissary general, to be appointed by the legislature.

All judicial officers, except justices of the peace, by the governor.

Justices of the peace, by the board of supervisors and judges of the county court.

Clerks of courts, by the courts of which they are clerks.

District attorneys, by the county courts.

Mayors, by the common councils.

Masters and examiners in chancery, by the governor and senate.

Clerk of the court of oyer and terminer and general sessions in the city of New York, by the court of general sessions.

Special justices and assistants in New York, by the common council.

Major general, brigade inspectors, and chiefs of the staff departments, by the governor and senate.

Adjutant general, by the governor.

Militia officers in general, by the organizations or by officers thereof.

#### TENURE.

Governor and lieutenant governor, two years. The term was three under the first Constitution.

Senators, four years, and

Members of Assembly, one year, the same as under the first Constitution.

Chancellor and justices of the supreme court, during good behavior, or until they attain the age of sixty years, as under the first Constitution.

Justices of the peace, four years. Under the first Constitution they held their office at the pleasure of the Council of Appointment.

Secretary of state, comptroller, attorney general, surveyor general, and commissary general, three years. Under the first Constitution these officers were subject

to removal at any time by the Council of Appointment.

Sheriffs, clerks of counties, register of New York, and coroners, three years. Under the first Constitution sheriffs and coroners were appointed annually. The clerks held their offices during the pleasure of the Council of Appointment.

Clerks of courts and district attorneys, three years. No term was fixed under the first Constitution.

Mayors of cities, one year.

Masters and examiners in chancery, three years.

Register and assistant register, during the pleasure of the chancellor.

The clerk of oyer and terminer and general sessions in New York, during the pleasure of the court.

Special justice and assistants in New York, four years.

County court judges and city recorders, five years.

An official term not fixed by the Constitution might be established by law, and if not so established the officers held during the pleasure of the appointing power.

#### IMPEACHMENT.

The assembly was given the power to impeach all civil officers. This power was vested in the assembly under the first Constitution.

#### REMOVAL.

Under the first Constitution the Council of Appointment had the general power of removal, and this power was exercised quite freely. Much more variety appears on the subject of removal in the second Constitution.

Several methods of removal are specified in this Constitution.

*By the legislature, on concurrent resolution.*—Secretary of state, comptroller, attorney general, surveyor

general, commissary general, and also all officers who held office during good behavior.

*By the senate, on the recommendation of the governor.*—Commissioned officers of the militia, masters and examiners in chancery, judges of the county courts, and recorders of cities.

*By the governor.*—Sheriffs, county clerks, registers, and coroners.

*By the county court.*—District attorneys and justices of the peace.

*By the court of general sessions in the city of New York.*—Clerk of oyer and terminer, and general sessions of the peace.

*By courts.*—Their clerks, except the county clerk.

#### THE JUDICIARY.

The Provincial Constitutional Convention did not spend much time over the judiciary provision of the first Constitution. It found a court of chancery, a supreme court, a court of common pleas, and justices' courts, and it recognized and continued them without substantial change. But, beginning with the Convention of 1821, the structure of our judicial system has always engaged the serious attention of constitutional conventions. We shall have occasion to note the important changes made in this system by the Conventions of 1846, 1867, and 1894, and also the fact that the subject of changes in the judiciary was deemed sufficiently important to call for a constitutional commission in 1890, which was charged with the sole duty of considering the judiciary article. This branch of the government received serious attention from the Convention of 1821, but it is apparent that the members of the Convention were not all actuated by the same motives.

It was suggested during the debate on the judiciary

article, that there was a settled purpose among the lawyers of the state, and which purpose was shared to a large extent by the people, to make some radical changes in the judicial organization. Some persons were in favor of change in the interest of actual improvement, while it seems quite certain that some favored alterations in the system for the purpose of effecting a change in the personnel of the court.

One of the great struggles of the Convention was over the judiciary article; and perhaps in no controversy that engaged the attention of the Convention was partisanship more plainly, and even painfully, manifest than in the effort to accomplish an alleged reform in the judiciary, but whose real purpose was to put out of office the judges of the supreme court. This purpose was not disclosed at once, but as the discussion of the various plans of judicial reform proceeded, members of the Convention did not hesitate to declare their intention to provide for a new appointment of supreme court judges upon the adoption of the new Constitution. This instrument (article 9, § 1) contained a provision that the commissions of all civil officers should expire on the last day of December, 1822. This, of course, included the judges, who held office during good behavior or until they should attain the age of sixty years. So far as the court itself was concerned it was not necessary for the Convention to take any positive action, except to provide additional judges, if deemed necessary.

The first Constitution took the supreme court as it found it, recognized and continued it, but made no special provision concerning it. This court, established by the act of the colonial legislature in May, 1691, had, at the time of the Revolution, a chief justice and four associate justices, and they comprised the judicial force of the supreme court. The Provincial Constitutional Conven-

tion inaugurated the new state supreme court by the election of a chief justice and two associate justices, and by later appointments the membership of the court was increased to five.

When the Convention of 1821 met, the court was composed of Chief Justice Ambrose Spencer, who had been a member of the court seventeen years, William W. Van Ness, who had held office fourteen years, Joseph C. Yates, thirteen years, Jonas Platt, eight years, and John Woodworth, two years. Under the Constitutional provision which abridged the term of a justice of the supreme court at the age of sixty years, Chief Justice Spencer might have held office until December 13, 1825. Judge Van Ness might have continued in office until 1836, Judge Platt until June 30, 1829; Judge Yates until November 9, 1828, and Judge Woodworth until November 12, 1828. The judges might, therefore, have continued in office several years if the constitutional provision had not been disturbed, or if the court had been continued without affecting the incumbents.

Three judges—Chief Justice Spencer, and Associate Justices Van Ness and Platt—were members of the Convention, but they do not seem to have made any special effort to be continued in office. They pursued a dignified course, and were probably prepared to accept the action of the Convention without complaint. The effort to get rid of the judges succeeded so far as this result could be reached by the Constitution. Judge Van Ness died within two months after the Constitution took effect. Judge Yates was elected governor in November, 1822, and took office with the new Constitution. He appointed as his successor Jacob Sutherland, who had been a member of the Convention. Judge Woodworth was reappointed in February, 1823.

Under the former Constitution there had been four



associate justices. The new Constitution reduced the number to two, and Justices Woodworth and Sutherland received these appointments. John Savage was appointed chief justice in place of Ambrose Spencer. Judge Platt might have served six and a half years longer before he reached the age limit, and the compulsory retirement of the judges apparently meant more to him than to any of the others.

The course of this Convention is in marked contrast with the course pursued by later conventions, notably the Convention of 1894, which abolished the superior courts of New York and Buffalo, the court of common pleas of New York, and the city court of Brooklyn, but transformed their judges into justices of the supreme court.

Some of the best lawyers in the Convention were members of the judiciary committee which was appointed on the 1st of September, and consisted of Peter Jay Munro (a nephew of John Jay), Nathan Williams, Jacob Sutherland, Francis Silvester, Henry Wheaton, John Duer, Melancton Wheeler. This committee, on the 24th of September, submitted a report, containing an elaborate plan of a judicial system. The plan provided for the following courts:

The court for the trial of impeachments, which was also to be the court for the correction of errors; court of chancery; supreme court of judicature; superior court of common pleas; court of nisi prius; courts of oyer and terminer, and general gaol delivery; inferior courts of common pleas, to be called county courts; courts of general sessions of the peace; and "such other tribunals of inferior and limited jurisdiction as the legislature may establish, under the restrictions hereinafter mentioned."

The court of chancery was to consist of a chancellor and the vice chancellor.

The number of supreme court judges was to be re-

duced to four, and the superior court of common pleas was to be composed of a chief justice and three associate justices.

The existing jurisdiction and powers of the supreme court were continued.

The superior court of common pleas was to have jurisdiction concurrent with the supreme court in civil cases, except as to mandamus, quo warranto, and prohibition.

The supreme court and the superior court of common pleas were each required to hold four terms each year.

Courts of nisi prius were to be held by justices of the supreme court or of the superior court of common pleas.

Courts of oyer and terminer were to be composed of three or more commissioners, and the justices of the supreme court and of the superior court, and judges of the county court were to be such commissioners *ex officio*; but one of the justices of the supreme court or of the superior court was always a necessary member of the court of oyer and terminer.

The county court was to be composed of a first judge and three associate judges, who were to be *ex officio* justices of the peace and judges of the courts of general sessions.

The county court was to have the jurisdiction then possessed by courts of common pleas, and was also to have jurisdiction to hear appeals from judgments of justices' courts.

The county court was also to be a court for the "probate and registering of wills and granting letters of administration," and was to have the powers then possessed by surrogates.

A special court of probate was to be held for the city and county of New York.

Review of proceedings in probate courts was vested in the court of chancery.

The court of common pleas and the court of general sessions of the peace in New York were continued.

The chancellor and vice chancellor and justices of the supreme court were to hold office during good behavior, or until they reach the age of sixty-five years, and were subject to removal by the governor, on the "address" of both houses of the legislature. They were prohibited from holding any other office, and were made ineligible to the office of governor or lieutenant governor, for two years after the expiration of their term.

The judges of the county court were to hold office for five years.

Certain judges in New York were to hold office for ten years.

The report was taken up for consideration on the 22d of October, and Mr. Munro, chairman of the committee, made a statement of the reasons which had prompted the committee in proposing this judicial plan.

The large increase in the business of the court of chancery was the occasion of the proposition to establish the office of vice chancellor, and the growth of population of the state, especially in the western counties, made it necessary to provide more judicial machinery; and it was thought that a sufficiently large judicial force would be provided by establishing the superior court of common pleas, whose four judges, with the four in the supreme court, would make eight for the state.

Erastus Root offered the following substitute for the first section of the report:

"The judicial power of this state shall be vested in a court for the trial of impeachments and the correction of errors, to consist of the president of the senate, and the senators; in a supreme court, to consist of a chief justice, and not more than four, nor less than two, associate justices; in circuit courts, and courts of common

pleas, and in justices of the peace, and in such other courts, subordinate to the supreme court, as the legislature may from time to time establish. The state shall be divided into a convenient number of districts, subject to alteration, as the public good may require; and for each, a circuit judge shall be appointed. He shall have the same powers as a judge of the supreme court, at his chambers. He shall have power to try issues joined in the supreme court; to preside in courts of oyer and terminer and jail delivery; and, if required by law, to preside in courts of common pleas and general sessions of the peace. The supreme court shall have jurisdiction in all cases in law and equity, and the legislature may, in their discretion, vest chancery powers in other courts of subordinate jurisdiction; provided, however, that the court of chancery, as at present organized, shall continue until the legislature shall otherwise direct."

It will be noted that the practical result of this substitute, if adopted, would have been the abolition of the court of chancery, and the transfer of its equity powers to the supreme court. This was considered the effect of the resolution, and it was debated accordingly. There was a spirited debate on the question of abolishing the court of chancery, the example of other states and countries being cited by those who favored or opposed its abolition, and the question was discussed on its merits; namely, whether there should be a distinct equity tribunal, or whether the supreme court should be vested with the double jurisdiction in law and equity.

Chancellor Kent took part in the debate, and in the course of his speech called attention to the fact that, from a personal point of view, the abolition of the court would make little difference to him, because he had almost reached the age limit fixed by the Constitution; but he urged the retention of the court as a matter of public

interest and benefit, pointing out the advantages accruing to the state from a separate equity tribunal, and the difficulties that would ensue if the powers were transferred to the common-law courts. The Chancellor is reported to have said, during the discussion, that "when he was appointed chancellor he was compelled to commence a new course of legal study, although he had held the office of chief justice." Of course this was not literally true. It appears from a letter written by him in 1828 that when appointed chancellor he had read the equity reports up to that time, and some other works on equity, but he says he "took the court as if it had been a new institution, and never before known in the United States;" and it is almost literally true that he made the court of chancery in New York.

After two days' debate Mr. Root's amendment was rejected by a vote of 36 to 73.

A vote on the first section of the committee's report was reached October 24, and it was rejected by a vote of 33 to 79. Martin Van Buren thought that this vote disposed of the whole report, and that seemed to be the general opinion of the Convention. Various propositions were thereupon submitted in the Convention, including one by Mr. Van Buren, providing for establishing circuits or districts, and the appointment of circuit judges, and also the appointment of vice chancellors. These propositions were submitted to a new committee.

The next day this committee, through Mr. Munro, its chairman, reported a plan providing for judicial circuits and the appointment of circuit judges who should have the powers of a supreme court judge at chambers, try issues joined in the supreme court, preside at courts of oyer and terminer and jail delivery, and also, when required by law, preside in courts of common pleas and general sessions of the peace. This report also fixed the

term of the chancellor and other higher judicial officers during good behavior, or until they reached the age of sixty years, prohibited them from holding any other office, and provided that all votes given for them for any other office should be void. The legislature was authorized to confer equity powers on courts subordinate to the court of chancery. The office of judge of probate was to be abolished, and his powers and duties devolved on the court of chancery.

Governor Tompkins made a proposition that the supreme court consist of a chief justice and not more than four nor less than two associate justices. This was rejected by a vote of 44 to 64.

Mr. Buel, discussing these various propositions, said: "What are we about to do? We are about to provide in our Constitution for the removal of the incumbents in our high judicial departments without having altered in any shape their jurisdiction, or the construction of the courts which they compose. By this, what do we say to the world? We say that we are about to make a constitutional provision which has no other object than that of pulling from the bench of our supreme court certain individuals who may have become odious to a portion of the community. This is not worthy of the people of the state of New York, or of this Convention. It will be a disgrace to us." Mr. Buel said he did not take this stand from any particular partiality for these judicial officers, but because he considered it beneath the dignity of so enlightened a body, and because he knew there was a method of reaching such officers by law; and he thought that that would be the wisest course to pursue in this case, if they had done any thing for which they deserved to be removed.

Mr. Van Vechten, speaking on the same subject, said that the Convention was assembled for the purpose of

amending the Constitution; "and no man had ever dreamed of its being for the purpose of dismissing officers from our government. . . . Is it seemly, or is it consonant with the dignity of this Convention, for the purpose of driving these men from office, to insert in the Constitution which we are forming for generations to come, a clause which has no object in view but to gratify personal revenge? We have already declared by our acts that these men shall hold till they arrive at the age of sixty years; and we have also provided that if they shall conduct in such a manner as to forfeit their claim to a continuance in office, a majority of the assembly may impeach, and by two thirds of the same, and a majority of the senate, they may be removed. With respect to the interference of our judges in politics, who has not had to do with politics? . . . It is not till quite lately that we have heard this great outcry. Have we not chosen the judges of our supreme court as electors for President and Vice President of the United States? We have gone hand in hand with these men, approving and leading them forward; and now we are to destroy them at a blow, contrary to the rule which we have ourselves established; leaving the stain upon our Constitution, that future generations may read our disgrace with shame and confusion."

Mr. Root, replying to Mr. Van Vechten, called attention to the fact that the Convention had already decided to terminate the office of senator when the new Constitution should take effect, which would put the senators out of office the same as the judges. He said the fact of the interference of the judges in politics was admitted. He said he had never encouraged the judges in their political career, and was not responsible for their perseverance in it; and he raised his "feeble voice" against this "politico-judicial domination." He said he

was not disposed to try these judges there, but he left them, with all the other officers, to the appointing power, "to see whether they have so behaved in their official stations as to entitle them to a reappointment."

The consideration of the judiciary article was resumed on the 1st of November, when Matthew Carpenter of Tioga offered a proposition in substance that the supreme court consist of a chief justice and two associate justices, that the state be divided into not less than four nor more than eight districts, that a judge be appointed for each district with the powers of a supreme court justice at chambers, and also with power to preside at trials of issues, and in courts of oyer and terminer and general gaol delivery, and who might be vested with further equity powers by the legislature.

This plan was quite similar to the plan proposed by the second committee, and which, as a whole, had already been rejected. It was understood to contemplate the destruction of the supreme court as then constituted, and the creation of a new one.

Mr. Clarke, speaking on this proposition, said that its object was not merely to remove the present incumbents, but to establish a useful system for the state. The supreme court was to be a court of appellate jurisdiction only, and three judges would be sufficient for the appellate court. He further suggested that it was questionable whether, from feelings of delicacy, men should be continued in office if their services were no longer required. He urged the increase of the judiciary force by providing for district judges, and said that, to a large part of the state, the present chancery system was worse than useless.

Judge Platt and Judge Van Ness do not seem to have taken any part in the debate.

On the 2d of November, while the Carpenter proposi-



tion was under consideration, Chief Justice Spencer, apparently speaking for all the members of the court, made some observations on the judicial system, showing the large increase in business, incident to the growth of population, and the large number of counties which had been created, and stated that when there were four judges there were twenty counties, and now, with five judges, there are fifty-two counties. He said it was not to be disguised that the judges had not sufficient time for the performance of their duties. He spoke of the labors of the judges and of their efforts to keep up with the work, and urged an increase of the judicial force by providing for circuit judges. Judge Spencer further said that he took a seat upon the bench of the supreme court eighteen years ago, since which his whole time had been devoted to a discharge of the duties incumbent on him in that station. The salary of that office had barely enabled him to support his family and educate his children, without laying up a dollar from that source, more than he had when he accepted the office. He had abandoned his profession, which was far more lucrative than the office which he accepted, and he received that appointment under the sanction of the Constitution, with a pledge that he should hold it till he arrived at the age of sixty, unless removed for mal-conduct. His term of service, by that limitation, would expire in about four years; but if the public good required his removal, amen to it. The Convention had an undoubted right to do it if they thought proper, notwithstanding it would appear rational that those who had received that office under the old Constitution should continue till their term expired by law. He did not ask this, but merely suggested it for the consideration of the Convention.

He submitted a plan for the appointment of as many circuit judges as the legislature might prescribe. In the

course of his speech Judge Spencer said this was the last opportunity he would have to address the Convention, as his official duties would require him to leave town the next day. In view of the avowed purpose of several prominent members of the Convention to put Chief Justice Spencer and his associates out of office, his speech showed a calm and dignified presentation of the subject from one who had a deep personal interest in the result.

The debates on this subject do not make very pleasant reading, and, looking back on the Convention after eighty years, the discussion does not present an agreeable picture.

Mr. Root spoke with some bitterness, saying, among other things, that for his part, he longed to see the emancipation of the state from judicial thralldom. Under that kind of slavery had this state groaned ever since he had been a member of it; and whenever a member of the bar had undertaken to lift his voice, he had had cause to rue the day that he undertook it. He also said: "The gentlemen of the bar in the country have seen and felt the evils of this system; and, as you have been already told, it is important that your high judicial officers be above suspicion; otherwise they are worse than useless. If they are suspected, they cannot render to the people justice and equity to their satisfaction. Then bring them before the proper appointing power, and see whether they are free from suspicion, and whether the people are willing to reappoint them."

Peter R. Livingston made a severe attack on the judiciary. He said that "characters have been permitted to remain in your judiciary department, who have been implicated with attempts to procure corrupt laws. It has been that department which has prevented the passage of wholesome laws which the public good required. It has been that department which has given sanction to

laws unfriendly to the public good. It has been some of that department who have become notorious, in every part of your state, in electioneering campaigns; who have repeatedly attended political meetings, and spoken in them over and over again. . . . Can a person, after having spent half of his life in politics, divest himself of all political prejudices and partialities upon a bench of justice? If he can, he is something more than man."

Mr. Wheaton proposed that the limitation of the number of judges should not take effect until the number had been reduced to three, by death, resignation, removal, or abridgment of the term by the age limit. This was rejected by a vote of 39 to 66.

This proposition seemed fair and reasonable and would probably have been adopted in a modern convention, especially if the element of personal hostility to an incumbent did not exist. The sequel shows that the number of judges would actually have been reduced to three within two months after the Constitution took effect, for it has already been noted that Judge Yates resigned to take the office of governor, and Judge Van Ness died in February, 1823. This would have left in office Chief Justice Spencer and Associate Justices Platt and Woodworth.

General Carpenter's proposition was adopted by a vote of 62 to 53. After some further discussion the judiciary plan was adopted, and appears as article 5 of the Constitution. This article provides in substance:

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

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

The tenure of office of chancellor and justice of the

supreme court was also continued, with an age limit at sixty years.

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

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

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

County judges and recorders were to hold office for five years, subject to removal by the senate, on the recommendation of the governor, for cause.

The chancellor, supreme court justices, and circuit judges were prohibited from holding any other office or public trust, and all votes for them for an elective office given by the legislature or the people were to be void.

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

It is probable that if the judiciary article had been

considered solely on its merits it would have been disposed of in much less time, and with much less discussion; but the introduction into the debate of the personal element, by the attack on the judges, and the manifest intention of the leaders of the Convention to exclude these judges from office by operation of the new Constitution, gave the discussion a character and tone not discovered in any other part of the work of the Convention.

In the course of the debate the suggestion was made that, so far as concerned the termination of their offices, the judges would fare no worse than many other public officers. This was true enough, for, in fact, the Constitution shortened the term of the Governor six months, and cut off the terms of the senators, the chancellor, and all other appointive officers. But these officers were not the subject of attack, like the judges, and the judiciary situation would have appeared much less objectionable if the criticism of the bench could have been omitted, and the general proposition asserted that the new Constitution should make a clean sweep of all appointive officers, treating them all alike, with a complete reorganization of the various departments of public service.

Before leaving this subject it should be noted that the legislature, on the 17th of April, 1823, passed a law for the purpose of putting into operation the judiciary provisions of the Constitution, among other things providing for eight circuits corresponding with the senate districts established by the Constitution; for the appointment of a judge in each circuit; and conferring on the circuit judges, in addition to the powers conferred on them by the Constitution, "concurrent jurisdiction with the chancellor in all matters and causes in equity, of every description and character, subject, however, in all cases, to the appellate jurisdiction of the chancellor."

The circuit judges were required to hold the necessary terms of courts of equity within their circuits.

April 23, Governor Yates appointed eight circuit judges, three of whom, Ogden Edwards, Nathan Williams, and Samuel Nelson, had been members of the Convention. Thus, the new judicial machinery was set in motion, and continued without constitutional change until remodeled by the Convention of 1846.

Chancellor Kent was permitted to continue in office until he reached the age limit, and he retired on the 31st of July, 1823, after more than twenty-five years of most distinguished and honorable service in the supreme court and the court of chancery.

#### CANALS.

The canals made their first appearance in the Constitution in 1821. This great system of internal waterways was under construction when this Convention met. For many years the subject of constructing canals had been agitated and considered by the people of the state, but the progress of sentiment in favor of building the great canals had been somewhat slow. The movement was well under way when it was interrupted by the War of 1812, and it seemed for a time as if the project would have to be abandoned. Soon after the war, however, it was revived with renewed energy, and carried to completion. The limits and scope of this work will not permit a detailed history of the canals, but they have played such an important part in the constitutional, local, and political history of the state that a brief reference to some of the more prominent incidents connected with the development of our canal policy may not be out of place here, as an introduction to the consideration of the relations which the canals have sustained to the evolution of the Constitution, and also for the purpose of showing the

condition of public affairs which prompted the Convention of 1821 to give the canals even the limited notice which they received in the new Constitution.

It will be observed that the attention given to the canals by this Convention was not of a creative sort, but was intended rather to recognize conditions established by statutes incident to the construction of the canals, and to crystallize in the Constitution itself the canal policy already established by the legislature. It will be shown under later Constitutions how this subject developed and grew, until it reached such a magnitude as sometimes to engross a large share of the attention of the people of the state.

1724, November 10. Cadwallader Colden, for forty years surveyor general of the province of New York, in a report to Governor Burnet, on the fur trade with the Indians, spoke of "the carrying place between the Mohawk river and the river that leads into the Oneida lake, which carrying place is only 3 miles long, except in very dry weather, when they are obliged to carry 2 miles further; from thence they go with the current down the Onondaga river to the Cataracqui lake (Ontario).

1768, August 17. Sir Henry Moore, governor of the province of New York, in a letter to the Earl of Hillsborough, describing a late tour to the central part of the province, said that he went up as far as the Canajoharie falls on the Mohawk river. "Here is a carrying place about 1 mile in length, and all boats going down or up the river are obliged to unload and be carried over land. As this fall is the only obstruction to the navigation between Fort Stanwix and Schenectady, my intention was to project a canal on the side of the falls, with sluices on the same plan as those built on the grand canal in Lanquedoc, and I stayed a whole day there, which was employed in measuring the falls and examining the

ground for that purpose." He further said that he intended to lay the matter before the "legislative bodies" at their next meeting, and request them to carry into execution the plan of constructing such a canal.

1768, December 16. Governor Moore sent a special message to the Colonial Assembly, in which he called their attention to the navigation of the Mohawk river, as follows: "The obstruction of the navigation of the Mohawk river between Schenectady and Fort Stanwix, occasioned by the falls of Canajoharie, has been constantly complained of, though it is obvious to all who have been conversant in matters of this kind that the difficulty is easily to be removed by sluices, upon the plan of those in the great canal of Lanquedoc, in France, which was made to open a communication between the Atlantic and the Mediterranean. The opportunity I had in my tour, last summer, of examining this carrying place, and of measuring the falls, has encouraged me to recommend to the house of assembly the improvement of our inland navigation as a matter of the greatest importance to the province, and worthy of their serious consideration." The Colonial Assembly took no action in the matter.

1774. Governor William Tryon, in a general report of the affairs of the province, says that a "short cut across the carrying place (Fort Stanwix) might be made into Wood creek, which runs into the Oneida lake, thence through the Onondaga river into Lake Ontario." He also suggested that north of Fort Edward, on the upper Hudson, it seemed practicable to "open a passage by locks, etc., to the waters of Lake Champlain."

1776, April. General Philip Schuyler suggested a canal between Hudson's river and Lake Champlain. Later in the season he was directed to "take measures for clearing Wood creek at Skeenesborough (White-



hall), constructing a lock there, and taking the level of the waters falling into the Hudson at Fort Edward, and into Wood creek." He completed the survey for the projected canal. Lossing's Philip Schuyler, vol. 2, pages 40, 104.

1777, July. Gouverneur Morris, in a conversation with Morgan Lewis and General Philip Schuyler, at Fort Edward, said: "That at no very distant day, the waters of the great western seas would, by the aid of man, break through their barriers, and mingle with those of the Hudson. . . . That numerous streams passed these barriers through natural channels, and that artificial ones might be conducted by the same routes." Related by Morgan Lewis in a letter to Harmanus Bleecker, dated May 26, 1828.

1783, July. General Washington, after the War of the Revolution had actually ended, and while waiting for the final treaty of peace, in company with Governor George Clinton, made a tour of the northern and central parts of the state, traveling in all about 750 miles, most of the way on horseback. Washington in a letter to Chevalier de Chastellux, dated October 12, 1783, said: "I have, lately, made a tour through the lakes George and Champlain, as far as Crown Point; then returning to Schenectady, I proceeded up the Mohawk river to Fort Schuyler, crossed over to Wood creek, which empties into the Oneida lake, and affords the water communication with Ontario; I then traversed the country to the head of the eastern banks of the Susquehanna, and viewed the lake Otsego, and the portage between that lake and the Mohawk river at Canajoharie. Prompted by these actual observations, I could not help taking a more contemplative and extensive view of the vast inland navigation of these United States, and could not but be struck with the immense diffusion and importance of

it, and with the goodness of that Providence who has dealt his favors to us with so profuse a hand. Would to God we may have wisdom enough to improve them! I shall not rest contented until I have explored the western country, and traversed those lines (or a great part of them), which have given bounds to a new empire."

1784, November 3. Christopher Colles, an engineer, presented to the assembly a memorial proposing improvements in the navigation of the Mohawk river, and requested state aid for this purpose. The memorial was also presented to the senate, but no action was taken except to refer it to a committee, which made no report.

1784, November 6. The assembly committee to whom the Colles memorial was referred made a report, which was concurred in, to the effect that the "laudable proposition merits encouragement, but that it would be inexpedient for the legislature to cause that business to be undertaken at public expense." The committee suggested that "if Mr. Colles, with a number of adventurers (as by him proposed), should undertake it, they ought to be encouraged by a law giving and securing unto them, their heirs and assigns forever, the profits that may arise by the transportation, under such restrictions and regulations as shall appear to the legislature necessary for that purpose; and authorizing them to execute that work through any lands or improvements on payment of the damages to the proprietors, as the same shall be assessed by a jury."

1785, March 31. Mr. Colles presented another petition relating to the removal of obstructions in the Mohawk river.

1785, April 5. The committee to whom the Colles memorial was referred made a report, which was concurred in, that the objects sought "would be productive of the most beneficial consequences to the state;" and

recommended an appropriation of \$125 to enable Mr. Colles to make an "essay" and lay a draft thereof before the legislature at their next meeting.

1786, February 1. Christopher Colles presented a petition and report relative to the navigation of the Mohawk river. Following this report a bill was introduced, but not passed, "for improving the navigation of the Mohawk river, Wood creek and Onondaga river, with a view of opening an inland navigation to Oswego, and for extending the same, if practicable, to Lake Erie."

1787. The possibilities of water communication between the Great Lakes and the ocean were considered not only by conservative statesmen and practical engineers, but the idea was expressed in the general literature of this period. A notable instance of the effect of the policy of expansion, which gave promise of such large results to the young nation just beginning a great career, and which inspired the imagination with unbounded hopes of results to be achieved by the development of arts, literature and commerce, is found in the ambitious poem called "The Vision of Columbus," published this year by Joel Barlow, one of the early American poets, and dedicated to Louis XVI., of France. In this "vision" the great discoverer witnesses the unfolding of America's greatness, including many aspects of growth and development now familiar to the world. Among other things there is presented to him the scene

"Where laboring Hudson's glassy current strays,  
York's growing walls their splendid turrets raise;  
Albania, rising in her midland pride,  
Rolls her rich treasures on his lengthening tide."

But the spirit of prophecy was upon him, and he saw far beyond the flowing tides of the Hudson, and the growing cities on her shores.

"He saw, as widely spreads the unchannel'd plain,  
Where inland realms for ages bloom'd in vain,  
Canals, long-winding, ope a watery flight,  
And distant streams and seas and lakes unite."

"From fair Albania, tow'rd the falling sun,  
Back thro' the midland, lengthening channels run,  
Meet the far lakes, their beauteous towns that lave,  
And Hudson join to broad Ohio's wave."

These quotations remind us of the speeches of Dr. Hayes in the assembly of 1878, when, with poetic prose, he so eloquently urged the adoption of a policy under which New York should continue to grow and prosper and utilize the Hudson in transporting an expanding commerce brought to it through the Erie canal. We recall also Judge Cady's speech in the Convention of 1894, in which he pointed out the close, if not inseparable, connection between that canal and the "sovereignty and material prosperity of an imperial state."

1788, September. Elkanah Watson, in his Journal, suggested a canal connecting the Mohawk river with Wood creek, and, by other locks and canals, making a communication between Hudson's river and Lake Ontario.

1791, January 5. Governor George Clinton, in his speech to the legislature, said that "our frontier settlements, freed from the apprehensions of danger, are rapidly increasing, and must soon yield extensive resources for profitable commerce; this consideration forcibly recommends the policy of continuing to facilitate the means of communication with them, as well to strengthen the bands of society as to prevent the produce of those fertile districts from being diverted to other markets."

1791, March 24, chapter 53. The commissioners of the Land Office were authorized to cause the explora-

tion, and the necessary survey, of the ground situated between the Mohawk river, at or near Fort Stanwix, and the Wood creek, in the county of Herkimer; and also between the Hudson river and Wood creek, in the county of Washington; and to cause an estimate to be made of the probable expense that would attend the making of canals sufficient for loaded boats to pass, and report the same to the legislature at their next meeting. One hundred pounds were appropriated for expenses.

1792, January 5. Governor George Clinton, in his annual speech to the legislature, referred to the act of 1791, requiring the commissioners of the Land Office to make an examination concerning proposed canals, and submitted their report, "which ascertains the practicability of effecting this object at a very moderate expense; and I trust that a measure so interesting to the community will continue to command the attention due to its importance, and especially as the resources of the state will prove adequate to these and other useful improvements without the aid of taxes."

1792, March 30. Chapter 40 provided for the incorporation of two lock navigation companies; one, the Western Inland Lock Navigation Company, "for the purpose of opening a lock navigation from the now navigable part of Hudson's river, to be extended to Lake Ontario and to the Seneca lake;" and the other, the Northern Inland Lock Navigation Company, for a like purpose from the now navigable part of Hudson's river to Lake Champlain. A subsidy of \$25,000 was to be paid by the state,—one half to each,—as a "free gift;" and the canals were to be completed within fifteen years. Amended as to some details by acts passed December 20, 1792 (chap. 8), March 9, 1793 (chap. 49), and March 31, 1795 (chap. 38).

1794, January 7. Governor George Clinton, in his

annual speech to the legislature, referring to the lock navigation companies and their work, said that, "although the care of improving and opening these navigations be committed to private companies, they will require, and no doubt, from time to time, receive, from the legislature every fostering aid and patronage commensurate to the great public advantages which must result from the improvement of the means of intercourse."

1796, January 6. Governor John Jay, in his annual speech to the legislature, said: "The ultimate connection that subsists between our agriculture, commerce, and navigation, strongly recommends the policy of facilitating and multiplying the means of intercourse between different parts of the state."

1796, April 11. Chapter 61 authorized the state treasurer to loan the Western Inland Lock Navigation Company £15,000, to be secured by mortgage of the company's property at Little Falls; also authorized the keeper of military stores to loan to the company a ton and a half of powder.

1796. The Western Company completed a canal at Little Falls  $2\frac{3}{4}$  miles long, with five locks, also a canal at German Flats,  $1\frac{1}{4}$  miles in length.

1797. The Western Company completed a canal from the Mohawk to Wood creek,  $1\frac{3}{4}$  miles only, making a total of  $5\frac{3}{4}$  miles opened by the company in two years. The character of the work is indicated by the fact that there were nine locks in these three canals.

1797, March 17. Chapter 36 authorized the Western Inland Lock Navigation Company to receive \$250,000 from Wilhelm Willink and others, aliens, who, in consideration of such payment, were to receive privileges additional to those conferred by chapter 58, Laws 1796, regarding their right to hold land in this state.

1798, April 5. Chapter 92 incorporated the Niagara

Canal Company "for the purpose of opening a canal and lock navigation between the waters of Lake Erie and those of Lake Ontario, from the most convenient place above the falls of Niagara at or near Steadman's landing, to the most convenient place below said falls, and nearly opposite to Queens Town landing." The company was also authorized to use the water in the canal for hydraulic or manufacturing purposes, or lease, let, grant, or convey the same for a limited time. The canal was to be completed within ten years, and the canal locks were to be large enough to allow the free passage of boats 70 feet long, 16 feet wide, and 4 feet draught. The act authorized the use of state lands for the canal, and 100 feet on each side thereof for towing paths, 5 acres at each end of the canal for the erection of buildings, "and the further quantity of 40 acres in one or more place or places in squares, as the said corporation shall judge most convenient, for erecting mills and other hydraulic works," with the right to take from such land timber, stone, and other materials for the necessary use of the company.

1800, December 20. Gouverneur Morris, in a letter to John Parish, said that "one tenth of the expense borne by Britain in the last campaign would enable ships to sail from London through Hudson's river into Lake Erie."

1801. Conversation in Washington, D. C., soon after the Parish letter, between Gouverneur Morris, Robert Morris, and others. Gouverneur Morris suggested tapping Lake Erie, and bringing the waters of that lake to the Hudson by an inclined plane or by a water table. Spark's *Life and Writings of Gouverneur Morris*, vol. 1, page 499. See also Lossing's *Life and Times of Philip Schuyler*, vol. 1, page 471.

1802, April 2. Chapter 97 authorized the comptroller,

on behalf of the state, to take stock in the Western Inland Lock Navigation Company.

1803. Conversation at Schenectady between Gouverneur Morris and Simeon De Witt, surveyor general of New York, in which Mr. Morris suggested "tapping Lake Erie and leading its waters in an artificial river directly across the country to Hudson's river."

Mr. De Witt, in a letter to William Darby, dated February 25, 1822, relating this conversation and other incidents, said that "the merits of first starting the idea of a direct communication by water between Lake Erie and Hudson's river, unquestionably belongs to Mr. Gouverneur Morris."

1806, December 2. President Jefferson, in his annual message to Congress, suggested the application of the surplus revenues to the "great purposes," among others, "of roads and canals. By these operations new channels of communication will be opened between the states; the lines of separation will disappear; their interests will be identified, and their union cemented by new and indissoluble ties."

1807, March 2. The United States Senate adopted the following resolution:

"Resolved, that the Secretary of the Treasury be directed to prepare and report to the Senate, at their next session, a plan for the application of such means as are within the power of Congress, to the purposes of opening and making canals; together with a statement of the undertakings of that nature which, as objects of public improvements, may require and deserve the aid of government; and also a statement of works of the nature mentioned which have been commenced, the progress which has been made in them, and the means and prospect of their being completed, and such information



as, in the opinion of the Secretary, shall be material in relation to the objects of this resolution."

1808, January 26. Governor Daniel D. Tompkins, in his annual speech to the legislature, referring to the fact that our external commerce was almost entirely cut off, and that it was not improbable that an appeal to arms would soon be made, said it was "peculiarly important to adopt all measures in our power, in order to increase the means of supplying ourselves, and to encourage those arts which contribute to the support and comfort of human life; to facilitate interior communication, and to invigorate the enterprising spirit of our country."

1808, February 4. Joshua Forman presented a concurrent resolution in the assembly, providing for a joint committee of the senate and assembly "to take into consideration the propriety of exploring and causing an accurate survey to be made of the most eligible and direct route for a canal, to open communication between the tide waters of the Hudson and Lake Erie, to the end that Congress may be enabled to appropriate such sums as may be necessary to the accomplishment of that great national object." The senate concurred in the resolution.

1808, March 21. The joint committee made a report favoring a canal between the Hudson river and Lake Erie, referring to the action of the President in "recommending an appropriation of a portion of the surplus revenues for improving by canals the inland navigation of the country;" presenting for the consideration of the national government the state of New York "as pre-eminently distinguished on the map of our country for its commercial advantages;" and urging "that speedy measures ought to be adopted on the part of this state for ascertaining the best route of communication by canals between the tide waters of Hudson river and the great western lakes, and for making an accurate survey and

charts, to be transmitted to the President of the United States."

The report was accompanied by a resolution, presented by the committee, which was adopted the same day, and concurred in by the senate April 6, directing the surveyor general to make a survey, map, and chart of a route for a canal between Hudson river and Lake Erie; and transmit a copy of the map and chart to the President of the United States.

1808, April 4. Albert Gallatin, Secretary of the Treasury, in compliance with the Senate resolution of March 2, 1807, made a report to the Senate, which included surveys and estimates for a canal between Hudson river and Lake Champlain, between Hudson river and Lake Ontario, by the Mohawk river and Wood creek, and between Lake Ontario and Lake Erie, around Niagara Falls. The report refers to the incorporation of the Northern, Western, and Niagara canal companies, describing the work which had then been done by each.

1808, April 11. \$600 was appropriated for the expenses of the surveyor general.

1808, June 11. James Geddes was appointed by the surveyor general to make the survey required by the foregoing resolution of the legislature.

1809. James Geddes made his report to the surveyor general.

1810, March 13. Senator Jonas Platt, of Oneida county, afterwards a justice of the supreme court, offered a resolution, which was concurred in by the assembly, appointing a commission, composed of Gouverneur Morris, Stephen Van Rensselaer, DeWitt Clinton, Simeon De Witt, William North, Thomas Eddy, and Peter B. Porter, to explore and survey routes for canals from Hudson river to Lake Ontario and Lake Erie.

1810, April 5. The legislature appropriated \$3,000 for the expenses of the commission.

1811, January 29. Daniel D. Tompkins, in his annual speech to the legislature, referring to the report of the commissioners appointed in 1810, said: "The importance of that subject highly merits, and, I doubt not, will receive, your early and serious attention."

1811, March 2. The commissioners appointed under the Platt resolution submitted an extended report "drawn by the masterly pen of Gouverneur Morris," treating the whole subject with great detail, estimating the cost of the canal at \$5,000,000, with the following suggestions:

"It remains, therefore, to determine whether this canal should be at the cost of this state or the Union. If the state were not bound by the Federal band with her sister states, she might fairly ask compensation from those who own the soil along the great lakes for the permission to cut this canal at their expense; or her statesmen might deem it still more advisable to make the canal at her own expense, and take for the use of it a transit duty, raising or lowering the impost, as circumstances might direct for her own advantage. This might be the better course if the state stood alone. But, fortunately for the peace and happiness of all, this is not the case; we are connected by a bond which, if the prayers of good men are favorably heard, will be indissoluble. It becomes proper, therefore, to resort for the solution of the present question, to principles of distributive justice. That which presents itself is the trite adage that those who participate in the benefit should contribute to the expense. . . . The wisdom as well as justice of the national legislature will, no doubt, lead to the exercise on their part of prudent munificence."

1811, March 2. DeWitt Clinton, following the presentation of the foregoing report, asked for and obtained

leave of the senate to bring in a bill, which was passed on the 8th of April, "to provide for the improvement of the internal navigation of the state." The act contained the following preamble:

"Whereas a communication by means of a canal navigation between the Great Lakes and Hudson's river will encourage agriculture, promote commerce and manufactures, facilitate a free and general intercourse between different parts of the United States, and tend to the aggrandizement and prosperity of the country, and consolidate and strengthen the Union."

The commissioners were authorized to consider "all matters relating to the said inland navigation," and to make application on behalf of this state to the Congress of the United States, or to the legislature of any other state or territory, to co-operate and aid in this undertaking. The act appointed a commission consisting of Gouverneur Morris, Stephen Van Rensselaer, De Witt Clinton, Simeon De Witt, William North, Thomas Eddy, Peter B. Porter, Robert R. Livingston, and Robert Fulton, and appropriated \$15,000 for their use.

1812, March 14. The commissioners submitted to the legislature a report of their proceedings, from which it appears that De Witt Clinton and Gouverneur Morris were especially deputed to visit Washington, and present to the President and Congress the question of national aid in the project of constructing a canal across the state of New York. President Madison seems to have favored the canal, but withheld his approval of the plan of national aid, on account of his scruples concerning the interpretation of the Constitution. He submitted the matter to Congress by a special message, transmitting a copy of the New York statute, but without any recommendation.

Congress, after some fluctuations of sentiment among

members of the committee to which the matter was referred, declined to engage in the project of the proposed canal.

The commissioners further said that, the canal having been offered to the national government, and not accepted, "the state is at liberty to consult and pursue the maxims of policy. These seem imperatively to demand that the canal be made by her, and for her own account, as soon as circumstances will permit. It is believed that a revenue may be derived from it, far exceeding the interest of what it will cost, and it seems just that those of our citizens who have no immediate interest in the work should find retribution for their share of the cost (if any) in a revenue which will lessen their future contributions. Whether this subject be considered with a view to commerce and finance, or on the more extensive scale of policy, there would be a want of wisdom, and almost of piety, not to employ for public advantage those means which Divine Providence has placed so completely within our power."

1812, June 19. Chapter 231 authorized the commissioners, appointed under the act of 1811, to purchase the property and interests of the Western Inland Lock Navigation Company, acquire other property for canal purposes, and borrow \$5,000,000 on a 15-year credit.

1813, April 6. Chapter 144 incorporated the Seneca Lock Navigation Company "for the purpose of improving the navigation between the Seneca and Cayuga lakes." The state comptroller was directed to subscribe 500 shares. The surveyor general was to be a director. Adjoining landowners might use the waters for mills or hydraulic purposes.

1815. City Hotel meeting held late in the year, in New York, called by Thomas Eddy, with the approval of Judge Jonas Platt and De Witt Clinton. William Bayard

was chairman, John Pintard secretary. A committee was appointed to circulate a memorial, composed of Mayor Clinton, Thomas Eddy, Cadwallader D. Colden, John Swartwout.

1816. The memorial authorized by the City Hotel meeting, and which was prepared by De Witt Clinton, was presented to the legislature. This is one of the ablest and most comprehensive documents ever prepared on the subject of a great public improvement, and shows the wide grasp and extended knowledge possessed by Mr. Clinton. It is evident that this memorial made a deep impression, and was a very efficient aid in creating public sentiment in favor of the canal enterprise.

1816, February 2. Governor Tompkins, in his annual speech to the legislature, made the following observations concerning internal navigation :

“The difficulties and expenses which attended the transportation of public stores to frontier posts, during the late war, have demonstrated the necessity of a legislative intervention to encourage the establishment of good roads from the Hudson to the St. Lawrence, and to Lake Erie, Ontario, and Champlain. . . . It will rest with the legislature whether the prospect of connecting the waters of the Hudson with those of the western lakes and of Champlain is not sufficiently important to demand the appropriation of some part of the revenues of the state to its accomplishment, without imposing too great a burthen upon our constituents.”

Discussing the subject further, Governor Tompkins remarked, with rather too much hopefulness, that the “first route being an object common with the states of the West, we may rely on their zealous co-operation in any judicious plan that can perfect the water communication in that direction. As it relates to connecting the waters of the Hudson with those of Lake Champlain, we

may, with equal confidence, count on the spirited exertions of the patriotic and enterprising state of Vermont."

1816, April 17. Chapter 237 provided for the "improvement of the internal navigation of this state." Stephen Van Rensselaer, De Witt Clinton, Samuel Young, Joseph Ellicott, and Myron Holley were appointed commissioners "to consider, devise, and adopt such measures as may or shall be requisite to facilitate and effect the communication by means of canals and locks between the navigable waters of Hudson's river and Lake Erie, and the said navigable waters and Lake Champlain."

The commissioners were authorized to apply to the United States, or to any other state or territory benefited, or to any person or corporation, "for cessions, grants, or donations of land or money for the purpose of aiding the construction" of the proposed canals. This statute repealed the acts of 1811 and 1812 above cited.

1817, April 15. Chapter 262 established a canal fund, to consist of appropriations, grants, and donations made for that purpose by this state, by Congress, by other states, or by corporations, companies, or individuals, and created commissioners of the canal fund, consisting of the lieutenant governor, comptroller, attorney general, surveyor general, secretary of state, and treasurer. The commissioners appointed by the act of 1816 were continued, under the name of canal commissioners.

The canal commissioners were authorized to "commence making said canals" by opening communications by canals and locks between the Mohawk and Seneca rivers, and between Lake Champlain and the Hudson river; to receive from the commissioners of the canal fund, and expend, moneys necessary for such construction; to establish reasonable tolls, and make rules for

their collection and payment to the commissioners of the canal fund.

The canal commissioners were authorized to acquire the property of the Western Inland Lock Navigation Co. The act imposed a tax of \$.12½ per bushel on all salt manufactured in Onondaga and in the western district, also \$1 for each passenger by steamboat on the Hudson river, for each trip over 100 miles, and half that sum for any distance less than 100 miles, and over 30 miles. The proceeds of the tax on salt and steamboat passengers, and also on all sales at auction, after deducting \$23,500 annually appropriated to the hospital, economical school, orphan asylum society, and \$10,000 appropriated annually for the support of foreign poor in the city of New York, the net proceeds from the Western Inland Lock Navigation Company, the net proceeds from the canals, and all grants and donations made or to be made for the purpose of making said canals, were appropriated for canal purposes.

1817, July 4. First work on state canal begun at Rome. "This important act, the commencement of the Erie canal, was performed with some ceremony. Mr. Clinton, the president of the Board, who had been chosen governor at the previous election, in 1817, attended, with the other canal commissioners and engineers. The anniversary of our independence, since the declaration of which only forty-one years had elapsed, was selected as an auspicious day to begin this great work. The first earth was removed from the canal path, amidst the acclamations of a large concourse of people, exulting in the past, enjoying the present, and anticipating the future."

1818, January 27. Governor De Witt Clinton, in his annual speech to the legislature, said :

"The internal trade of a country is equally essential to



the prosperity of agriculture, of manufactures, and of commerce; for, embracing the interests of all, it extends its enlivening influence to every important department of human industry. But it can never be advantageously nor extensively pursued and cultivated without easy and rapid communications by water courses, roads, and canals; and it is among the first duties of government to facilitate the transportation of commodities, by opening and ameliorating all the channels of beneficial intercourse; for, in peace or in war, it is equally essential to our cardinal interests. . . .

“I congratulate you upon the auspicious commencement and successful progress of the contemplated water communications between the great western and northern lakes and the Atlantic ocean. Near sixty miles of the western canal have been contracted for to be finished within the present year, and it is probable that the whole of the northern canal will be disposed of in the same manner before the ensuing spring. . . .

“With respect to the debt which will be incurred in the prosecution of internal improvements, there can be no doubt but that light tolls on our own commodities, and higher transit duties on foreign productions, will, in a few years, not only accumulate a fund for its extinguishment, but be a prolific source of revenue for the general purposes of government. And this subject may, in other respects, form the basis of important arrangements in our system of political economy. It may be rendered a powerful instrument for encouraging our own manufactures and for restraining the pernicious use of foreign commodities.”

1818, March 6. Chapter 23 incorporated the Chittenengo Canal Co. for the purpose of “making a canal from the Chittenengo village to the great western canal.”

1819, January 5. Governor De Witt Clinton, in his

annual speech to the legislature, reviewed at some length the work already accomplished in the construction of the canals, recommended further legislation, and concluded with the following observation: "And, when we contemplate the immense benefits which will be derived from the consequent promotion of agriculture, manufactures, and commerce; from the acquisition of revenue; from the establishment of character; and from the consolidation of the Federal Union, we must feel ourselves impelled, by the most commanding motives, to proceed in our honorable career by perfecting, with all possible expedition, this inland navigation."

1819, April 7, chapter 105. The commissioners of the canal fund were authorized to borrow an additional sum of \$600,000. The canal commissioners were authorized to extend the canals from Seneca river to Lake Erie, also from the eastern terminus of the great western canal to the Hudson river, between Fort Edward and the navigable waters of the Hudson river, and between the great western canal and the salt works in the village of Salina.

1820, January 4. Governor De Witt Clinton, in his annual speech to the legislature, after again referring to the satisfactory progress of the work, said: "The efforts of direct hostility to the system of internal improvements will, in future, be feeble. Honest and well-disposed men, who have hitherto entertained doubts, have yielded them to the unparalleled success of this measure. But, as there is great reason to apprehend the exertions of insidious enmity, I consider it my solemn duty to warn you against them. As the canal proceeds to the west, the country east will, of course, be accommodated, and in proportion to its progress to completion, in that ratio will it be considered more easy to combine a greater mass of population against its further extension. Attempts have already been made to arrest its progress west of the

Seneca river, and it is highly probable that they will be renewed when the work is finished to the Genesee."

He further remarked that the "honor and prosperity of the state imperiously demand the completion of the whole of this great work."

1820, March 30. Chapter 117, amended act of 1817, suspended the steamboat tax conditionally, and imposed a general tax of \$5,000 in lieu thereof.

1820, November 7. Governor De Witt Clinton, in his annual speech, again reviewed the progress of the work of construction of the canals, and urged the speedy completion of the enterprise.

1821, February 9, chapter 36. Commissioners of the canal fund were authorized to make an additional loan of \$2,000,000. The statute also authorized the legislature to appoint an additional canal commissioner. Canal commissioners should hold office during the pleasure of the legislature, and might be removed by a concurrent resolution of the two houses.

1822, January 2. Governor De Witt Clinton, in his annual speech to the legislature, communicated to that body the condition of the canal enterprise, stating the number of miles completed, and the prospect concerning the remainder, and observed: "We cannot too highly appreciate the importance of the artificial navigation now in train of rapid and successful completion." He urged the legislature to cherish "a prospective spirit, and to provide in season for the exigencies of future times."

1823, January 7. Governor Joseph C. Yates, in his first message to the legislature, said:

"It gives me much pleasure to state that the canal system, so wisely adopted and successfully pursued in the state, promises to realize the expectations of the community. The convenience already afforded to the inhabitants by the facility with which the products of the coun-

try may be brought to market has exceeded the most sanguine hopes of its warmest supporters."

1823, October 8. The Albany basin was opened. The first canal boat, De Witt Clinton, passed through the lock into the Hudson river.

1824, January 6. Governor Yates, in his annual message to the legislature, said, in part, concerning canals:

"During the last year, the Champlain canal has been rendered navigable to the Hudson river, at the city of Albany, and the completion of the Erie canal, the ensuing season or the summer following, is rendered morally certain; so that the period is not distant when we shall fully experience the benefits and important advantages secured to our citizens by this unexampled improvement. A more propitious era, connected with the growth and prosperity of our country, cannot well be imagined; and in taking a retrospective view of the enterprise and patriotism of our predecessors, it is difficult to suppress the most endearing emotions of respect and gratitude for the memory of those with whom this vastly important and useful project of connecting the western and northern lakes with the waters of the Hudson first originated."

1824, April 12. De Witt Clinton was removed by the legislature from the office of canal commissioner by a vote of 21 to 3 in the senate, and 64 to 34 in the assembly. This proceeding was taken on the last day of the session, just before adjournment, without charges, and almost without debate. It is evident that the people did not approve the action of the legislature, for Mr. Clinton was elected governor again by a very large majority within seven months after his removal, and on the first of January, 1825, resumed this office. It was thus his happy fortune as chief magistrate, to bring to a successful completion the enterprise to which he had devoted his energies and talents for fifteen years.

1825, January 4. Governor De Witt Clinton, on resuming the office of governor, after an interregnum of two years, in his annual message to the legislature, presented the subject of canals, and said:

“The Erie canal (which is the longest in the world, and which, in conjunction with the Champlain canal, and the contemplated communications with Lake Ontario and the minor lakes, will produce the most extensive and important inland navigation ever witnessed) would have been finished last season, had it not been for the intervention of unexpected impediments. . . . I consider these works as but the first in a series of great undertakings. We must, however, pursue our objects with prudence as well as with energy, in every stage of our progress, looking for support in the wisdom and patriotism of the people. And it is a source of high felicitation to know that the debt may be speedily satisfied without resorting to taxation, without discontinuing our efforts for similar improvements, and without staying the dispensing hand of government in favor of the great departments of education, literature, and science, or the cardinal interests of productive industry.”

1825, October 26. The Erie canal was completed. The Seneca Chief, the first canal boat for New York, left Buffalo, having on board Governor De Witt Clinton, Lieutenant Governor James Tallmadge, and other prominent citizens.

1825, November 4. The Seneca Chief arrived at New York, *via* the Erie canal and the Hudson river, a distance of 513 miles.

The Convention of 1821 found a canal policy already established and in practical operation, although the canals were not yet completed. The promoters of the canal enterprise had all along expressed the opinion that the canals would pay for themselves, and that, while money

on the credit of the state had been borrowed for their construction, this debt could and would be paid from the tolls, without any direct taxation.

The legislature, by the acts of 1817 and 1820, above cited, had provided for the payment of this debt by the application of the proceeds derived from the salt springs, and from licenses to auctioneers, and from the steamboat passenger traffic. The effect of the provision concerning canals, adopted by the Convention, was to fix in the Constitution, beyond danger of interference or change, the policy already established by the legislature. This insured a permanent and continuing fund for the gradual payment of the canal debt. The proposition to include this subject in the Constitution was vigorously opposed in the Convention, principally on the ground that the administration of this new department of public affairs would necessarily be subject to some fluctuation, and that it ought to be left to the discretion of the legislature rather than to be fixed by any cast-iron constitutional provision, which would prevent the legislature from making changes which might be found necessary after the canals were completed; and it was further urged in this connection that the legislature could be trusted to do whatever was for the public interest. In the course of the debate a sectional feeling between the eastern and western parts of the state was manifested, and the whole subject provoked very animated discussion. A large majority of the Convention thought that the faith of the state by its Constitution should be pledged for the maintenance of the canal policy already established, and that there should be no opportunity for the diversion to other purposes of funds already devoted to the payment of the canal debt, and a consequent resort to general taxation. The Convention evidently felt assured of the success of the canal enterprise to which the state had committed

itself, though it was not completed until four years after the Convention; and the debates evince a breadth of view of public affairs, and the confidence in the future which was a marked characteristic of the statesmen of that period.

The subject of canals occupies only a small space in the Constitution, but it embraced the following propositions:

Canal tolls at a rate not less than that already fixed by the canal commissioners were established and continued.

The canal tolls, the duties on salt, auction duties, and the revenue raised in lieu of the steamboat passenger tax, were inviolably appropriated for canal purposes, without change of rate or diversion until all expenses and debts incident to the construction of the canals were fully paid.

The legislature was prohibited from selling or disposing of the salt springs, or salt lands, or the canals.

#### BILL OF RIGHTS.

Sir William Blackstone in his Commentaries (I, 124) says that the "principal aim of society, and the primary end of human laws, are to maintain, regulate, and to protect the absolute rights of individuals; namely, the right of personal liberty, the right of personal security, the right of private property;" to which Chancellor Kent added, "the right to the free exercise and enjoyment of religious profession and worship."

It has been deemed essential that these rights, and others logically deducible from them, be stated in concrete written form in a constitution, statute, or other instrument, so that all the people entitled to their enjoyment may claim the privileges conferred by them whenever their liberties are invaded.

Blackstone further says that these rights are "private immunities," which include "either the residuum of natural

liberty which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges which society hath engaged to provide in lieu of the natural liberties so given up by individuals;" and that the enjoyment of these rights has sometimes been subject to "serious fluctuation," sometimes "depressed," and at other times even "too luxuriant," but that the "vigor of our free Constitution has always delivered the nation from these embarrassments," and the fundamental articles have been asserted as often as they were thought to be in danger.

These fundamental principles of personal liberty are stated with great force and vigor in the 39th and 40th articles of Magna Charta (1215), where it is declared that,

"No freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."

"To none will we sell, to none will we deny, to none will we delay, right or justice."

The principles contained in the 39th article were reasserted by an act of Parliament, passed in the 28th year of the reign of Edward III. (1354), which provided that "no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law."

Sir James Mackintosh, commenting on the 39th and 40th articles of Magna Charta, says they contain "the Habeas Corpus and the Trial by Jury; the most effectual securities against oppression which the wisdom of man has hitherto been able to devise."

Hallam (*Middle Ages*, vol. 2, pp. 448-450) says of



the 39th and 40th articles of Magna Charta: "But the essential clauses of Magna Charta are those which protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation." Hallam further says that "it is obvious that these words [of the 39th and 40th articles] interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's charter, it must have been a clear principle of our Constitution, that no man can be detained in prison without trial. Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it became from that era, the right of every subject to demand it. . . . That writ, rendered more actively remedial by the statute of Car. II., but founded upon the broad basis of Magna Charta, is the principal bulwark of English liberty."

Charles I., soon after his accession, made a forced loan, which many people refused to pay. Some of the common people who refused were pressed into the navy; some of the gentry were imprisoned. Five of these, Sir Thomas Darnel and others, sued out their writs of habeas corpus in the King's Bench, to which the warden of the Fleet returned that they were detained under a warrant from the Privy Council by *special command of the King*. This raised a question of the power of the Crown to imprison without specific charges. This question was of vital importance to the subject, and it was contended with great ability, by eminent counsel, that a British subject could not be imprisoned at the mere pleasure of the King. The court, after long argument and much consideration, sustained the Crown, and remanded the prisoners to custody. This proceeding was in 1627, and it gave rise to the famous Petition of Right, 1628.

This petition was the next most important step in the development of the rights of English subjects. It was wrung from Charles I. by the third Parliament, in 1628. Macaulay calls this "The Second Great Charter of the Liberties of England." This petition recited various statutes and charters limiting the royal prerogative, and granting popular rights, among them Magna Charta and the Statute of 28 Edward III., above cited, and various infringements on these charters and privileges which had recently been either directed or permitted by the King, including :

The compulsory loan of money for royal purposes, and requiring persons who refused to make such loan to take an unlawful oath, and become bound to make appearance to give utterance before the Privy Council, and in other places.

The unlawful levying of taxes.

The imprisonment of several persons, contrary to Magna Charta and the Statute of Edward III., who, on a writ of habeas corpus, were found to be detained without any specific charge, but simply at the royal pleasure.

Quartering soldiers in time of peace, without the consent of the people.

Unlawfully creating extraordinary commissions for the trial and punishment of offenders by the use of martial law in time of peace, instead of resorting to the ordinary criminal procedure.

The petition included the following demands :

1. That "no man hereafter be compelled to make, or yield, any gift, loan, benevolence, tax, or such like charge, without common consent by act of Parliament."

2. "That none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusal thereof."

3. That "no freeman, in any such manner as is before mentioned, be imprisoned or detained."

4. That the soldiers and mariners may be removed, so that the people may not be burdened.

5. That the commissions for proceeding by martial law be revoked and annulled, and that no such commissions be again issued.

After some delay Charles gave a reluctant assent to this petition, and Macaulay, describing the event, says that "the day on which the royal sanction was solemnly given to this great act was a day of joy and hope. The Commons, who crowded the Bar of the House of Lords, broke forth into loud acclamations as soon as the clerk had pronounced the ancient form of words by which our Princes have, during many ages, signified their assent to the wishes of the Estates of the Realm. These acclamations were re-echoed by the voice of the capital and of the nation."

But the end was not yet; the struggle between royal prerogative and parliamentary government in the name of the people was soon renewed. Scarcely three weeks elapsed after Charles gave his assent to the great "Petition" when he began plotting to subvert or evade it. His encroachments on popular liberty finally became unendurable, and he was driven from the throne to the block.

The "Protectorate" of Cromwell was, in many respects, the beginning of a new era in English liberty, but after a short period this Protectorate was succeeded by another monarchy, and by a sovereign who forgot or ignored the obligations which the Crown owed to the people. But the people did not forget.

The decision of the court in *Darnel's Case*, denying the relief sought by the writ of habeas corpus, and announcing the doctrine that the subject could be imprisoned at the pleasure of the King, without assigning any specific

reason, caused an alarm which did not readily abate. This decision meant that the will of the King "might be deemed the law of the land" within the meaning of Magna Charta. This doctrine could not long prevail. Several efforts were made within the next few years to procure the passage of a law defining more clearly the remedies of the subject on a writ of habeas corpus. These efforts finally resulted in the enactment of chap. 2, 31 Car. II., on the 26th of May, 1679, entitled "An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonment Beyond the Seas." This is the famous habeas corpus act. It did not state any new principles, but was intended to provide ample and stringent remedies. It stands as one of the landmarks of English constitutional history, and has been the basis of modern legislation on the same subject.

Magna Charta, the Statute of Edward, the Petition of Right, and the habeas corpus act had traveled across the sea, and the colonists in New York, at their first Colonial Assembly, held in October, 1683, six years before the English Bill of Rights, passed "The Charter of Liberties and Privileges," in which they asserted for New York the rights conferred by these great instruments, so far as they were applicable to colonial conditions.

In addition to various provisions concerning local government the charter contained the following statement of fundamental principles:

1. "THAT Every ffreeholder within this province, and ffreemen in any Corporacon Shall have his free Choise and Vote in the Electing of the Representatives without any manner of constraint or Imposicon. And that in all Eleccons the Majority of Voices shall carry itt and by freeholders is understood every one who is Soe understood according to the Lawes of England."

2. "THAT Noe freeman shall be taken and imprisoned

or be disseized of his ffreehold or Libertye or ffree Customes or be outlawed or Exiled or any other wayes destroyed nor shall be passed upon adjudged or condemned But by the Lawfull Judgment of his peers and by the Law of this province. Justice nor Right shall be neither sold denied or deferred to any man within this province." Magna Charta, 39.

3. "THAT Noe aid Tax, Tallage, Assessment, Custome, Loane, Benevolence or Imposicon whatsoever shall be layed assessed imposed or levyed on any of his Majestyes Subjects within this province or Their Estates upon any manner of Colour or pretence but by the act and Consent of the Governour Councill and Representatives of the people in Generall Assembly mett and Assembled." Petition of Right.

4. "THAT Noe man of what Estate or Condicon soever shall be putt out of his lands or Tenements, nor taken, nor imprisoned, nor disherited, nor banished nor any wayes destroyed without being brought to Answer by due Course of Law." 28 Ed. III., chap. 2.

5. "THAT A Ffreeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold. And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize And none of the said Amerciaments shall be assessed but by the oath of twelve honest and Lawfull men of the Vicinage provided the faults and misdemeanors be not in Contempt of Courts of Judicature.

"ALL Tryalls shall be by the verdict of twelve men, and as near as may be peers or Equalls And of the neighbourhood and in the County Shire or Division where the fact Shall arise or grow Whether the Same be by Indictment Infermacon Declaracon or otherwise against the person Offender or Defendant." Magna Charta.

6. "THAT In all Cases Capitall or Criminall there shall be a grand Inquest who shall first present the offence and then twelve men of the neighbourhood to try the offender who after his plea to the Indictment shall be allowed his reasonable Challenges."

7. "THAT In all cases whatsoever Bayle by sufficient Suretyes Shall be allowed and taken unlesse for treason or felony plainly and specially Expressed and menconed in the Warrant of Committment provided Alwayes that nothing herein contained shall Extend to discharge out of prison upon bayle any person taken in Execucon for debts or otherwise legally sentenced by the Judgment of any of the Courts of Record within the province.

8. "THAT Noe Comissions for proceeding by Marshall Law against any of his Majestyes Subjects within this province shall issue forth to any person or persons whatsoever least by Colour of them any of his Majestyes Subjects bee destroyed or putt to death Except all such officers persons and Soldiers in pay throughout the Government." Petition of Right, 1628.

9. "THAT From hence forward Noe lands within this province shall be esteemed or accounted a Chattle or personall Estate but an Estate of Inheritance according to the Custome and practise of his Majestyes Realme of England."

10. "THAT All Lands and Heritages within this province and Dependencyes shall be free from all fines and Lycences upon Alienacons, and from all Herriotts Wards Shippes Liveryes primer Seizens yeare day and Wast Escheats and forfeitures upon the death of parents and Ancestors naturall casuall or Judiciall, and that forever; Cases of High treason only excepted.

11. "THAT Noe person or persons which professe ffaith in God by Jesus Christ Shall at any time be any wayes molested punished disquieted or called in Question

for any Difference in opinion or Matter of Religious Concernment, who doe not actually disturb the Civill peace of the province, But that all and Every such person or persons may from time to time and at all times freely have and fully enjoy his or their Judgments or Consciencies in matters of Religion throughout all the province, they behaveing themselves peaceably and quietly and not using this Liberty to Lycentiousnesse nor to the Civill Injury or outward disturbance of others."

The English people endured the reign of the second Charles with great patience; but this patience soon became exhausted when his successor, James II., began his desperate career of royal usurpation.

This part of English history is not especially pertinent here, and is mentioned only for the purpose of recalling the well-known fact that the struggle between royal prerogative and popular rights continued with varying results through sixty years, ending in the overthrow and abdication of James, in 1688, and the transfer of the crown to William and Mary. But the English people did not mean to be deceived again, and, when the crown was offered to William and Mary, they were required to give their assent to the Declaration of Right.

This Declaration, which became the English Bill of Rights, was enacted as chapter 2, passed at the second session of Parliament, 1689. This Bill of Rights was one of the immediate effects of the Revolution which resulted in the abdication of James II., who usurped and attempted to overthrow some of the most important personal rights and privileges secured by Magna Charta, and by the act of 28 Edward III.

This Bill of Rights declared:

"I. That the pretended power of suspending laws, or the execution of laws by regal authority, without consent of Parliament, is illegal.

“2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

“3. That the commission for erecting the late Court of Commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

“4. That levying money for or to the use of the Crown, by pretense of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

“5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

“6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.

“7. That the subjects which are Protestants may have arms for their defense suitable to their conditions, and as allowed by law.

“8. That election of members of Parliament ought to be free.

“9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

“10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

“11. That jurors ought to be duly impaneled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

“12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

“13. And that for redress of all grievances, and for



the amending, strengthening, and preserving of the laws. Parliament ought to be held frequently.

“And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties.”

The statute declares that all and singular the rights and liberties asserted and claimed by the Declaration are and shall be esteemed, allowed, adjudged, deemed, and taken to be “the true, ancient, and indubitable rights and liberties of the people of this kingdom.” Macaulay describes the Declaration as a “great contract between the governors and the governed,” and the “title deed by which the King held his throne, and the people their liberties.”

The privileges affirmed and granted by the Bill of Rights, and also all other liberties possessed and enjoyed by the English people, were solemnly ratified and confirmed by the Act of Settlement, 12 and 13 Wm. III. (1700), chap. 2, which closes with the following paragraph:

“And whereas the Laws of England are the birthright of the people thereof, and all the Kings and Queens, who shall ascend the Throne of this realm, ought to administer the Government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same: The said Lords Spiritual and Temporal, and Commons, do therefore further humbly pray, That all the Laws and Statutes of this realm for securing the established religion, and the rights and liberties of the people thereof, and all other Laws and Statutes of the same now in force, may be ratified and confirmed, and the same are by his Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, and by the authority of the same, ratified and confirmed accordingly.”

The transfer of the crown from James II. to William and Mary was a real revolution, and the instrument by which that transfer was effected was a revolutionary instrument. It established a new government in a new royal line, with limitations and restrictions on the royal prerogative, and an assertion of popular rights which have become permanent and irrevocable under the English Constitution. It is noteworthy here, also, that the crown was tendered to William and Mary by a convention of representatives of the people, chosen in the manner required for the election of members of Parliament, not by virtue of the usual royal writ, but by general consent, and as a voluntary act, in response to William's request for the selection of representatives with authority from the people to re-establish the government. This convention was not originally a Parliament, but it turned itself into a Parliament, and became the law-making power of the English nation. This body was in effect a constitutional convention; it established a new government, and proclaimed certain fundamental principles on which that government should be administered.

There is a striking similarity between this convention and the New York Provincial Convention of 1776. We have already noted in the chapter on the first Constitution that the first constitutional convention not only framed and put in operation a new state government, but that it also assumed and exercised legislative powers. In doing this the New York patriots, perhaps unconsciously, imitated their English predecessors who accomplished the revolution of 1688.

The English Bill of Rights, contained in the statute of William and Mary, became not only the property of Englishmen in England, but also the property of the inhabitants of the English colonies in America; and this statute was in full force in the colony of New York at the begin-

ning of the Revolution. But many of its provisions were not applicable to the new conditions incident to the separation of the colonies from Great Britain, and the establishment of a new form of government. It was quite natural, therefore, that the Provincial Convention should wish to provide for a Bill of Rights in the first Constitution, stating these rights from the American point of view.

The resolution of the Provincial Convention adopted on the 1st of August, 1776, providing for a committee to "report a plan for instituting and framing a form of government," also directed the committee 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." A Bill of Rights was not reported by the committee as a part of the Constitution, nor was such a declaration of principles adopted by the convention. The committee did, however, include in the proposed Constitution a few propositions which fairly belong in a Bill of Rights; namely, the provision that the people are the source of all authority; the provision against disfranchisement, or depriving any citizen of his rights or privileges, "unless by the law of the land, or the judgment of his peers;" religious toleration, preserving trial by jury, and prohibiting acts of attainder. But it should be noted that the Constitution, by article 35, continued in force, subject to alteration by the legislature, "such parts of the common law of England, statute law of England and Great Britain, and the acts of the legislature of the colony New York, as together did form the law of the said colony on the 19th day of April, 1775." This actually continued the English Bill of Rights as a part of the law of New York.

Many of the early state Constitutions contained elaborate Bills of Rights, based largely on the provisions of

Magna Charta, and on subsequent charters and statutes which were the outgrowth and development of the principles stated in that great document.

The legislature of New York, on the 26th of January, 1787, passed (chap. 1) "An Act Concerning the Rights of the Citizens of this State." This has since been known as the Bill of Rights. It was continued in the revisions of 1801, 1813, and also, with some modifications, in the revised statutes of 1828, by which the original act of 1787 was repealed. The Bill of Rights contained in the revised statutes is still a part of the law of New York, and many of its provisions are also in the Constitution. The Bill of Rights in its original form continued in force more than forty years, and was deemed of great value and significance by the statesmen of that period. Several of its most important features were included in the Constitution of 1821, and have since remained a part of our fundamental law. Their value as checks on the exercise of power by the majority will be noted when we take up the consideration of judicial decisions construing various statutes which have been declared obnoxious to the provisions of the Constitution which seek to secure the individual rights and privileges of the citizen.

The Bill of Rights of 1787 is so important historically and as a source of constitutional limitations that it deserves to be quoted here in full. This statute contained the following statement of principles:

First. That no authority shall, on any pretense whatsoever, be exercised over the citizens of this state but such as is or shall be derived from and granted by the people of this state.

(This is substantially a repetition of article 1 of the Constitution of 1777.)

Second. That no citizen of this state shall be taken or imprisoned or be disseised of his or her freehold or lib-

erties or free customs, or outlawed or exiled or condemned or otherwise destroyed, but by lawful judgment of his or her peers, or by due process of law.

(This is based on the 39th article of Magna Charta, with some modification not affecting the principle of the original. See also 28 Edward III., chap. 3.)

Third. That no citizen of this state shall be taken or imprisoned for any offense upon petition or suggestion unless it be by indictment or presentment of good and lawful men of the same neighborhood where such deeds be done, in due manner or by due process of law.

(This paragraph and the next seem to be based on the provision in the English "Petition of Right" against the extraordinary commissions for the trial of offenses instead of resorting to the usual judicial tribunals.)

Fourth. That no person shall be put to answer without presentment before justices, or matter of record, or due process of law according to the law of the land, and if any thing be done contrary it shall be void in law and holden for error.

(See note to paragraph 3.)

Fifth. That no person, of what estate or condition soever, shall be taken or imprisoned, or disinherited or put to death without being brought to answer by due process of law; and that no person shall be put out of his or her franchise or freehold, or lose his or her life or limb, or goods and chattels, unless he or she be duly brought to answer and be forejudged of the same by due course of law; and if anything be done contrary to the same it shall be void in law, and holden for none.

(Based on Magna Charta, chap. 39, and on 28 Edward III., chap. 3.)

Sixth. That neither justice nor right shall be sold to any person, nor denied, nor deferred; and that writs and process shall be granted freely and without delay to all

persons requiring the same, and nothing from henceforth shall be paid or taken for any writ or process but the accustomed fee for writing and for the seal of the same writ or process; and all fines, duties, and impositions whatsoever heretofore taken or demanded under what name or description soever, for or upon granting any writs, inquests, commissions, or process to suitors in their causes, shall be and hereby are abolished.

(Based on Magna Charta, article 40, with modifications, but without affecting the principle.)

Seventh. That no citizens of this state shall be fined or amerced without reasonable cause, and such fine or amercement shall always be according to the quantity of his or her trespass or offense and saving to him or her, his or her contenment; That is to say, every freeholder saving his freehold, a merchant saving his merchandize, and a mechanic saving the implements of his trade.

(Based on Magna Charta, articles 20, 21, and 22.)

Eighth. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

(English Bill of Rights, 1689, article 10, without change.)

Ninth. That all elections shall be free, and that no person, by force of arms nor by malice or menacing or otherwise, presume to disturb or hinder any citizen of this state to make free election, upon pain of fine and imprisonment and treble damages to the party grieved.

(An extension of article 8, English Bill of Rights, providing that election of members of Parliament ought to be free.)

Tenth. That it is the right of the citizens of this state to petition the person administering the government of this state for the time being, or either house of the legis-

lature, and all commitments and prosecutions for such petitioning are illegal.

(English Bill of Rights, article 5, extended so as to permit petitions to the legislature.)

Eleventh. That the freedom of speech and debates and proceedings in the senate and assembly shall not be impeached or questioned in any court or place out of the senate and assembly.

(English Bill of Rights, article 9, substituting the senate and assembly for Parliament.)

Twelfth. That no tax, duty, aid, or imposition whatsoever shall be taken or levied within this state without the grant and assent of the people of this state, by their representatives in senate and assembly, and that no citizen of this state shall be, by any means, compelled to contribute to any gift, loan, tax, or other like charge not set, laid, or imposed by the legislature of this state; and further, that no citizen of this state shall be constrained to arm himself or to go out of this state or find soldiers or men of arms, either horsemen or footmen, if it be not by assent and grant of the people of this state, by their representatives in senate and assembly.

(Based on the Petition of Right, par. 1, and also the Bill of Rights, article 4.)

Thirteenth. That by the laws and customs of this state the citizens and inhabitants thereof cannot be compelled against their wills to receive soldiers into their houses and to sojourn them there, and therefore no officer, military or civil, nor any other person whatsoever shall, from henceforth, presume to place, quarter, or billet any soldier or soldiers upon any citizen or inhabitant of this state of any degree or profession whatever without his or her consent, and that it shall and may be lawful for every such citizen and inhabitant to refuse to sojourn or quarter any

soldier or soldiers, notwithstanding any command, order, warrant, or billeting whatever.

(Based on the Petition of Right.)

The proposition was made in the Federal Constitutional Convention of 1787 to include in the Constitution a Bill of Rights, but the proposition was defeated by a tie vote. Many of the states, while acting on the ratification of the Federal Constitution of 1787, proposed numerous amendments to that instrument, many of which were intended to declare certain fundamental principles commonly included in a Bill of Rights, and an examination of the first ten amendments to the Federal Constitution will show the importance of these principles.

One of the statesmen of that day (Mr. Samuel Livermore, of New Hampshire) is reported to have said that these amendments were "of no more value than a pinch of snuff, since they went to secure rights never in danger." But more than a century of legislation and judicial construction since the adoption of the amendments demonstrate the wisdom of the statesmen who insisted on incorporating these principles in the Constitution.

The first ten amendments to the Federal Constitution were recommended to the states by Congress in September, 1789, at its first session under the Constitution.

These amendments to the Constitution of the United States assert the following principles relating to the rights and privileges of the citizen :

1. Freedom of religious profession and worship.
2. Freedom of speech and of the press.
3. Right of petition.
4. Right of the people to keep and bear arms.
5. Soldiers not to be quartered in time of peace without consent of the owner of the house, "nor in time of war, but in a manner to be prescribed by law."



6. Guaranteeing immunity from unreasonable searches and seizures.

7. Indictment necessary in prosecutions for capital or otherwise infamous crimes.

8. No person shall be deprived of life, liberty, or property without due process of law.

9. Private property shall not be taken for public use without compensation.

10. Trial by jury is preserved in civil cases where the amount in controversy exceeds \$20.

11. A person accused of crime—

*a.* Shall not be compelled to be a witness against himself.

*b.* Is entitled to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.

*c.* Must be informed of the nature and cause of the accusation.

*d.* Must be confronted with the witnesses against him.

*e.* Must have compulsory process for obtaining witnesses in his favor.

*f.* Is entitled to the assistance of counsel for his defense.

12. Excessive bail shall not be required.

13. Excessive fines shall not be imposed.

14. Cruel and unusual punishments shall not be inflicted.

15. No person shall "be subject, for the same offense, to be twice put in jeopardy of life or limb."

16. Rights not enumerated, preserved.

This brings us to the Constitution of 1821. The framers of this instrument sought to include in it all the provisions deemed necessary, which were found in the English and New York Bills of Rights, and in the first ten amend-

ments to the Federal Constitution. The Constitution of 1821 appears in full in another part of this work.

A synopsis only of the Bill of Rights is given here, for the purpose of showing the subjects included, and their continuance or evolution from earlier Bills of Rights. These provisions may be stated or summarized as follows:

1. Citizens not to be disfranchised.
2. Trial by jury preserved.
3. Creation of new courts limited.
4. Religious toleration.
5. Writ of habeas corpus.
6. Indictment necessary in prosecutions for capital or otherwise infamous crimes.
7. Accused may have counsel.
8. No person to be twice put in jeopardy.
9. Accused person not compelled to be a witness against himself.
10. No person to be deprived of life, liberty, or property without due process of law.
11. Private property shall not be taken for public use without just compensation.
12. Freedom of speech and of the press.
13. Truth may be given in evidence in libel cases.

#### NEW YORK BILL OF RIGHTS, 1905.

The Bill of Rights has become somewhat disconnected by the manner in which its various parts have been adopted, some parts being in the Constitution, others in the statutes, and several in both. It seems desirable to state here, in a connected form, the various provisions belonging in the Bill of Rights, whether in the Constitution or in statutes. In this arrangement the Constitution is given the preference, and similar statutory provisions are not repeated. This arrangement also includes pro-

visions not usually stated in a formal Bill of Rights, but which, under our Constitution, confer peculiar privileges either on the whole people or specified classes of people,—such as the right of suffrage, which is fundamental in a republican government; the common-school provision, which gives the children of the state a right to the benefits of a system of common schools; the civil service provision, which confers on certain classes of citizens superior rights in relation to positions in the public service; and the provision relative to damages for negligence causing death, which prohibits the legislature from limiting the amount which may be recovered in such cases.

1. *All authority derived from the people.*—No authority can, on any pretense whatsoever, be exercised over the citizens of this state, but such as is or shall be derived from and granted by the people of this state.

[Const. 1777, art. 1; act 1787, § 1; Rev. Stat. ¶ 1, chap. 4, § 1.]

2. *Persons not to be disfranchised.*—No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

[Magna Charta, chap. 39; Const. 1777, art. 13; N. Y. act 1787, ¶ 2; Const. 1821, art. 7, § 1; Const. 1846, art. 1, § 1; Const. 1894, art. 1, § 1.]

3. *Due process of law.*—No person shall be deprived of life, liberty, or property without due process of law.

[U. S. Const. 5th Amend.; N. Y. Const. 1821, art. 7, § 7; Const. 1846, art. 1, § 6; Const. 1894, art. 1, § 6.]

4. *Right of suffrage.*—Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election, and for the last four months a resi-

dent of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided that in time of war no elector in the actual military service of the state, or of the United States, in the Army or Navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.

[N. Y. Const. 1777, art. 7; 1821, art. 2, § 1, as amended 1826; 1846, art. 2, § 1, as amended 1864 and 1874; 1894, art. 2, § 1.]

5. *Religious toleration.*—The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

[Const. 1777, art. 38; U. S. Const. 1st Amend.; N. Y. Const. 1821, art. 7, § 3; Rev. Stat. pt. 1, chap. 4, § 9; N. Y. Const. 1846, art. 1, § 3; 1894, art. 1, § 3.]

6. *Common schools.*—The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

[Const. 1894, art. 9, § 1.]

7. *Trial by jury*.—The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law.

[Const. 1777, art. 41; 1821, art. 7, § 2; Rev. Stat. pt. 1, chap. 4, § 8; N. Y. Const. 1846, art. 1, § 2; 1894, art. 1, § 2.]

8. *Habeas corpus*.—The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

[English habeas corpus act, 31 Car. II., chap. 2, 1679; U. S. Const. art. 1, § 9, sub. 2; N. Y. Const. 1821, art. 7, § 6; Rev. Stat. pt. 1, chap. 4, § 10; N. Y. Const. 1846, art. 1, § 4; 1894, art. 1, § 4.]

9. *Justice to be speedily administered and process freely granted*.—Neither justice nor right should be sold to any person, nor denied, nor deferred; and writs and process ought to be granted freely and without delay to all persons requiring the same, on payment of the fees established by law.

[Magna Charta, chap. 40; N. Y. act of 1787, ¶ 6; Rev. Stat. pt. 1, chap. 4, § 15.]

10. *Indictments*.—No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on presentment or indictment of a grand jury.

[U. S. Const. 5th Amend.; N. Y. Const. 1821, art. 7, § 7; Rev. Stat. pt. 1, chap. 4, § 13; N. Y. Const. 1846, art. 1, § 6; 1894, art. 1, § 6.]

*11. Rights of persons accused of crime.*—In all criminal prosecutions the accused has a right to a speedy and public trial by an impartial jury, and is entitled to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor.

[U. S. Const. 6th Amend.; Rev. Stat. pt. 1, chap. 4, § 14.]

*12. Accused may appear in person or by counsel.*—In any trial, in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions.

[U. S. Const. 6th Amend.; N. Y. Const. 1777, art. 34; 1821, art. 7, § 7; Rev. Stat. pt. 1, chap. 4, § 12; N. Y. Const. 1846, art. 1, § 6; 1894, art. 1, § 6. The provision giving the accused the right to appear in person was first included in the Constitution in 1846, but it had already been made a part of the Bill of Rights in the Revised Statutes of 1828.]

*13. Accused person not compelled to be a witness against himself.*—No person shall be compelled in any criminal case to be a witness against himself.

[U. S. Const. 5th Amend.; N. Y. Const. 1821, art. 7, § 7; Rev. Stat. pt. 1, chap. 4, § 13; N. Y. Const. 1846, art. 1, § 6; 1894, art. 1, § 6.]

*14. Excessive fines.*—Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

[English Bill of Rights, 2 Wm. & M. chap. 2, 1689, art. 10; N. Y. act 1787, chap. 1, § 8; U. S. Const. 8th Amend.; Rev. Stat. pt. 1, chap. 4, § 17; N. Y. Const. 1846, art. 1, § 5; 1894, art. 1, § 5.]

*15. Twice in jeopardy.*—No person shall be subject to be twice put in jeopardy for the same offense.

[U. S. Const. 5th Amend.; N. Y. Const. 1821, art. 7, § 7; Rev. Stat. pt. 1, chap. 4, § 13; N. Y. Const. 1846, art. 1, § 6; 1894, art. 1, § 6.]

16. *Truth in libel cases, power of jury.*—In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

[Const. 1821, art. 7, § 8; Rev. Stat. pt. 1, chap. 4, § 21; N. Y. Const. 1846, art. 1, § 8; 1894, art. 1, § 8.]

17. *Search warrants regulated.*—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ought not to be violated; and no warrants can issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[U. S. Const. 4th Amend.; Rev. Stat. pt. 1, chap. 4, § 11.]

18. *Fines to be reasonable.*—No citizen of this state ought to be fined or amerced without reasonable cause, and such fine or amercement should always be proportioned to the nature of the offense.

[Magna Charta, arts. 20, 21, 22; N. Y. Bill of Rights, 1787, ¶ 7; Rev. Stat. pt. 1, chap. 4, § 16.]

19. *Private property taken for public use.*—Private property shall not be taken for public use without just compensation.

[U. S. Const. 5th Amend.; N. Y. Const. 1821, art. 7, § 7; Rev. Stat. pt. 1, chap. 4, § 13; N. Y. Const. 1846, art. 1, § 6; 1894, art. 1, § 6.]

20. *Liberty of speech and of the press.*—Every citizen may freely speak, write, and publish his sentiments on all

subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

[U. S. Const. 1st Amend.; N. Y. Const. 1821, art. 7, § 8; Rev. Stat. pt. 1, chap. 4, § 20; N. Y. Const. 1846, art. 1, § 8; 1894, art. 1, § 8.]

21. *Members of the legislature not to be questioned for speeches.*—For any speech or debate in either house of the legislature the members shall not be questioned in any other place.

[English Bill of Rights, 2 Wm. & M. chap. 2, 1689, art. 9; N. Y. Laws 1787, chap. 1, ¶ 11; U. S. Const. art. 1, § 6, sub. 1; N. Y. Const. 1846, art. 3, § 12; 1894, art. 3, § 12.]

22. *Right of petition preserved.*—No law shall be passed abridging the right of the people peaceably to assemble and to petition the government, or any department thereof.

[English Bill of Rights, 2 Wm. & M. chap. 2, 1689, art. 5; Rev. Stat. pt. 1, chap. 4, § 19; N. Y. Const. 1846, art. 1, § 10; 1894, art. 1, § 9.]

23. *Elections to be free and undisturbed.*—All elections ought to be free; and no person by force of arms, malice, menacing, or otherwise, should presume to disturb or hinder any citizen of this state in the free exercise of the right of suffrage.

[English Bill of Rights, 2 Wm. & M. chap. 2, 1689, art. 8; N. Y. act 1787, ¶ 9; Rev. Stat. pt. 1, chap. 4, § 18.]

24. *Taxes, how levied.*—No tax, duty, aid, or imposition whatsoever, except such as may be laid by a law of the United States, can be taken or levied within this state, without the grant and assent of the people of this state, by their representatives in senate and assembly; and no



citizen of this state can be, by any means, compelled to contribute to any gift, loan, tax, or other like charge, not laid or imposed by a law of the United States, or by the legislature of this state.

[Petition of Right, 1628, ¶ 1; English Bill of Rights, 2 Wm. & M. chap. 2, 1689, art. 4; N. Y. act 1787, ¶ 12; Rev. Stat. pt. 1, chap. 4, § 2.]

25. *Right to keep arms.*—A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed.

[English Bill of Rights, 1689, ¶ 7; U. S. Const. 2d Amend.; Rev. Stat. pt. 1, chap. 4, § 3.]

26. *Military service by citizens.*—No citizen of this state can be constrained to arm himself, or to go out of this state, or to find soldiers or men of arms, either horsemen or footmen, without the grant and assent of the people of this state, by their representatives in senate and assembly, except in the cases specially provided for by the Constitution of the United States.

[Petition of Right, 1628, ¶ 1; English Bill of Rights, 2 Wm. & M. chap. 2, 1689, art. 4; N. Y. act 1787, ¶ 12; Rev. Stat. pt. 1, chap. 4, § 4.]

27. *Who excused from military service.*—All such inhabitants of this state, of any religious denomination whatever, as, from scruples of conscience, may be averse to bearing arms, are to be excused therefrom by paying to the state an equivalent in money; and the legislature is required to provide by law for the collection of such equivalent, to be estimated according to the expense, in time and money, of an ordinary able-bodied militiaman.

[Const. 1821, art. 7, § 5; Rev. Stat. pt. 1, chap. 4, § 5; N. Y. Const. 1846, art. 11, § 1; 1894, art. 11, § 1; Mil. Code 1898, § 1.]

28. *Quartering of soldiers.*—No soldier can, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

[Petition of Right, 1628; N. Y. Bill of Rights, 1787, ¶ 13; Rev. Stat. pt. 1, chap. 4, § 6.]

29. *Feudal tenure.*—All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain, which, at any time heretofore, have been lawfully created or reserved.

[Const. 1846, art. 1, § 12; 1894, art. 1, § 11.]

30. *Allodial tenures.*—All lands within this state are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

[Const. 1846, art. 1, § 13; 1894, art. 1, § 12.]

31. *Escheats.*—The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people.

[Const. 1846, art. 1, § 11; 1894, art. 1, § 10.]

32. *Civil service appointments and promotions.*—Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations

which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the Army and Navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

[Const. 1894, art. 5, § 9.]

33. *Damages for injuries causing death.*—The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

[Const. 1894, art. 1, § 18.]

34. *Personal rights; discrimination prohibited.*—That all persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, public conveyances on land and water, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens. That no citizen of the state possessing all other qualifications which are or may be required or prescribed by law shall be disqualified to serve as grand or petit juror in any court of this state on account of race, creed, or color.

[Laws 1895, chap. 1042. The act prescribes penalties for its violation.]

#### COUNCIL OF REVISION.

The Council of Revision was represented by Chancellor Kent, Chief Justice Spencer, and Associate Justices Platt

and Van Ness. The attempt to overthrow the council brought out, from the judges, a very able defense; and while they did not seek to retain the council as a permanent institution, they showed that it was based on a salutary principle of administration, and that it had not abused its powers, but, on the contrary, had rendered great service to the state in preventing hasty, ill-considered, and unconstitutional legislation.

The section in the first Constitution relating to the Council of Revision was prepared by Robert R. Livingston. He became the first chancellor, and held the position twenty-four years. He was, therefore, a member of the council during all that time. According to a table used by Judge Jonas Platt in a speech on the Council of Revision, eighty-two bills were vetoed while Chancellor Livingston was a member of the council, and one hundred and twenty-eight during the forty-five years of its existence. The whole number of bills passed during this period is given as 6,590. The bills vetoed amount to less than 2 per cent of the entire number,—an average of less than three a year. Two years no bills were vetoed, and ten years show only one veto each year. Alfred B. Street published a history of the Council of Revision in 1859, and his figures differ somewhat from those given by Judge Platt, but they cover a little longer time. According to Mr. Street, the council vetoed one hundred and sixty-nine bills, fifty-one of which were passed over the veto, leaving one hundred and eighteen which did not become laws. Taking either Judge Platt's or Mr. Street's figures as the basis of an inference, it is clear that the Council of Revision was a very conservative body, and that its authority was not "dangerous," as might be supposed from the language of the Ulshoeffter committee's report. According to Judge Platt's figures, eighty-three bills were vetoed as unconstitutional. Some of these

were passed over the veto, but it is quite evident that a large number of unconstitutional bills were thus disposed of by the chancellor and judges without waiting for the law to be attacked, perhaps years after its passage, in a judicial proceeding.

The most substantial reason for abolishing the council was the intermingling of judicial and legislative functions, occasioned by requiring the judges to consider all bills passed by the legislature. The council might reject bills because it did not agree with the legislature on questions of policy; and it was charged that the council had in fact rejected bills for this reason; but it is evident, from the small number of bills vetoed, that the council did not seriously interfere with the legislature in determining matters of policy.

Governor Tompkins said he believed that the framers of the first Constitution meant to limit the jurisdiction of the Council of Revision to the consideration of constitutional objections to bills. "The council had become the third branch of the legislature, with a control equal to two thirds of all the representative branches." A suggestion was made by several delegates that the members of the council had vetoed bills from party views. Chancellor Kent replied to this insinuation, giving details of different vetoes, with the votes thereon, and concluded his statement with the following observation:

"Thus, sir, we perceive that in the cases selected to prove the predominating influence of party spirit in the council, the spirit of party was subdued by the firmness and independence of the council. I am not called here to vindicate my official conduct as a member of the council, nor am I responsible to the house for my acts in another place; but I must be permitted to say, after the charge that has been made, that for the twenty-three years in which I have had the honour to be a member of the Coun-

cil of Revision, I have always endeavored to discharge my trust without regard to party influence, and with a single reference to the intrinsic merits of the bills that have been submitted to the council. My judgment may have frequently misled me, but I have never considered myself, in my official character, as the representative of a party. My judicial appointments have been conferred upon me successively by different parties, and I have always considered myself, and have always endeavored to discharge my duty in my public character, as the impartial trustee of the community at large. I therefore deny and disclaim, so far as it respects myself, the imputation which has been cast upon the council."

Judge Platt spoke at some length on the proposition to abolish the council, giving a history of its labors, and, in closing, said :

"Let the Council of Revision descend in silence to the grave. But let no man now write any inscription on its tomb. When the feelings and interests and passions of the day shall have subsided, if I do not greatly deceive myself, impartial posterity will inscribe an epitaph on that tomb, expressive of profound veneration."

One delegate called Judge Platt's last remarks a "requiem," and it is evident from the debates that for some reason, whether justifiable or not, the council no longer enjoyed the fullest confidence of the leaders in public affairs. At this distance the impression is almost irresistible that the hostility to the council had its origin largely in partisan ambition which was sometimes defeated by the refusal of the council to sanction certain bills. Besides, the council was beyond the reach of ordinary partisan influence, for the reason that its judicial members held office during good behavior, or until they reached the age of sixty years; consequently this council was the most permanent part of the state government.

Governors might come and governors might go, but the council remained. Legislators might serve their brief term, but whatever they did in the way of legislation must pass under the scrutiny of this council.

It has already been noted that Chancellor Livingston was a member of this council for twenty-four years, and that Chancellor Kent was also a member for the same length of time. It is not surprising, therefore, that after a while a feeling should have grown up in the state that the judicial members of the council, not being responsible to the people for their appointment, nor for their continuance in office, sometimes stood in the way of schemes proposed by the dominant party in the legislature. It was suggested while the proposition to abolish the council was under discussion, that if it had limited its functions to the consideration of constitutional questions only it would have been continued as a necessary and useful part of the machinery of state government. But the council had the power, and it was its plain duty, as it is the duty of the governor now, to point out defects in bills aside from any constitutional question, for the purpose of perfecting the statutes.

The power given to the judiciary by the first Constitution, to prevent the enactment of unconstitutional laws, was of great value in shaping our early legislation, and doubtless accounts to a large degree for the few cases in our early judicial history involving the constitutionality of statutes. It would be an advantage in constructing legislation now if there were some method to determine the constitutionality of laws prior to their enactment; and it would be an improvement in our law-making machinery if the legislature and the governor had the right to require the opinion of the court of appeals as to the constitutionality of a pending bill. This opinion should, of course, be limited strictly to the question of constitution-

ality. The legislature and the governor would thus have the aid of our highest judicial tribunal while the bill is under consideration. If the court's opinion should be adverse to the bill, it could be amended or laid aside, and not be made a statute, as is now the case, with the possible resulting complications of public and private interests involved in its constitutionality. To this extent it seems clear that Mr. Livingston showed wise forethought and statesmanship in requiring the aid of the judiciary in the enactment of laws. The legislature and the governor may consult the attorney general, or seek other legal advice, but an opinion obtained from either source is not binding on the courts; and such opinions, however eminent their authors may be, cannot take the place of the solemn determination of our highest judicial tribunal, which must ultimately determine these disputed questions, and whose judgments deservedly command such high respect.

The value and importance of a resort to the judiciary in the first instance has already been noted in connection with our early legislation. Chancellor Livingston's policy might profitably be revived so far as it related to the determination of constitutional questions. There was a partial revival of its spirit in 1893, when the legislative law was amended by making it the duty of the Statutory Revision Commission, on the request of either house of the legislature, or any committee, member, or officer thereof, to "render opinions as to the constitutionality, consistency, or other legal effect of proposed legislation." The legislature very frequently consulted the Statutory Revision Commission, and procured its advice concerning pending legislation; but while the legislature might consent to be guided by the opinions of the commission, it was not bound to do so, and these opinions were only advisory, and did not have the effect of a judicial decision.



Besides, when there is no revision commission, the statute is, of course, inoperative. None of these makeshifts can take the place of judicial advice.

#### COUNCIL OF APPOINTMENT.

The destruction of the Council of Appointment had been foreordained even before the people had determined to hold a new convention, and within three weeks after the Convention met, the select committee, of which Mr. Van Buren was chairman, brought in a report providing for the abolition of the council. The organization and history of the council have already been noted, and also the reasons which actuated the statesmen of that period in desiring its abolition. But it was felt that, while as a consequence of the mistaken construction of the powers of the council under the first Constitution, as enunciated by the Convention of 1801, the council had outlived its usefulness as a desirable feature of the state government, the principle underlying it was not objectionable. Hence, several substitute plans were offered by prominent members of the Convention before it was finally agreed to transfer the confirming power to the senate. General Tallmadge proposed that the eight senators of the fourth class constitute an executive council, and that the governor should nominate, and by and with the consent of the council appoint, certain officers. This plan was rejected by a vote of 48 to 68.

Mr. Russell proposed an executive council of eight members,—one from each district,—to be elected by the people. The governor was to have a casting vote in the council, and was also given the exclusive right to nominate all state officers; but each councilor was given the exclusive right to nominate all officers whose powers were to be exercised in his district. This proposition received 36 votes. A council of appointment was also proposed

for New York city only, to be called a "Board of Electors," composed of as many members as there were wards, the people of each ward electing one.

These plans and their serious consideration by the Convention show the tenacity of habit, and the tendency to continue existing conditions. There was evident reluctance on the part of many men to have such a large confirming body as a senate of thirty-two members, but the transition was comparatively easy from four of the senators acting as a council to the whole number acting in effect as a council, although under another name. The practical result of the change was the enlargement of the council from four to thirty-two members, and vesting in the governor the exclusive right of nomination.

Thus after twenty-eight years since the nominating power of the governor had been actually disputed in the case of the appointment of Egbert Benson as a justice of the supreme court, in 1794, against the protest of the governor, George Clinton, that power was clearly and firmly fixed in the Constitution, and John Jay was vindicated.

#### MISCELLANEOUS.

The common-school fund, already established, was fixed and made permanent, with the declaration that the interest of the fund "shall be inviolably appropriated and applied to the support of common schools throughout this state." Lotteries were prohibited; the provision of the first Constitution concerning land contracts with Indians was continued; the provision of the first Constitution relative to the continuance of the common and colonial law was continued, with the exception that the provision in the first Constitution, continuing the statute law of England and Great Britain, was omitted; the provision of the first Constitution relative to royal grants was continued.

One of the subjects especially committed to this conven-

tion related to the method of amending the Constitution. The first Constitution was defective in not containing any provision for its amendment. Under that Constitution there could be no amendments, except by a convention, and probably this condition prevented many amendments, because of the unwillingness of the people to call conventions. The Convention of 1821 adopted the plan, since continued, of permitting amendments to be recommended to the people by the legislature; but, to prevent hasty action, required the proposed amendment to pass the scrutiny of two legislatures. This gives the people an opportunity to elect a new legislature while the proposed amendment is pending, and, if deemed of sufficient importance, it may receive special consideration in the election. A significant change concerning constitutional amendments will be considered under the Constitution of 1894.

The new Constitution provided that several of its most important parts should take effect on the last day of February, 1822; that members of the existing legislature should, on the first Monday of March, take an oath to support the new Constitution so far as the same should then be in effect; that elections should be held on the first Monday of November, 1822, for elective officers under the new Constitution; that commissions of all appointive officers should expire on the last day of December, 1822, and that the whole Constitution should be in force from that day.

#### CONCLUSION.

The convention act authorized the submission of the Constitution to the people either as a whole or in separate parts. The report on this subject, prepared by Mr. Root, stated that because so much of the Constitution was new, and because of the relations of its various parts to one

another, it would be impracticable to submit specific parts without reference to the remainder ; therefore the Convention determined to submit the Constitution as a whole.

The Convention directed that the Constitution be submitted to the people at an election to be held January 15, 16, and 17, 1822, and ordered the printing and distribution of five thousand copies of the Constitution, of the resolution providing for its submission, and of the Convention's address to the people.

The Constitution was adopted by the Convention at its last session on the 10th day of November, 1821, with nine negative votes. Ninety-eight delegates then signed the Constitution, and the engrossed amended Constitution thus signed was on that day delivered to the secretary of state, and deposited in his office, where it is still preserved.

President Tompkins, in his closing address, on the adjournment of the Convention, said: "It is my sincere hope that the approbation of the community may greet the result of our consultations ; and that it may accomplish the momentous objects for which we have been assembled ; and redound to the liberty, tranquillity, and permanent welfare of our constituents and of posterity."

Governor De Witt Clinton, in his annual speech to the legislature on the 2d of January, 1822, made the following observations concerning the new Constitution, which was then under consideration by the people :

"Since the adjournment of the legislature, an event has occurred of the highest importance to the people of this state. The delegates elected 'for the purpose of considering the Constitution of this state, and making such alterations in the same as they may deem proper, and to provide the manner of making future amendments thereto,' have concluded their deliberations, and presented the result for the ratification or rejection of the people,

in the shape of a new Constitution, varying essentially in many of its provisions from the present frame of government. As this subject is now under the consideration of the supreme and sovereign power of the community, the source of all legitimate government, it would be obviously improper for the derivative and subordinate authorities to interfere in their official characters with its deliberations and decisions. Whatever advice we offer, whatever determination we form, and whatever course we pursue, must be indicated in our individual capacities, as component members of a great community, acting in its sovereign character; and whenever the momentous decision is made, and whatever it may be, it will be our incumbent duty to obey implicitly the determinations of the people, and to carry into full effect their expressed volitions. Were it not for considerations so imperative, I should on this, as I trust I have on all proper occasions, have communicated with frankness and candor my views in relation to the bearing of this important question on the public welfare. It is a spectacle truly felicitating, to observe the calm and dignified moderation with which our constituents have approached this important subject, for, so far as my observation has extended, the discussions have been free from the usual asperities and agitations of the times. It is, indeed, not a question involving the views of personal ambition, the interests of party ascendancy, or the feelings of local contention. It looks to the past for enlightened instruction; to the present for wise and patriotic decision; and to the future for general and permanent benefit. To perceive a vast and growing population sitting in judgment on its own form of government, acting with intelligence, independence, and firmness, discarding minor and evanescent considerations, and consulting the greatest happiness of the greatest number, is a sublime sight, administering to the best

hopes, and answering the highest expectations, of the friends of republican government. And let us humbly supplicate the Supreme Dispenser of all good to shed his propitious influence on this occasion, and to produce a result auspicious to the stability of civil liberty and ascendancy of good government, and the prosperity of our beloved country."

The Constitution was ratified by the people by a vote of 74,732 to 41,402, and all of its provisions went into operation during that year. Thus, on the last day of December, 1822, the first Constitution of New York passed into history. It had served its purpose well. It might almost literally be said of it that it was born on the battle-field. Its authors wrote it, musket in hand. They left the arena of war at short intervals to sit in the councils of state, to construct a government for times of peace. It had some defects, not especially manifest at first, but which became apparent as the state increased in wealth, population, and commercial interests, and as new problems were presented for the consideration of the people. It was founded on correct principles; but these principles needed extension and enlargement to meet the growing needs of the state. It was a good Constitution for that time, and deserved the encomiums which it received from statesmen of that period. We may most fittingly quote here the eloquent words of Chancellor Kent, who, in the Convention of 1821, speaking of the first Constitution, said: "This state has existed for forty-four years under our present Constitution, which was formed by those illustrious sages and patriots who adorned the Revolution. It has wonderfully fulfilled all the great ends of civil government. During that long period, we have enjoyed, in an eminent degree, the blessings of civil and religious liberty. We have had our lives, our privileges, and our property, protected. We have had

a succession of wise and temperate legislatures. The code of our statute law has been again and again revised and corrected, and it may proudly bear comparison with that of any other people. We have had, during that period (although I am, perhaps, not the fittest person to say it), a regular, stable, honest, and enlightened administration of justice. All the peaceable pursuits of industry, and all the important interests of education and science, have been fostered and encouraged. We have trebled our numbers within the last twenty-five years, have displayed mighty resources, and have made unexampled progress in the career of prosperity and greatness. Our financial credit stands at an enviable height; and we are now successfully engaged in connecting the great lakes with the ocean by stupendous canals, which excite the admiration of our neighbors, and will make a conspicuous figure, even upon the map of the United States. These are some of the fruits of our present government."

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

"There has been only one period since the declaration of our independence, that the legislature of the state of New York have been called upon to perform such high and responsible duties as at this session will devolve upon you; and when we reflect upon the conduct of those who formed the first Constitution of this state, and organized a government, every well-ordered mind must be led with gratitude to bow before the throne of Grace, returning fervent thanks to the God of heaven and of earth, who raised up for us, in that time of need, men eminently endowed with great intelligence, integrity, and superior, I had almost said inspired, views of the rights and liberties of man. The checks and balances of the old Con-

stitution of this state were admirable, when judged with reference to the time in which it was adopted; just emerging from a state of colonial dependence, and while desperately, and almost convulsively, struggling to break the fetters of trans-Atlantic despotism; almost every man in the community at that time possessing high ideas of the necessity of a strong executive power, and great legislative independence; and although we have amended what we have deemed its errors, and what, in the present state of the community, were really such, yet the candid mind cannot but admire and applaud its great comparative excellence. I could not, gentlemen, withhold at this time, and on this occasion, the expression of my affection and veneration for those men, great in intellect and honesty, several of whom were personally known to many of us, who, having placed and seen their country in prosperity and the enjoyment of liberty, have gone to sleep with their fathers until the great day of retribution.

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