THE

CONSTITUTIONAL HISTORY

OF

NEW YORK

FROM THE BEGINNING OF THE COLONIAL PERIOD TO THE YEAR 1905, SHOWING THE ORIGIN, DEVELOPMENT, AND JUDICIAL CONSTRUCTION OF THE CONSTITUTION

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IN FIVE VOLUMES

VOL. II.
1822–1894

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
Rochester N. Y.
1905

E. R. ANDREWS PRINTING CO., Rochester, N. Y.

vote of 30 to 61. The provision was approved by the Convention, and appears as § 4 of article 5 of the Constitution of 1846.

THE JUDICIARY.

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 All agreed that the judicial system contained in the Constitution of 1821 should be superseded by one better suited to the large and expanding business interests of the state, and better adapted to produce harmony and unity in the administration of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

The Convention met on the 1st day of June, 1846. On the 12th a judiciary committee was appointed, composed of Mr. Charles H. Ruggles, Charles O'Conor, Charles P. Kirkland, John W. Brown, Ambrose L. Jordan, Arphaxed Loomis, Alvah Worden, George A. Simmons, Ansel Bascom, Orris Hart, John L. Stephens, George W. Patterson, and Thomas B. Sears. Several of the members of this committee had already seen extended legislative or judicial service, and some of them were afterwards chosen to important positions. Mr. Ruggles, the chairman, had already served fifteen years as circuit judge, and was, therefore, familiar with the existing judicial system. He was chosen one of the judges of the court of appeals at the first election under the new Constitution. Charles O'Conor, for many years

one of the leaders of the New York bar, devoted his great talents to the work of the Convention, giving to it his close attention, and bestowing on it the results of a large experience in the practice of his profession. Mr. Brown, soon after the Convention, was chosen a justice of the supreme court, and held the office two terms. Mr. Loomis had already served as surrogate and county judge, and soon after the Convention was chosen one of the "commissioners on practice and pleadings" under the act of 1847, passed in pursuance of the 24th section of article 6. Mr. Worden was a member of assembly in 1842, when so much important financial legislation was enacted, and again in 1845, when the Convention was called; and in 1847 he was appointed one of the "commissioners of the Code" under the act passed in pursuance of § 17 of article 1 of the new Constitution. Mr. Jordan had also been surrogate, district attorney, and attorney general. Mr. Hart had also served as surrogate.

The committee at once began the work of preparing a judiciary article, but it was not submitted to the Convention until the 1st of August. The great diversity of views on the subject, as already indicated in the sketch of the preliminary discussion, prior to the Convention, further appears from the fact that several reports were submitted, stating plans for the revision of the judiciary article. There was a majority report, three minority reports, and several independent propositions. Some debate was had on the presentation of the majority and minority reports, and the general consideration of the subject was begun on the 10th of August, and continued a month, with scarcely any interruption. The plan submitted by the majority of the judiciary committee included a court for the trial of impeachments, a court of appeals, composed of eight judges, four to be elected by the people, and four to be designated from the justices

of the supreme court having the shortest time to serve; and a supreme court, with eight judicial districts and general and special terms in circuits. The majority plan provided for thirty-two supreme court justices,—four in each district,—and authorized additional judges in the first district, composed of the city of New York. The plan also included justices' courts and other inferior courts of civil and criminal jurisdiction, to be established by the legislature. The majority report proposed to abolish county courts, and it provided no substitute for them.

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

general sessions of the peace might be held by any three district or county judges, or by one of them and two justices of the peace.

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

abolished; the plan provided for a rehearing of a case as a substitute for an appeal.

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

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

1st. The court for the trial of impeachments.—Under the first and second Constitutions this court was composed of the president of the senate, the senators, the chancellor, and the judges of the supreme court, or the major part of

them. The abolition of the court of chancery, and the reconstruction of the supreme court, by the Constitution of 1846, required a change in the composition of the court for the trial of impeachments; and the judges of the court of appeals were substituted for the chancellor and judges of the supreme court.

2d. The court of appeals.—When the Convention of 1846 was called, there was a general, if not universal, conviction that the court for the correction of errors, or, as it was familiarly called, "the court of errors," had outlived its usefulness; that a court including one entire branch of the legislature, with only a very small minority of members representing the judiciary, was not the best form of a high judicial tribunal under our system of government, and that the semipolitical and semijudicial tribunal so constituted could not be expected to work out the best results in the administration of justice. Whatever might have been the advantages of this form of tribunal as illustrated in the English House of Lords, which was the model on which the framers of the first Constitution constructed the court, the radical difference in the official tenure and constitution of the upper branch of the legislature, the unwieldy size of the court, composed, in all, of thirty-seven members, under the second Constitution, and the fact that the majority of the senators were or were likely to be laymen, made such a court an incongruous element in any well-ordered judicial system. I have already called attention to the fact that, under the first Constitution, which provided for a council of revision, there was little occasion to ask the judicial tribunals to pass on the constitutionality of statutes, for the reason that the members of these tribunals, the chancellor and judges of the supreme court, composing a majority of the Council of Revision, had already determined the constitutionality of the statutes before they were passed. One ground of criticism against

the court of errors, stated in the Convention of 1846, was that the court had never declared a statute unconstitutional. The reason alleged was that the senators, who controlled the court, were unwilling to declare unconstitutional a statute which they had passed, and which they must have considered constitutional at the time of its passage. An examination of the reported decisions of this court shows that the statement made in the Convention was not quite accurate; but it appears that only three statutes were declared unconstitutional by the court for the correction of errors, during its entire existence, from 1777 to 1847,—a period of seventy years. Of course, it is not to be assumed that the court sustained the constitutionality of statutes from the motive alleged in the Convention: but its record on constitutional questions furnished some ground for urging that a court should not be permitted to sit in judicial review of its own action as a political branch of the government.

The germ of the court of appeals has already been noted in a "court of review," suggested in an amendment proposed in the legislature in 1841. The idea of a court of appeals was also embodied in an amendment presented to the legislature of 1844, which provided for reorganizing the court of errors so as to make it consist of eight judges, one to be elected from each senate district. The Convention seemed to be unanimous in the opinion that there should be a central court, with power to review the judgments of lower tribunals, and thus preserve harmony in judicial decisions. The membership and tenure of the court, and the method of selecting its judges, presented questions which provoked serious and extended discussion, and on which there was a wide divergence of opinion. This diversity of opinion has already been noted in the several reports which came from the judiciary committee. It also appears from the various suggestions

made during the progress of the debate. The majority view, which finally prevailed, divided the court into two parts,—one part to be composed of judges elected directly by the people, and another part to be composed of justices of the supreme court, designated by a prescribed rule; and these justices were to be chosen, not by all the people, but by the inhabitants of a particular district. The argument for this division of the court into two parts, presented by the majority of the judiciary committee, in substance was that the court of errors was divided into two parts,—one part, the senators, being elected by the people, and the other, the chancellor and judges, being appointed by the governor,—and it was thought that this distinction should be preserved in the new court, giving the people the right to elect one half of the court, leaving the other half to be supplied from the judges, either appointed by the governor or elected by districts, as the Convention might ultimately determine. Another reason for this division was that the judges elected by the people might come directly from the legal profession, without any previous judicial experience, while the judges of the supreme court, who would become *ex officio* judges of the court of appeals for stated periods, would bring to the higher court the results of judicial experience in the supreme court. This effort to construct a court composed of original and also secondary elements illustrates the conservatism of the Convention in its unwillingness to cut loose from tradition and experience, and create a new court on new lines. The reform proposed by the Convention, and embodied in the Constitution, was not complete. Its results did not justify the fullest expectations of its promoters. We shall have occasion to note, when the work of the Convention of 1867 is under consideration, the grounds of objection against the half-and-half court of appeals pro-

vided by the third Constitution, and the reasons which prompted a reorganization of the court, making it a distinct and independent tribunal, uniform in its composition and in the method of selecting its members.

The opinion that a professional education was not necessary for high judicial position prevailed for a long period prior to the Convention of 1846. This is manifest from the long acquiescence in the court for the correction of errors, composed largely of laymen, and of the old court of common pleas and surrogates' courts, which also, in many counties, were composed of laymen. In this connection the fact should not be overlooked that, while the court of errors was in existence, some of its most valuable opinions were written by men without special legal training. This fact, which was known to members of the Convention, justified the assertion made by some of them, that there were many laymen amply qualified to dispose of questions relating to public affairs, and not depending on mere technical rules of law. The competency of laymen for high judicial position was suggested by Mr. Ruggles, chairman of the judiciary committee, who, in his statement accompanying the majority report, concerning the election of judges of the court of appeals, said: "This preserves and continues in the court of last resort, a popular, and, as your committee believe, a valuable, feature existing in the present court. The presence of a portion of laymen in that court, if such should be elected,—of men of extensive general knowledge and sound judgment, not educated to the legal profession,—may, in many cases, be useful. It may serve to correct the tendency which is said to exist in the minds of professional men, to be led away by habits of thought from the just conclusions of natural reason into the track of technical rules, inapplicable to the circumstances of the case, and at variance with the nature and principles of

our social and political institutions. The committee entertain no fears that a court so constituted will be unstable in its decisions, or that it will fail in paying all respect to uniform rules and established precedents." The opinion expressed by Mr. Ruggles was shared by other members of the Convention, who urged the importance of so constituting the court of appeals that prominent laymen might be chosen judges; and this view was maintained by delegates who were in favor of dividing the court,—half elected, half coming from the supreme court,—as well as by some who favored the election of the entire court, without bringing in justices of the supreme court. This suggestion that judges of the court of appeals might very properly be laymen evidently did not find favor with the people, for without exception only lawyers have been deemed eligible to that tribunal. Since the Constitution of 1846 was adopted the legislature has frequently imposed the requirement of professional training as a qualification for local judicial officers, and the modern opinion on this subject is crystallized in § 20 of article 6 of the Constitution of 1894, which provides that "no one shall be eligible to the office of judge of the court of appeals, justice of the supreme court, or, except in the county of Hamilton, to the office of county judge or surrogate, who is not an attorney and counselor of this state."

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

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

3d. *Supreme court.*—When James Graham, speaker of the Colonial Assembly of 1691, drew the act creating the supreme court, he builded better than he knew, for he made a great tribunal, which has had a great history. It has grown from the small beginning of that early day to a court with seventy-six members; and it has been, from the first, a court of general original jurisdiction, and by the act of its creation was vested with "cognizance of all pleas, Civill, Criminall, and Mixt, as fully & amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Common Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have, In & to which Supreme court, all & every person & persons whatsoever shall or may if they shall so see meet, Commence, or remove an Action, or suite the Death or Damage Laid in such Action or suit being upward of Twenty pounds And not otherwise." While other tribunals, like the court for the correction of errors, the court of chancery, the superior city courts, and the New York court of common pleas, flourished and filled a large place in our

history for a long period, and in the process of judicial development were swept away, the supreme court continued, not only unchanged in its essential features, but absorbing to a large degree the powers and jurisdiction of the other courts, which had served their purpose and were no longer needed. The first Constitution, without any express provision, assumed the continuance of the court by a mere reference; but the provision of article 35, which continued in force the acts of the colonial legislature, confirmed and continued under the Constitution the jurisdiction possessed by the supreme court on the 19th day of April, 1775. This jurisdiction was continued substantially in the same way by the Constitution of 1821, which fixed the number of judges, but did not define the jurisdiction of the court. The Constitution of 1846 for the first time declared in terms that "there shall be a supreme court having general jurisdiction in law and equity," but with the significant qualification that "the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity as they have heretofore possessed." The subject of the supreme court, as presented to the Convention of 1846, involved three important considerations: First, the abolition of the court of chancery, and the transfer of its jurisdiction to the supreme court; second, the abolition of the circuit judge system, vesting the justices of the supreme court with full power to preside at circuits, at special term, and in general term; third, while merging the powers of the old supreme court and circuit courts in one system, to be administered by one set of judges, the supreme court was to be one court, and not a specified and distinct number of courts, administering justice independently, by judicial districts.

It was evident from the tone and scope of the discussion which preceded the Convention that the court of chancery must be radically changed or abolished. It had become inadequate to dispose of a large mass of equity litigation without great expense and delay. It had become physically impossible for the chancellor to keep up with the business, and the equitable jurisdiction of the court, at first administered somewhat liberally, according to the original idea of the court of chancery, had become crystallized in a body of law and rules apparently as inflexible as the common law. The two systems of law and equity thus growing up side by side were not calculated to produce a satisfactory and harmonious administration of justice. It was evident from the first that a large majority of the Convention favored the union of the two courts, and, while a few delegates clung to both courts, and advocated their continuance, the proposition to merge law and equity jurisdiction in the supreme court was adopted without a count. This vote determined the attitude of the Convention toward the court of chancery, and its abolition was the result.

The most serious discussion relating to the subject of the supreme court was the proposed merger of law and equity in one court; and when this was agreed to the rest was mere detail. The Convention was substantially unanimous in the opinion that the circuit judge system ought to be abrogated, and there was little discussion on this subject. There was considerable difference of opinion as to the number of judges, but the Convention, by a large majority, adopted the recommendation of the judiciary committee, fixing the number at thirty-two, to be chosen for eight years, from eight judicial districts, four from each, with a provision for a possible increase in the city of New York. The supreme court ceased to be stationary, but, combining the former circuit judge system

and the supreme court, with modifications, circuits and special terms were to be held in each county, where an opportunity would be afforded to dispose of both law and equity business, with a right of appeal to a general term in the same district. An appeal could be taken from the general term to the court of appeals, which was the central and final judicial authority of the state, and whose judgments were intended to harmonize the possible conflicting opinions of the lower courts. The provision in a former Constitution was continued, prohibiting judges from holding any other office or public trust, with the additional provision that they should exercise no power of appointment to public office.

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

4th. The county court.—The court of common pleas was established by the same statute of 1691 that created the supreme court. By that statute the court of common pleas was to be held by a judge and three justices, appointed in each county for that purpose, or by any three of them, and it had jurisdiction of all common-law actions. By chapter 28 of the Laws of 1692, the jurisdiction of this court was limited by excluding actions concerning the title of land. Such was the court of common pleas when the Constitutional Convention of 1777 began its work. This Convention did not attempt to define the jurisdiction of the court, but incorporated in the Constitution some provisions relative

to the appointment and tenure of county judges. The jurisdiction was continued under the new state government by operation of article 35, which continued in force the colonial statutes. In 1787 the legislature, by chapter 10, enlarged the jurisdiction of this court by including all actions, "real, personal, and mixed, suits, quarrels, controversies, and differences" arising in the county. In 1801, by chapter 110, the jurisdiction was extended to transitory actions, although not arising in the county, and the court was also given power to grant new trials. The Constitution of 1821 did not define the jurisdiction of this court, but recognized and continued it, following substantially the provisions of the first Constitution. I have already noted, in the section on the judiciary, in the chapter on the second Constitution, the report of the judiciary committee of the Convention of 1821, recommending a county court with the jurisdiction then possessed by courts of common pleas, the right to hear appeals from judgments of justices' courts, and also with authority to admit wills to probate, and grant letters of administration; but the report was not approved in all its parts by the Convention, and the court of common pleas remained unchanged. The revision of 1813 continued the court with the same jurisdiction. The Revised Statutes of 1827–28 continued the court, with the powers and jurisdiction "which belong to the court of common pleas of the several counties in the colony of New York, with the additions, limitations, and exceptions created and imposed by the Constitutions and laws of this state." In addition to this general provision the court was vested with the powers it had possessed since 1787. In 1837 the supreme court had occasion to consider the jurisdiction of the court of common pleas in *Foot* v. *Stevens,* 17 Wend. 483. In that case Judge Cowen said that, in point of subject-matter, the jurisdiction of the court "is equal to that of

the common pleas in England, and to that of this court in respect to civil actions, with the exception of actions local to another county. It is also a court of record. . . . No doubt that it is a court of general jurisdiction as to subject-matter, united with the character of a court of record, proceeding according to the general course of common law."

This was the status of the court of common pleas as a part of our judicial system when the Convention of 1846 began its labors. The majority of the judiciary committee in that Convention proposed the abolition of the county court as then organized. The committee apparently adopted the suggestion made by Governor Seward, in his message in 1841, "that the courts of common pleas had, in a great degree, been deserted by suitors, and had the form and organization of courts of justice, while they enjoyed little of the popular respect due to such tribunals, and performed few of their important functions." Mr. Ruggles, in a statement accompanying the report, said that "in some counties, the county courts are efficient and useful in the despatch of business. In others, it is said they are not so, and are complained of as a burthen rather than a benefit to the county. In the trial of civil causes before a jury, experience has demonstrated that a single judge is more efficient than a greater number, and that those county courts in which the trial of causes is committed to some one of the judges give greater satisfaction to suitors than when they all take part in the trial." Charles O'Conor, a member of the committee, presented a minority report which continued the county court. In explaining the report he said that he "dissented from the majority in their resolution to abolish the county courts." He said, further, that he thought it to be expedient not to annihilate the county courts because they were now inefficient, as indeed all the courts were. On

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

over justices' courts, but no original civil jurisdiction. Mr. Marvin proposed that the justices of the supreme court should hold county courts.

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

The legislature, speaking through the judiciary act of 1847, declared that the county court "shall have power and jurisdiction to hear, try, and determine all matters and proceedings specially conferred by statute upon and heretofore triable and cognizable by courts of common pleas of the several counties." After conferring chamber powers on the county judge, the section closes with the declaration that "nothing in this section contained shall be deemed to confer original jurisdiction upon any county court, in any action known to the common law." Jurisdiction was then conferred on the court in a large class of common-law actions against resident defendants, and also equity jurisdiction in several cases. Existing statutes conferring powers on the court of common pleas were continued and made applicable to the county court. This effort to vest in the new county court the jurisdiction pos-

sessed by the old court of common pleas failed to a large degree, for the reason that the court of appeals not long afterwards declared that the legislature could not constitutionally clothe this court with original civil jurisdiction. Chief Judge Bronson, in *Griswold* v. *Sheldon* (1851) 4 N. Y. 581, expressed this view, but the point was not decided, because not deemed necessary in disposing of the case. This court also said in *Free* v. *Ford* (1852) 6 N. Y. 176, that the county court was not a court of general jurisdiction, as was the old court of common pleas: "On the contrary, it is a new court, with a limited statutory jurisdiction." The question came before the court again in *Kundolf* v. *Thalheimer* (1855) 12 N. Y. 593, where it was held that a provision of the Code of Procedure conferring jurisdiction on the county court in an action for assault and battery was unconstitutional: the court declaring that the legislature could not confer original jurisdiction on the county court in common-law actions. These decisions sustained the evident intention of the Convention, for it was the avowed purpose of some of its leaders to leave only two courts of original civil jurisdiction in ordinary cases; namely, the justice's court and the supreme court. The majority of the committee declared this purpose in the proposed judiciary article, and it was often stated in debate; and while the county court was restored in part, it was only to a limited degree, for the provision authorizing it was coupled with the express declaration that it should not have any original civil jurisdiction except in special cases. This purpose of the Convention is further manifest from the provision in § 5 of article 14, that on the first Monday of July, 1847, jurisdiction of all suits and proceedings originally commenced, and then pending, in any court of common pleas (except in the city and county of New York), shall become vested in the supreme court; and that suits and

proceedings commenced in justices' courts, and then pending in the court of common pleas, shall be transferred to the new county courts. Later constitutional amendments have enlarged and made more definite the jurisdiction of the county court, and an attempt was made in the Convention of 1894 to rehabilitate this court with its ancient powers and jurisdiction, but it failed, and this court continues as an inferior intermediate court of limited jurisdiction between the justice's court and the supreme court. It now has jurisdiction of a large mass of common-law litigation, but Governor Seward's remark in 1841, "that the court of common pleas had, in a great degree, been deserted by suitors," is still largely true, for comparatively few original actions are brought in the county court. It is quite possible that the Constitutional Convention of 1918 may conclude to consummate the purpose expressed by the majority of the judiciary committee in the Convention of 1846, and reiterated to some extent in the Convention of 1894, and abolish the county court, merging its general powers in the supreme court and in distinct surrogates' courts.

5th. Surrogates' courts.—The Convention of 1846 for the first time put surrogates into the Constitution. These officers and their courts were not mentioned in the first and second Constitutions. The surrogates' courts were, however, continued by operation of article 35 of the first Constitution. These courts were statutory courts, possessing, at first, powers and jurisdiction borrowed from English laws and customs, and which had gradually been developed from the jurisdiction conferred on the early Dutch governors and councils, through the colonial prerogative office, and several statutes passed during the colonial period. The earliest of these statutes was passed November 11, 1692. This act related to intestates' estates. It provided for the selection of two freeholders in

each town, who were to inquire concerning the estate of a deceased person within forty-eight hours after his interment, and, if he left property not disposed of by will, to make an inventory thereof, and deliver it to the "supervisor" of such estate, appointed in each county by the governor. The supervisor was to take charge of the estate, and dispose of it for the benefit of those interested. The widow was entitled to administer the estate of her husband. This statute also provided that letters of administration and probate of wills should be granted by the governor, or by such person as he should delegate, under the seal of the prerogative office, and that wills in Orange, Richmond, Westchester, and Kings counties should be proved in New York by the governor or such delegate. In other counties testimony on the probate of a will might be taken by the court of common pleas, or in vacation, by the judges of the court, assisted by justices of the peace; which testimony, with the will, was to be certified to the secretary's office, at New York, except that where the estate did not exceed £50 the probate of the will or letters of administration might be granted by such court or judges. In 1750 the court and judges of common pleas in Orange county were authorized to grant probate of wills and letters of administration the same as in remote counties under the act of 1692. In 1772 the powers of courts and judges of common pleas were extended to the counties of Tryon, Charlotte, Cumberland, and Gloucester.

The provincial convention which framed the first Constitution apparently gave little attention to these courts. The first Constitution provided for the appointment of a clerk of the court of probate by the judge of said court, but surrogates are not mentioned, and there was no probate court by name at that time, the general powers in such cases being vested in the governor, who, as already

noted, had authority to appoint a delegate, who was called a surrogate. In 1778 the governor's authority to grant probate of wills and letters of administration was transferred to a new officer, called the judge of probate, who was given all the power in these respects exercised by the governor during the colonial period, except the power to appoint surrogates, which power was vested in the Council of Appointment. The act of 1692 continued in force until 1787,—ninety-five years,—when it was repealed, and a general law passed, providing for the probate of wills, and settlement of estates. This law authorized the appointment of a surrogate in each county by the governor, by and with the advice and consent of the Council of Appointment, to hold during the pleasure of the council. Such surrogate had authority to grant probate of wills and letters of administration, and was given power to determine controversies on probate of wills or on granting letters of administration, subject to the right of appeal to the judge of probates.

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

6th. Justices' courts.—The Convention of 1846 materially enlarged the scope of the judiciary article, including several courts which had been recognized by former Constitutions, but whose jurisdiction had not been defined. Justices' courts belong to this class. Justices' courts are not mentioned in the first Constitution. These courts as such are not mentioned in the second Constitution, but

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

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

7th. Miscellaneous.—The Convention also included in

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

Tribunals of conciliation.—The Constitution also authorized the legislature to erect tribunals of conciliation. There was considerable discussion in the Convention over this provision, its advocates expressing the opinion that such tribunals could be made available as a substitute for the ordinary judicial tribunals; but the Convention declined to give these tribunals full judicial authority; their judgments were not to be binding, unless the parties to the controversy had consented thereto in the presence of the tribunal. The provisions for a tribunal of conciliation evidently did not excite much interest among the people, for not till 1862, sixteen years after the Conven-